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MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (OCTOBER 19, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

No. 21-16997

D.C. No. 4:18-cv-05159-JSW

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Submitted October 17, 2022**

Before: McKEOWN, CALLAHAN, and VANDYKE, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiff-Appellant Jason Fyk seeks review of a district court order denying his motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure to vacate and set aside a judgment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The Federal Rules of Civil Procedure provide that a Rule 60(b) motion "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). "What constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Ashford v. Stuart*, 657 F.2d 1053, 1055 (9th Cir. 1981) (per curiam). This court reviews the denial of a motion for relief from judgment under Rule 60(b) for an abuse of discretion. *See, e.g.*, *Riley v. Filson*, 933 F.3d 1068, 1071 (9th Cir. 2019).

The gravamen of Fyk's Rule 60(b) motion is that our court's holding in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019), constituted a substantial change in controlling law with respect to section 230 of the Communications Decency Act, which Fyk alleges resuscitates his dismissed claims. *See* 47 U.S.C. § 230. But Fyk did not pursue his Rule 60(b) motion within a "reasonable time." First, he failed to raise any argument based on the *Enigma* decision to *this court*, even though his first appeal was pending for nine months after the *Enigma* decision first issued. Second, he waited nine additional months before bringing *Enigma* to the district court's attention. In total, Fyk waited over a year and a half before making any argument that *Enigma* had changed the law to either this court or the district court.

The district court dismissed Fyk's complaint on June 18, 2019, and Fyk filed his first appeal the next day. Our court's *Enigma* decision—which Fyk now alleges constituted a change in controlling law—first issued on September 12, 2019, nearly a week before Fyk submitted his opening brief in that appeal. *See Enigma*, 938 F.3d 1026, 1036-38 (9th Cir. 2019).[1] Our court issued a decision affirming the district court on June 12, 2020, nine months after the *Enigma* decision was first issued, and more than five months after it was reissued. *See Fyk v. Facebook, Inc.*, 808 F. App'x 597 (9th Cir. 2020). Fyk had ample opportunity to submit a Rule 28(j) letter during this period but never did so.

Fyk then waited more than nine additional months before filing his Rule 60(b) motion in the district court on March 22, 2021. Fyk offers no excuse for this significant delay and we see no reason why he could not have either raised his *Enigma* argument in his first appeal or made his Rule 60(b) motion much earlier. Accordingly, the district court did not abuse its discretion in denying Fyk's Rule 60(b) motion.

AFFIRMED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DENYING MOTION FOR RELIEF PURSUANT TO FED. R. CIV. P. 60(B) (NOVEMBER 1, 2021)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 18-cv-05159-JSW

Re: Dkt. No. 46

Before: Jeffrey S. WHITE,
United States District Judge.

This matter comes before the Court upon consideration of the motion for relief pursuant to Fed. R. Civ. P. 60(b), filed by Plaintiff Jason Fyk. The Court has considered the parties' papers, relevant legal authority, and the record in this case, and it finds the motion suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). For the reasons below, the Court DENIES Fyk's motion.

On June 18, 2019, the Court granted Defendant Facebook's motion to dismiss. (*See* Dkt. No. 38). Fyk now asks the Court to vacate that Order under Federal Rule of Civil Procedure 60(b)(5) and (6), matters within the Court's discretion. *See Wilson v. City of San Jose*, 111 F.3d 688, 691 (9th Cir. 1997).

Under Federal Rule of Civil Procedure 60(b)(5), the Court may relieve a party from a final judgment if "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). Fyk argues that he is entitled to relief under 60(b)(5) because the Ninth Circuit's opinion in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020), and a statement by Justice Thomas in the Supreme Court's denial of certiorari to that Ninth Circuit *Enigma* decision "serve as new legal precedent undermining this Court's previous findings and conclusions." (Dkt. No. 46, Motion at 5:21-24). Fyk claims that the Court's Order dismissing his suit was based on an earlier judgment that has now been vacated or reversed. Fyk is incorrect. The Order that Fyk seeks to vacate based its conclusion on 47 U.S.C. 230(c)(1). (*See* Dkt. No. 38, Order at 2, 4). By contrast, the Ninth Circuit's *Enigma* opinion did not involve the application of 230(c)(1); instead, the court examined 230(c)(2). *See* 946 F.3d at 1050 ("The legal question before us is whether § 230(c)(2) immunizes blocking and filtering decisions that are driven by anticompetitive animus." (emphasis added)). Thus, *Enigma* did not reverse any case law upon which the Order was based. And neither does Justice Thomas's statement. Justice Thomas's

statement, made "respecting the denial of certiorari" to the *Enigma* opinion, is not the holding of the Supreme Court and it therefore does not "constitute[] binding precedent." *See, e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997) ("We agree with respondent that the former statement was dictum, and the latter was contained in a concurrence, so that neither constitutes binding precedent."). Finally, Fyk has not shown the "extraordinary circumstances" required under 60(b) for granting relief. *See Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009) ("[T]he exercise of a court's ample equitable power under Rule 60(b)(6) to reconsider its judgment 'requires a showing of 'extraordinary circumstances.'" (citation omitted)).

Accordingly, the Court DENIES Fyk's motion.

IT IS SO ORDERED.

/s/ Jeffrey S. White
United States District Judge

Dated: November 1, 2021

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA GRANTING MOTION TO DISMISS (JUNE 18, 2019)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC,

Defendant.

No. C 18-05159 JSW

Before: Jeffrey S. WHITE, United States District Judge.

Now before the Court is Defendant Facebook, Inc. ("Facebook")'s motion to dismiss. Plaintiff, Jason Fyk, filed suit under diversity jurisdiction, for intentional interference with prospective economic advantage, violation of California Business and Professions Code section 17200 *et seq.*, civil extortion, and fraud for Facebook's devaluation of Plaintiff's online pages. Plaintiff had used Facebook's free online platform to create a series of, among other amusing things, pages dedicated to videos and pictures of people urinating. In enforcing its community standards, Plaintiff alleges

that Facebook blocked content posted by Plaintiff and removed content in order to make room for its own sponsored advertisements. Plaintiff contends these actions by Facebook destroyed or severely devalued his pages.

Facebook moves to dismiss on two bases. First, that the claims are barred by Section 230(c)(1) of the Communications Decency Act ("CDA") which immunizes internet platforms like Facebook for claims relating to moderation of third-party content on the platform such as "reviewing, editing, and deciding whether to publish or to withdraw publication of third-party content." *Barnes v. Yahoo!*, 570 F.3d 1096, 1102 (9th Cir. 2009). Second, Facebook contends that Plaintiff fails to state a cause of action for each of his individual claims.

ANALYSIS

Facebook invokes Section 230 of the CDA which "immunizes providers of interactive computer services against liability arising from content created by third parties." *Perkins v. Linkedin Corp.*, 53 F.Supp.3d 122, 124 (N.D. Cal. 2014) (internal citations omitted). Specifically, Section 230(c)(1) provides that "[n]o provider or user of an interactive service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Section 230(c)(1) "establish[es] broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751, 767 (9th Cir. 2007) (internal citations omitted). Immunity extends to activities of a service provider that involve its

moderation of third-party content, such as "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102.

The immunity, "like other forms of immunity, is generally accorded effect at the first logical point in the litigation process" because "immunity is an immunity from suit rather than a mere defense to liability." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (9th Cir. 2009); *see also Levitt v. Yelp! Inc.*, 2011 WL 5079526, at *8-9 (N.D. Cal. Oct. 26, 2011) (holding that Section 230(c)(1) immunity protects service providers from lawsuits for their "exercise of a publisher's traditional editorial functions."); *see also Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (holding that Section 230 should be "interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.").

The CDA immunizes Facebook from suit if three conditions are met: (1) Facebook is a "provider or user of an interactive computer service;" (2) the information for which Plaintiff seeks to hold Facebook liable is "information provided by another information content provider;" and (3) Plaintiff's claim seeks to hold Facebook liable as the "publisher or speaker" of that information. *See Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F.Supp.3d 1088, 1092-93 (2015) (citing 47 U.S.C. § 230(c)(1); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014)).

Facebook qualifies as an interactive computer service provider. The CDA defines this element as "any information service, system, or access software

provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). Here, the complaint itself alleges that Facebook provides an internet-based platform where millions of users can access third party content, including the content uploaded on Plaintiff's pages. (*See* Complaint ¶ 2.) The first element of the CDA immunity provision is therefor met. *See Sikhs for Justice*, 144 F.Supp.3d at 1093; *see also Fraley v. Facebook, Inc.*, 830 F.Supp.2d 785, 801-02 (N.D. Cal. 2011) (finding that Facebook acts as an interactive computer service).

With regard to the second element of the CDA immunity provision, Plaintiff contends that Facebook is not entitled to immunity because although the statute provides immunity for a website operator for the removal of third-party material, here there is no third party as Plaintiff himself contends that he created the content on his pages. This was precisely the argument rejected by this Court in *Sikhs for Justice* which distinguished the reference to "another information content provider" from the instance in which the interactive computer service itself is the creator or developer of the content. 144 F.Supp.3d at 1093-94. In other words, "the CDA immunizes an interactive computer service provider that 'passively displays content that is created entirely by third parties,' but not an interactive computer service provider by creating or developing the content at issue." *Id.* at 1094. Put another way, "'third-party content' is used to refer to content created entirely by individuals or entities other than the interactive computer service provider." *Id.* (citing *Roommates*, 521 F.3d at 1162). Here, there is no dispute that

Plaintiff was the sole creator of his own content which he had placed on Facebook's pages. As a result, those pages created entirely by Plaintiff, qualifies as "information provided by another information content provider" within the meaning of Section 230. *See id*.

Lastly, Plaintiff's claims here seek to hold Facebook liable as the "publisher or speaker" of that third party content. The three causes of action alleged in the complaint arise out of Facebook's decision to refuse to publish or to moderate the publication of Plaintiff's content. To determine whether a plaintiff's theory of liability treats the defendant as a publisher, "what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.* (citing *Barnes*, 570 F.3d at 1101). Consequently, if the duty that the plaintiff alleges was violated by defendant "derives from the defendant's status or conduct as a 'published or speaker,' . . . section 230(c)(1) precludes liability." *Id.* (citing *Barnes* 570 F.3d at 1102). Publication "involves the reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Id*. 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 section 230." *Id.* (citing *Roommates*, 521 F.3d at 1170-71).

Here, all three of Plaintiff's claims arise from the allegations that Facebook removed or moderated his pages. (*See* Complaint ¶¶ 20, 49-73.) Because the CDA bars all claims that seek to hold an interactive computer service liable as a publisher of third party content, the Court finds that the CDA precludes Plaintiff's claims. In addition, the Court concludes

that granting leave to amend would be futile in this instance as Plaintiff's claims are barred as a matter of law. *See, e.g., Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."); *see also Lopez v. Smith*, 293 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (holding that dismissal without leave to amend is justified where "pleading could not possibly be cured by the allegation of other facts.")

CONCLUSION

For the foregoing reasons, the Court GRANTS Facebook's motion to dismiss without leave to amend. A separate judgment shall issue and the Clerk shall close the file.

IT IS SO ORDERED.

/s/ Jeffrey S. White
United States District Judge

Dated: June 18, 2019

ORDER OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING MOTION FOR RECONSIDERATION (NOVEMBER 9, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

No. 21-16997

D.C. No. 4:18-cv-05159-JSW

Before: McKEOWN, CALLAHAN, and VANDYKE, Circuit Judges.

The motion for reconsideration [37], is DENIED.

ENTERED: 11/9/2022

MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (NOVEMBER 17, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC,

Defendant-Appellee.

No. 21-16997
D.C. No. 4:18-cv-05159-JSW
U.S. District Court for Northern District of California (Oakland Div.)

The judgment of this Court, entered October 19, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Nixon Antonio Callejas Morales
Deputy Clerk

ORDER OF THE SUPREME COURT OF THE UNITED STATES DENYING PETITION FOR A WRIT OF CERTIORARI (JANUARY 11, 2021)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Jason Fyk v. Facebook, Inc.
No. 20-632
(Your No. 19-16232)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ Scott S. Harris
Clerk

TITLE 47, UNITED STATES CODE, SECTION 230

47 U.S.C. § 230—Protection for private Blocking and Screening of Offensive Material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" Blocking and Screening of Offensive Material

(1) Treatment of Publisher or Speaker

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.

(2) Civil Liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Obligations of Interactive Computer Service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on Other Laws

(1) No Effect on Criminal Law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No Effect on Intellectual Property Law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State Law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No Effect on Communications Privacy Law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No Effect on Sex Trafficking Law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(June 19, 1934, ch. 652, title II, § 230, as added Pub. L. 104–104, title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub. L. 105–277, div. C, title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681–739; Pub. L. 115–164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

APPELLANT FYK OPENING BRIEF [DE 8]
(MARCH 3, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal No. 21-16997

On Appeal from Denial of Motion for Relief Pursuant to Fed.R.Civ.P. 60(b) to Vacate and Set Aside Entry of Judgment of the United States District Court for the Northern District of California, 4:18-cv-05159 (Hon. Jeffrey S. White)

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[. . .]

JURISDICTIONAL STATEMENT

This is the second appeal involving Plaintiff/Appellant, Jason Fyk ("Fyk"), and Defendant/Appellee, Facebook, Inc. ("Facebook"), relating to Facebook's blocking of Fyk's Facebook business/pages, not for substance of content but because of Facebook's anti-competitive conduct, motivated by financial gain, resulting in tortious interference with (*i.e.*, the destruction of) Fyk's livelihood, as alleged in Fyk's underlying Verified Complaint. In the first appeal, Fyk challenged the District Court's dismissal of the case based on Facebook's assertion that it was entitled to immunity under Title 47, United States Code, Section 230(c)(1) regardless of whether or not its actions would have been unlawful outside the ether of the Internet.[1],[2] The

[1] Hereafter, the germane subsection of the Title 47, United States Code, Section 230, the Communications Decency Act ("CDA") is drafted in shortest form. For example, 230(c)(1) will refer to Title 47, United States Code, Section 230(c)(1). As other examples, 230(c)(2)(A) will refer to Title 47, United States Code, Section 230(c)(2)(A) and 230(f)(3) will refer to Title 47, United States Code, Section 230(f)(3).

[2] "ER __" refers to Plaintiff's/Appellant's Excerpt of Record. ER

United States District Court for the Northern District of California (Judge Jeffrey S. White presiding) exercised jurisdiction in this case under Title 28, United States Code, Section 1332, as the parties were/are diverse and the amount in controversy exceeded/exceeds $75,000.00 exclusive of fees, costs, interest, or otherwise. Venue was/is proper in the Northern District of California pursuant to Title 28, United States Code, Section 1391(b), as Facebook maintains its principal place of business in that judicial district and various events or omissions giving rise to the action occurred within that judicial district.

The appeal challenges the District Court's erroneous decision to divest 230(c)(1) from the "Good Samaritan" requisite that *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019) requires for 230(c)(2) in denying the Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment (hereafter, "Motion for Reconsideration") filed on March 22, 2021, by Fyk.[3]

176-204 is Fyk's August 22, 2018, Verified Complaint, 4:18-cv-05159-JSW [D.E. 1]; ER 158-175 is Facebook's November 1, 2018, Motion to Dismiss, [D.E. 20]; ER 108-157 is Fyk's December 14, 2018, Response in Opposition, [D.E. 27]; ER 90-107 is Facebook's December 28, 2018, Reply, [D.E. 31]; ER 86-89 is the District Court's June 18, 2019, dismissal Order, [D.E. 38]; and ER 84-85 is the District Court's June 18, 2019, related Judgment, [D.E. 39].

[3] ER 21-83 is the Motion for Reconsideration, [D.E. 46] (with Exhibits A-D); ER 17-20 is Facebook's April 5, 2021, Response to Motion for Relief Pursuant to Fed. R. Civ. P. to Vacate and Set Aside Judgment, [D.E. 47] (hereafter, the "Response"); ER 5-16 is Fyk's April 12, 2021, Reply to Facebook's April 5, 2021, Response, [D.E. 48] (hereafter, the "Reply"); ER 3-4 is the District

The District Court erred by failing to distinguish between the CDA's immunity afforded to Facebook (in certain circumstances discussed below) for policing content versus no immunity for Facebook's conduct, which is fundamental to the CDA's immunity. This appeal stems from the legal error of the Order;[4] the material misstatement of facts subsumed in the Order,[5] and the resulting inequity of the Order denying Relief, a result inconsistent with the CDA.[6]

Court's November 1, 2021, Order Denying Motion for Relief Pursuant to Fed. R. Civ. P. 60(b), [D.E. 51] (hereafter, the "Order").

[4] The District Court's failure to apply this Court's *Enigma* decision, which was/is controlling authority in the Ninth Circuit, compels Rule 60(b)(5) relief here.

[5] The District Court's continued adoption of factual misstatements made by Facebook regarding Fyk's businesses, rather than Fyk's factual allegations in his Verified Complaint (which must be considered true for the purposes of a Rule 12(b)(6) motion) warrant Rule 60(b)(3) relief here. The District Court should have accepted Fyk's Verified Complaint allegations as true and, correspondingly, that Facebook's conduct and not Fyk's content formed the basis of causes of action against Facebook (*e.g.*, Fyk's allegations that his case was a 230(c)(2)(A) case, not 230(c)(1)) and draw any reasonable inferences therefrom in Fyk's favor rather than ratifying Facebook's Motion to Dismiss arguments that this case was about 230(c)(1).

[6] In the District Court, there has never been a single hearing for Fyk to present argument about how Fyk contends that the CDA was misapplied or to proffer facts that might have afforded Fyk to allege facts to more clearly articulate the causes of action that are based on Facebook's conduct, rather than Fyk's content. Because Rule 60(b)(6) is the "grand reservoir" of power afforded to courts to uphold justice, especially where (as here) "extraordinary circumstances" exist, insofar as the District Court dismissed Fyk's case as framed by Facebook, rather than the actual allegations in Fyk's Verified Complaint.

This case asks whether the "Good Samaritan" general provision expressed in 230(c) of the CDA, exclusively applies to the examination of section 230 (c)(2) or does the "Good Samaritan" general provision apply to all of section 230(c) including section 230(c) (1)?

This Court has jurisdiction pursuant to Title 28, United States Code, Section 1291 and its review of the Order is under an abuse of discretion standard. *See, e.g.*, *Starr v. City of Angels Camp*, 99 Fed.Appx. 792, 793 (9th Cir. 2004).

On December 1, 2021, Fyk filed his Notice of Appeal from a Judgment or Order of a United States District Court, along with his Representation Statement. ER 205-207. On December 2, 2021, the Time Schedule Order was entered, prescribing February 1, 2022, as Fyk's opening brief deadline. Thereafter, an enlargement of the February 1, 2022, deadline was procured, extending that deadline to March 3, 2022.

ISSUES PRESENTED

This appeal asks:

(1) In denying Fyk's request for Federal Rule of Civil Procedure 60(b)(5) relief, did the District Court err in holding that the anti-competitive animus non-immunity holding of *Enigma*[7] only applies to a 230(c)(2) challenge, notwithstanding the fact that (a) the "Good

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[7] *See Enigma Software Group USA, LLC v. Malwarebytes, Inc.* 946 F.3d 1040 (9th Cir. 2019) (wherein this Court determined that conduct driven by an anti-competitive animus does not enjoy CDA immunity at the 230(c) Good Samaritan threshold), cert. denied *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13, 208 L. Ed. 2d 197 (2020).

Samaritan" general directive/general provision/intelligible principle (with anti-competitive animus being the antithesis of "Good Samaritanism") is applicable to all of 230(c) (whether that be 230(c)(1) or 230(c)(2)), based on commonsense, the very title of 230(c) (*i.e.*, express statutory language), and what a general directive/general provision/intelligible principle handed down by Congress is supposed to be; and/or (b) the express language of 230(c)(2)(B) pulls in 230(c)(1), further demonstrating that "Good Samaritanism" is not a general directive/general provision/intelligible principle that can somehow be selectively applied to just Section 230(c)(2) as the District Court and Facebook wrongly think; *i.e.*, further demonstrating that this Court's anti-competitive animus non-immunity *Enigma* holding is not (nor could be consistent with canons of statutory construction; *e.g.*, whole text, harmonious reading, irreconcilability, and/or surplusage tenets) isolated to a 230(c)(2) scenario? Put differently, is an Interactive Computer Service ("ICS," such as Facebook or Malwarebytes),[8] entitled to <u>any</u> CDA immunity when the ICS' <u>action</u> is motivated by an anti-competitive animus (as was alleged by Enigma against Malwarebytes, and as was alleged by Fyk against Facebook)?[9]

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[8] "Interactive Computer Service" is defined in 230(f)(3).

[9] Here, Fyk alleged that Facebook took <u>action</u> against Fyk's Facebook businesses/pages, which had the effect of destroying Fyk's businesses that were valued at the time in the nine-figure range, so that Facebook could make more money after steering Fyk's businesses/pages into the hands of a Fyk competitor that paid Facebook appreciably more money. The content remained the same, but Facebook did not take discretionary CDA action against the better paying commercial Facebook user. *See* [D.E. 1], ER 176-204. Justice Thomas posits, *see Malwarebytes*, 141

(2) Did the District Court err in determining that Fyk was not entitled to Rule 60(b)(6) relief commensurate with a showing of "extraordinary circumstances"?

(3) Did the District Court err in denying Fyk's unopposed request for Rule 60(b)(3) relief to the extent that the requested relief is predicated on the District Court's having erroneously relied upon Facebook's (mis)characterization of Fyk's content as the basis of

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S.Ct. 13: (a) The first logical point for 230(c) immunity analysis is the "Good Samaritan" general directive overarching all of 230(c). If an ICS' action is not that of a "Good Samaritan," then the immunity analysis stops at the 230(c) threshold; (b) If an ICS (*e.g.*, Facebook) takes no action over the content of an Information Content Provider ("ICP," like Fyk, with "Information Content Provider" being defined in 230(f)(3)), then Facebook enjoys immunity under 230(c)(1); (c) if an ICS takes action over the content of an ICP, then, under 230(c)(2)(A), the ICS enjoys no immunity for such action unless such action is demonstrably taken in "good faith," which such "good faith" analysis is merits-based (*i.e.*, not at the initial pleading stage) and, for all intents and purposes, an extension of the "Good Samaritan" general directive; and (d) If an ICS provides an ICP #1 (like a parent/ICP/user concerned with protecting their child from Internet pornography) with the tools/services needed to eradicate the kind of Internet garbage contemplated by 230(c)(2)(A) posted by another ICP #2, then the ICS enjoys immunity under 230(c)(2)(B) just like with respect to 230(c)(1) (with the language of 230(c)(2)(B) expressly relating back to 230(c)(1)) because in either the 230(c)(1) or 230(c)(2)(B) setting, the ICS took no direct action over the content of a user. The proper application of 230(c) (non-)immunity should not be a guessing game, which is the practical result of the mixed jurisprudence in the past twenty-six years since the CDA's enactment. *See Malwarebytes, Inc.*, 141 S.Ct. at 13 (wherein Justice Thomas provides a detailed Statement of the judicial abuse across the country, including from within California's court system, that has turned Section 230 into legal morass leaving no clear interpretation about the limits of immunity).

the lawsuit, rather than the actual claims and factual allegations in Fyk's Verified Complaint, which sounded in tort and California code, and which derived from Facebook's conduct? The District Court's dismissal without leave to amend, and subsequent judgment, denial of reconsideration – all without oral argument – violated Fyk's Due Process rights.

STATEMENT OF THE CASE/ RELEVANT FACTS

Fyk was the owner-publisher of several Facebook businesses/pages. For years, Fyk used social media to create and post humorous content on Facebook's purported "free" social media platform. Fyk's content was extremely popular and, ultimately, Fyk had more than 25,000,000 documented followers at peak on his Facebook pages/businesses. According to some ratings, Fyk's Facebook page (WTF Magazine) was ranked the fifth most popular page on Facebook, ahead of competitors like BuzzFeed, College Humor, Upworthy, and large media companies like CNN. Fyk's large Facebook presence resulted in his pages becoming income generating business ventures, generating hundreds of thousands of dollars a month in advertising and lead generating activities, which such value was derived from Fyk's high-volume fan base distribution. *See, e.g.*, ER 177-178 at ¶¶ 1-2, 5; ER 180 at ¶ 15; ER 181 at ¶ 16.

Between 2010 and 2016, Facebook implemented an "optional" paid for reach program. Facebook began selling distribution, which it had previously offered for free and, in doing so, Facebook became a direct competitor of users like Fyk. This advertising business model "create[d] a misalignment of interests between

[Facebook] and people who use [Facebook's] services," Mark Zuckerberg, *Understanding Facebook's Business Model* (Jan. 24, 2019), which incentivized(s) Facebook to selectively and tortiously interfere with users' ability to monetize by removing content or distribution from non-paying/low-paying users in favor of Facebook's higher paying, "sponsored," "high[er] quality participants in the ecosystem." Mark Zuckerberg Interview/Public Discussion With Mathias Döpfner (Apr. 1, 2019). *See, e.g.*, ER 181-182 at ¶¶ 17-18.

A high-ranking Facebook executive bluntly told Fyk that Fyk's business was disfavored compared to other businesses that opted into paying Facebook extraordinary sums of advertising money. *See, e.g.*, ER 182 at ¶ 18; ER 194 at ¶ 47. Although Fyk reluctantly opted into Facebook's commercial program at a relatively low amount of money (in comparison to others, such as Fyk's competitor), Facebook reduced the reach/distribution/visibility of Fyk's pages/businesses by over 99% overnight. *See, e.g.*, ER 182-184 at ¶¶ 19-21. Then, in October 2016, Facebook fully deactivated ("restricted access to or availability of Fyk's material") several of Fyk's pages/businesses, totaling over 14,000,000 fans cumulatively, under the fraudulent aegis of "content policing" pursuant to Section (c)(2)(a). *See, e.g.*, ER 184-185 at ¶¶ 21-22. Facebook's content policing, however, was not uniformly applied or enforced due to Facebook's desire for financial gain. *See, e.g.*, ER 185-191 at ¶¶ 23-40.

In February and March of 2017, Fyk contacted a prior business colleague (and now competitor) who was more favored by Facebook, the competitor having paid over $22,000,000.00 in advertising. Fyk's competitor had dedicated Facebook representatives available to

its team (whereas Fyk was not offered the same services) offering additional assistance directly from Facebook. Fyk asked his competitor if they could possibly have their Facebook representative restore Fyk's unpublished and/or deleted pages for Fyk. Facebook's response was to decline Fyk's competitor's request unless Fyk's competitor was to take ownership of the unpublished and/or deleted content/pages. Facing no equitable solution, Fyk sold his pages/businesses to the competitor at a "fire-sale" price. Facebook thereafter restored the exact same content (*i.e.*, in form, not in access or availability) that Facebook had previously restricted and maintained "violated" its purported "offensive" content Community Standard rules (*i.e.*, purportedly violative of (c)(2)(A)) while owned by Fyk but not when in the hands of Fyk's competitor). Facebook's preferred (*i.e.*, higher paying) "Sponsored Advertisers" do not suffer the same consequences as Fyk, simply because they pay more. *See, e.g.*, ER 192-194 at ¶¶ 41-47.

On August 22, 2018, Fyk sued Facebook in the District Court, alleging fraud, unfair competition, extortion, and tortious interference with his economic advantage based on Facebook's anti-competitive animus. *See* ER 194 at ¶ 49 through ER 202 at ¶ 72. Facebook filed a Rule 12(b)(6) motion, based largely on Section 230(c)(1) immunity. *See* ER 158-175. The District Court continued the proceedings, then vacated oral arguments and granted Facebook's motion on the papers, without affording Fyk leave to amend the Verified Complaint. The District Court misinterpreted/misapplied Section 230 protection/immunity. *See* ER 84-89.

Fyk appealed to this Court. The Ninth Circuit panel affirmed the District Court decision without oral argument in a cursory five-page Memorandum. *See* ER 52-57. Fyk filed a Petition for Hearing *En Banc*, which was summarily denied on July 21, 2020. The Ninth Circuit's affirmation of dismissal stood in stark contravention of the Ninth Circuit's own interpretation/application of Section 230 in another anti-competitive animus case (*Enigma*).

On November 2, 2020, Fyk filed a Petition for Writ of Certiorari to the Supreme Court of the United States (the "Petition"). Notwithstanding Justice Thomas' October 13, 2020, invitation for the SCOTUS to take up an appropriate case wherein the "correct interpretation of § 230," *Malwarebytes*, 141 S.Ct. at 18, could be assessed, the SCOTUS denied Fyk's Petition without comment. *See* ER 58-83.

With case law having evolved since the time the District Court dismissed Fyk's case against Facebook (along with other bases for reconsideration under Rule 60), Fyk filed his Motion for Reconsideration on March 22, 2021. By Order dated November 1, 2021, the District Court cursorily denied same, prompting Fyk to lodge an appeal with this Court on December 1, 2021. The District Court's denial of Fyk's Motion for Reconsideration ignored (or cursorily misapplied) this Circuit's controlling *Enigma* authority.

In this appeal, Fyk seeks the opportunity to have his case heard on the merits *via* the application of controlling authority of this Circuit; and in doing so, giving effect to Fyk's constitutionally guaranteed Due Process rights. This is especially so, considering this Court handed down a different fate to Malwarebytes than Facebook and to Enigma than Fyk in identical

(at least on the anti-competitive animus front) circumstances. What has transpired so far for Fyk was wrong, unjust, and should be undone by this Court.

SUMMARY OF THE ARGUMENT

As discussed in Section A below, the District Court erred in denying Fyk's request for Rule 60(b)(5) relief by narrowing/limiting this Court's *Enigma* 230(c) holding to only a 230(c)(2) setting. This Court's *Enigma* holding was not exclusive to a 230(c)(2) setting – this Court, in *Enigma*, properly applied the "Good Samaritan" general provision overarching all of 230(c) (both 230(c)(1) and 230(c)(2)) to the reality that ICS action, driven by anti-competitive animus, is the antithesis of "Good Samaritanism" and is accordingly entitled to no 230(c) immunity.

As discussed in Section B below, the District Court erred in denying Fyk's request for Rule 60(b)(6) relief in deciding "extraordinary circumstances" were not present. The Order cites to *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009) for the proposition that "extraordinary circumstances" need to be present in order for Rule 60(b)(6) relief to be afforded. The District Court did not engage in an analysis of the "extraordinary circumstances" guideline/considerations outlined by this Court in *Phelps*.[10] As discussed in Section B below, applying the *Phelps* factors to this case,

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[10] Not surprisingly, neither Facebook's Response nor the District Court's Order analyzed *Phelps*, but merely cited *Phelps* for the undeniable proposition that "extraordinary circumstances" must be present for Rule 60(b)(6) relief to be afforded and went on to syllogistically assert that no "extraordinary circumstances" exist.

Fyk was/is plainly entitled to Rule 60(b)(6) relief just like Phelps was.

As discussed in Section C, the District Court Order ignored certain aspects of the Motion for Reconsideration, namely Fyk's request for Rule 60(b)(3) relief. As to Rule 60(b)(3), the District Court wrongly denied Fyk's request for Rule 60(b)(5) relief by narrowing this Court's *Enigma* 230(c) holding to only a 230(c)(2) setting (as discussed in Section A), the District Court bootstrapped its dismissal finding that Fyk's case was a 230(c)(1) challenge (as misleadingly argued by Facebook), rather than a 230(c)(2)(A) challenge (as actually alleged in Fyk's Complaint).[11] The District Court's overlooking a standalone basis under Rule 60 for vacating dismissal/judgment in this case was improper, especially considering Facebook's Response did not even rebut Fyk's request for Rule 60(b)(3) relief.

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[11] Almost three years ago in this action that commenced almost four years ago, the District Court dismissed Fyk's 230(c)(2)(A) case (as actually pleaded in the Verified Complaint, [D.E. 1], ER 176-204) by adopting Facebook's dismissal argument that Fyk's case was somehow a 230(c)(1) challenge. The District Court parlayed its approximate three-year-old dismissal erroneously characterizing Fyk's Verified Complaint as a 230(c)(1) challenge into a denial of the Motion for Reconsideration based on an equally incorrect view that this Court's *Enigma* anti-competitive animus 230(c) immunity preclusion holding was limited to only a 230(c)(2) setting. Neither the District Court nor Facebook addressed Rule 60(b)(3) in the reconsideration motion practice that is the subject of this appeal.

ARGUMENT

A. Rule 60(b)(5) Relief Is Warranted – This Court's Enigma Anti-Competitive Animus Non-Immunity Holding Was Not Limited Exclusively To A 230(c)(2) Setting

The Order reads, in pertinent part, as follows: "By contrast, the Ninth Circuit's *Enigma* opinion did not involve the application of 230(c)(1); instead, the court examined 230(c)(2)." [D.E. 51] at 2, ER 4. This is wrong for at least two reasons.

First, properly interpreted, it is plain that *Enigma's* holding that there is no immunity where there is anti-competitive animus flows from the "Good Samaritan" general directive that applies to all of 230(c). Indeed, one cannot be both a Good Samaritan and an anti-competitor at the same time, it is *prima facie* impossible. The following from this Court's *Enigma* decision punctuates this reality:

- "This dispute concerns § 230, the so-called "Good Samaritan" provision of the Communications Decency Act of 1996, enacted primarily to protect minors from harmful online viewing." *Enigma*, 946 F.3d at 1044.
    - This is the very first line of this Court's *Enigma* decision, which makes clear that the case dealt with the 230(c)-threshold consideration that is the "Good Samaritan" general directive, not just 230(c)(2). Just because the *Enigma* case apparently had a 230(c)(2) backdrop by no means confined this Court's over-arching conclusions/holdings that "Good

Samaritanism" (applicable to all of 230 (c)) cannot allow conduct of an anti-competitive animus to enjoy CDA immunity.

- In line with Judge Fisher's *Zango v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009) concurring advisements against turning 230 immunity into a weapon available to chill competition, this Court held as follows in *Enigma*: "We conclude, however, that Enigma's allegations of anticompetitive animus are sufficient to withstand dismissal." *Id.* at 1045.
    - The same should have been determined here in relation to Fyk's allegations of Facebook's anti-competitive animus.
- "The CDA, which was enacted as part of the Telecommunications Act of 1996, contains this 'Good Samaritan' provision that, in subparagraph B, immunizes internet-service providers from liability for giving internet users the technical means to restrict access to [certain content]." *Id.*
    - Just because this Court found that the "Good Samaritan" general directive of 230(c) applies to 230(c)(2) settings does not mean that this Court found that the "Good Samaritan" general directive/general provision/intelligible principle does not apply to other subsections of 230(c). There is, in fact, no way that this Court could have so determined since the "Good Samaritan" general directive so plainly qualifies the immunity analysis under all of 230(c).

- One of Congress' goals in enacting the CDA was to "'to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.'" *Id.* at 1047 (citing 47 U.S.C. § 230 (b)).
    - Why did Fyk not receive the benefit of a competitive free market? Why was Facebook's anti-competitive conduct allowed to crush Fyk's livelihood? Why did Malwarebytes have to act as a "Good Samaritan" in regards to Enigma but Facebook did not have to act as a "Good Samaritan" in regards to Fyk?
- "We must today recognize that interpreting the statute to give providers unbridled discretion to block online content would, as Judge Fisher warned, enable and potentially motivate internet-service providers to act for their own, and not the public, benefit. Immunity for filtering practices aimed at suppressing competition, rather than protecting internet users, would lessen user control over what information they receive, contrary to Congress's stated policy." *Id.* at 1051 (internal citations omitted).
    - Nowhere in this holding is the Court's *Enigma* determinations confined to 230 (c)(2). Nor could it have been – conduct that quashes competition is not immune anywhere within the four corners of the CDA.

- "Because we hold that § 230 does not provide immunity for blocking a competitor's program (*i.e.,* materials) for anticompetitive reasons, and because Enigma has specifically alleged that the blocking here was anticompetitive, Enigma's claims survive the motion to dismiss. We therefore reverse the dismissal of Enigma's state-law claims and we remand for further proceedings." *Id.* at 1052.
    - Again, nowhere in the Court's holding is the exception to immunity for anti-competitive animus confined to just 230(c)(2). Again, nor could it have been since the "Good Samaritan" general directive (which such "Good Samaritan" is the polar opposite of conduct/action driven by anti-competitive animus) applies to all of 230(c).
        - Fyk alleged that Facebook's actions against him were grounded in anti-competitive conduct just like Enigma alleged. Thus, Fyk should have enjoyed the same result as Enigma; *i.e.*, Fyk's case should not have been dismissed.
- "As we have explained with respect to the state law claims, *Zango* did not define an unlimited scope of immunity under § 230, and immunity under that section does not extend to anticompetitive conduct." *Id.* at 1054.
    - This Court's exception to immunity for anti-competitive animus applied to 230

(c), not just 230(c)(2). And, again, that had to be the case and makes perfect sense because the "Good Samaritan" general directive/general provision/ intelligible principle (from which this Court's anti-competitive animus non-immunity holdings flowed) applies to all of 230(c).

- Here, why was Facebook afforded an "unlimited scope of immunity"? Why were Fyk's allegations of anti-competitive animus not worthy of surviving dismissal as was the case for Enigma? Why has the legal system thus far protected Enigma but not Fyk under the same circumstances?

This Court's decision in *Enigma*, after Fyk's first appeal before this Court, corrected the same kind of anti-competitive animus that Fyk alleges here against Facebook. On this ground, Fyk respectfully requests that this Court reverse the Order and remand to the District Court for the vacating and setting aside of dismissal/judgment, to give Fyk a chance at a real day in court on the merits; *i.e.*, affording Fyk the Due Process he is constitutionally entitled to and under this Court's decision in *Enigma*. Indeed, as pointed out by Justice Thomas in his *Malwarebytes* statement, providing litigants like Fyk an opportunity to have the merits of their case heard does not guarantee victory, it simply provides those litigants a chance to articulate the facts and present evidence:

> Paring back the sweeping immunity courts have read into § 230 would not necessarily

> render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail.

Malwarebytes, 141 S.Ct. at 18. Fyk deserves the right to raise his claims in the first place, and a chance to prove the merits of his claims.

This Court's *Enigma* decision constitutes a change in law, after the District Court's initial dismissal of Fyk's case and while Fyk's first appeal was pending, justifying Rule 60(b)(5) relief; *i.e.*, justifying the District Court's vacating and setting aside dismissal/judgment and allowing Fyk's case to proceed on the merits. The exception to CDA immunity that is conduct driven (*i.e.*, not content driven) by anti-competitive animus (which is explicit in the CDA) was not yet a precedent in the Ninth Circuit until *Enigma*. *See, e.g.*, *Malwarebytes*, 141 S.Ct. at 18 ("§ 230 should not apply when the plaintiff sues over a defendant's 'conduct rather than for the content of the information,'" citing the concurring opinion of J. Tymkovich in *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1204 (10th Cir. 2009), emphasis in original). Had the *Enigma* decision been in existence mere weeks earlier, the District Court's decision would not have resulted in a dismissal at the initial pleading stage; *i.e.*, Fyk's Verified Complaint would have survived dismissal (just like Enigma's complaint) because Fyk appropriately alleged that Facebook's conduct was driven by an anti-competitive animus. The relevant judicial precedents now mandate that a different result would occur because disparate legal results (Enigma's case going one way, and Fyk's

case going another way) under identical circumstances and analysis (here, Enigma alleging anti-competitive animus against Malwarebytes and Fyk alleging anti-competitive animus against Facebook) cannot coexist, especially given consistency is key to justice and/or maintaining the public's faith in the judiciary.

Second, even if it was somehow the case that this Court's *Enigma* decision somehow determined that the "Good Samaritan" general directive somehow only applied to 230(c)(2) settings (rather than applied to all of 230(c) in accordance with the express statutory language, the very title of 230(c), and the very point of a general directive/general provision/intelligible principle handed down by Congress when tasking others, directly or indirectly, to carry out regulatory functions, such as Internet content policing here), the Court's *Enigma* decision would nevertheless implicate Section 230(c)(1) by way of the express wording of 230(c)(2)(B) that relates back to 230(c)(1). Why does 230(c)(2)(B) implicate Section 230(c)(1)? Because the ICS is enjoying the same non-action immunity under slightly different contexts. Under 230(c)(1), if the ICS takes no action as to someone's content, the ICS cannot possibly be held liable for whatever happened to someone else's content. Under 230(c)(2)(B), the ICS takes no action as to the content of another when the ICS provides ICP #1/user #1 with the tools/services needed to eradicate garbage posted by ICP #2/user #2, which is the exact same end result as 230(c)(1) – if the ICS does not take any action as to one's content, the ICS enjoys immunity.

B. Rule 60(b)(6) Relief Is Warranted – "Extraordinary Circumstances" Exist

The District Court's Order summarily asserts: "Finally, Fyk has not shown the 'extraordinary circumstances' required under 60(b) for granting relief." 4:18-cv-05159-JSW, [D.E. 51] at 2, ER 4. The Order provides no analysis or explanation as to how Fyk's reconsideration circumstances differ from the factors set forth by this Court in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). Had the District Court actually engaged in an "extraordinary circumstances" analysis (rather than citing without analysis the *Phelps* citation found in Facebook's Response), Rule 60(b)(6) relief would have been afforded to Fyk.

Applying *Phelps* here:

> In this case, the lack of clarity in the law at the time of the district court's original decision, the diligence [Fyk] has exhibited in seeking review of his original claim, the lack of reliance by either party on the finality of the original judgment, the short amount of time between the original judgment becoming final and the initial motion to reconsider, the close relationship between the underlying decision and the now controlling precedent that resolved the preexisting conflict in the law, and the fact that [Fyk] does not challenge a judgment on the merits . . . but rather a judgment that has prevented review of those merits all weigh strongly in favor of granting Rule 60(b)(6) relief. Accordingly, we reverse the denial of [Fyk's] motion and grant his request for relief from the judgment dismissing his [case]. On remand, the

district court shall evaluate the merits of the [complaint] that [Fyk] presented [approximately four] years ago.

It has sometimes been said that the law is a study of 'those wise restraints that make men free.' Much of law consists of necessary rules that give order and structure to a free society. Some rules promote order by emphasizing the need for efficiency, including the need for efficient management of the judicial system. Other rules are employed in the service of protecting individuals' fundamental rights and are designed to ensure that such individuals receive the Due Process they are guaranteed by our Constitution. *See* U.S. Const., amends. V, XIV. Yet far too often in recent years, concern for efficiency and procedure has overshadowed concern for basic fairness, and has transformed our fidelity to 'process' into an undue obsession with formalism and technicalities. In short, a concern for procedure has far too often obscured or eclipsed the equally important if not greater role to be played by our dedication to justice. It was, after all, in order 'to establish justice' that our Constitution was written. *Id.* pmbl.

[Fyk's] case represents the epitome of our obsession with form over substance. For [roughly four] years, [Fyk] has sat in [Facebook's prison] while he and his attorneys have struggled to have his claim that he is being imprisoned in violation of the Constitution evaluated on its merits. [Fyk] has traveled

up and down the federal judiciary's apparatus . . . . In so doing, he has produced nearly [hundreds, if not thousands, of] pages of legal briefs, motions, and petitions. His arguments have been evaluated by no less than [four] federal judges and nine Supreme Court Justices—not including his petition[] for rehearing en banc . . . .

Yet, in all this time, not a single federal judge has once examined the substance of [Fyk's] claims. All of this energy – and, more important to [Fyk], all of this time – has been spent evaluating one procedural question after another . . . in wading through this endless morass of procedural questions, and frequently answering them incorrectly, a crucially important point has been repeatedly overlooked: Over [approximately four] years ago, a man came to federal court and told a federal judge that he was being unlawfully [placed in Facebook prison] in violation of the rights guaranteed to him by the Constitution of the United States. [Approximately four years] later, not a single federal judge has ever once been allowed to seek to discover whether that claim is true.

The United States Supreme Court has made clear that the equitable power embodied in Rule 60(b)(6) is the power 'to vacate judgments whenever such action is appropriate to accomplish justice.' Given that directive, we agree that 'the decision to grant Rule 60(b)(6) relief' must be measured by 'the incessant command of the court's conscience that

> justice be done in light of all the facts.' With that guiding principle in mind, we REVERSE the denial of [Fyk's] motion for reconsideration and REMAND to the district court for further proceedings consistent with this opinion.

Phelps, 569 F.3d at 1140-1142 (emphasis in original) (certain citations omitted). Here, Fyk's filings in conjunction with the subject reconsideration motion practice, [D.E. 46]/ER 21-83 and [D.E. 48]/ER 5-16, tracked almost all of the "extraordinary circumstances" *Phelps* factors. *See* [D.E. 46] at 10-12/ER 30-32. Facebook's Response and the District Court's Order, conversely, amount to: "*Phelps* says there must be 'extraordinary circumstances' to afford Rule 60(b)(6) relief and such circumstances are not here because we summarily say that they do not exist without any analysis."

Notably, Facebook's Response did nothing to rebut the "extraordinary circumstances" advanced by Fyk. Again, all Facebook did in its Response was cite *Phelps*; *i.e.*, it did not analyze the *Phelps* factors. It is axiomatic that whatever is not rebutted by an opponent (Facebook) should be deemed admitted in favor of the other party (Fyk).

The District Court's failure to apply the *Phelps* factors in considering Fyk's Motion for Reconsideration based on new law not in existence at the time of its initial dismissal was an abuse of discretion and warrants reversal.

C. Rule 60(b)(3) Relief Is Warranted – The Dismissal/Judgment That Was Subject To Reconsideration Was Improperly Predicated On Facebook's Misleading Characterization Of Fyk's Claims

As explained by Fyk in his earlier filings (both in District Court and in this Court), the District Court accepted Facebook's false characterization of Fyk's content in dismissing Fyk's case; *i.e.*, in depriving Fyk of his Due Process rights. An example discussed in past filings was the blatant lie in Facebook's Motion to Dismiss that one of Fyk's businesses/pages was dedicated to public urination, which such demonstrably false statement was featured by the District Court in the very first paragraph of the dismissal Order.

But the most egregious example of the District Court's acceptance of Facebook's distorted facts was the mischaracterization of Fyk's Verified Complaint as a 230(c)(1) case rather than the 230(c)(2)(A) case that this case actually was/is, as discussed in footnote 11 above. Facebook perpetuated the misleading argument to the Court because Facebook knew that 230(c)(2)(A) cases are generally not subject to dismissal at the pleading stage because there are too many factual considerations at play when assessing the "good faith" (or "bad faith") of the ICS. Facebook engaged in a prestidigitation of Fyk's actual factual allegations in the Verified Complaint showing Facebook's <u>conduct</u> with Facebook's <u>argument</u> of Fyk's alleged (but false characterization of) <u>content</u>, to which the District Court fell victim. On a Rule 12(b)(6) motion, the District Court was required to accept as true at the pleading stage Fyk's factual allegations (which revolved

around Facebook's conduct, not Fyk's content), concerning (among other illegalities) Facebook's anticompetitive animus towards and tortious interference with Fyk's businesses.

Rule 60(b)(3) relief is available where (as here) a Court's adverse ruling was predicated, in whole or in part, on a fraud on the court and upon new controlling case authority. If the District Court did not understand 230(c)(2)(A) (as Fyk pleaded the factual allegations), it should have permitted a hearing to allow Fyk to further explain/show why the Verified Complaint was/is a 230(c)(2)(A) case or permitted Fyk to amend his Verified Complaint to make even clearer how his case was brought pursuant to a 230(c)(2)(A). The District Court's disposition of the case was the result of having been misled by Facebook's mischaracterization of Fyk's claims. Worse, the District Court seized upon Facebook's false statement that one of Fyk's businesses/pages was dedicated to public urination, which was a patently false Facebook assertion and had no proper basis for appearing as a ground for the District Court's order at the initial pleading and 12(b)(6) motion practice stage. Fyk's Verified Complaint allegations were to be taken as true with reasonable inferences drawn therefrom in favor of Fyk. Rule 60(b)(3) relief is warranted, the denial Order was fundamentally flawed by the District Court's adopting of Facebook's mischaracterization that Fyk's case was somehow a 230(c)(1) challenge.

Moreover, just as the District Court did not engage in an analysis of the *Phelps* "extraordinary circumstances" Rule 60(b)(6) factors (contrary to Fyk's Motion for Reconsideration that analyzed such factors), the Order also did not address Fyk's request for Rule

60(b)(3) relief (just like Facebook's Response – no mention of Rule 60(b)(3)). Again, it is axiomatic that whatever is not rebutted by an opponent (Facebook) should be deemed admitted in favor of the other party (Fyk).

CONCLUSION

The first logical point of 230(c) immunity analysis is the general directive found in the very title of 230 (c) – "Good Samaritan[ism]." This is what this Court's *Enigma* decision necessarily declared. If an ICS (*e.g.*, Facebook) is not a Good Samaritan (one cannot be an anti-competitor and a Good Samaritan at the same time, that is *prima facie* oxymoronic), then the 230(c) immunity analysis stops there; *i.e.*, does not proceed to the subsections of 230(c). That is where the California judiciary should have snuffed out Facebook's immunity nonsense in this case years ago. If the Good Samaritan threshold is cleared, then the immunity analysis of 230(c)'s subsections necessarily unfolds as follows.

230(c)(1) immunizes an ICS/provider/host/platform (*e.g.*, Facebook) when the ICS takes no action with respect to the content of another ICP/user (*e.g.*, Fyk)– it makes perfect sense that where there is no harm inflicted by a Facebook/Google/Twitter/*etc*. because there was no action taken by a Facebook/Google/Twitter/*etc*. as to another ICP's content. Here, the Verified Complaint could not be any clearer in alleging Facebook took action to destroy Fyk and could not be any clearer that Fyk was/is not trying to treat Facebook as Fyk (the publisher); meaning, no immunity for Facebook under 230(c)(1) exists even

assuming *arguendo* the threshold Good Samaritan general directive was somehow surmountable here.

230(c)(2)(A) immunizes an ICS/provider/host/platform when an ICS takes "good faith" restrictive action to eradicate filthy content posted by an ICP/user – it makes perfect sense that a Facebook/Google/Twitter/*etc*. should be able to delete child pornography posted by an ICP/user, for example, without fear of liability. This is how Facebook acted against Fyk, and the allegations of the Verified Complaint are clear in this regard; *e.g.*, the Verified Complaint alleges that Facebook destroyed one of Fyk's businesses/pages because Facebook deemed a screenshot of the Disney movie *Pocahontas* violative of 230(c)(2)(A). What should have happened (and what this appeal asks this Court to finally make happen) is that Facebook's 230(c)(2)(A) actions should have been analyzed on the merits (during discovery) under a "good faith" lens.

Section 230(c)(2)(B) (which expressly relates back to 230(c)(1) because it is the same kind of inaction situation in a slightly different context) immunizes an ICS/provider/host/platform when the ICS takes no action with respect to the content of another ICP #2/user #2 but provides the tools/services to an ICP #1/user #1 to take action on the content of ICP #2/user #2 – it makes perfect sense that a Facebook/Google/Twitter/*etc*. would not be subject to any liability for giving a parent/user/ICP (ICP #1) the tools needed to protect a child in eradication of pornography, for example, posted on the Internet by another user/ICP (ICP #2). The Section 230(c)(2)(B) setting simply does not apply in this case, so Facebook would not enjoy immunity under 230(c)(2)(B) either.

Here, an ICS (Facebook) took action on the content of an ICP (Fyk) – more specifically, Facebook destroyed Fyk's content while in Fyk's hands and restored (took another action) Fyk's identical (in form not function) content for a Fyk competitor who paid Facebook significantly more money than Fyk once Facebook had steered Fyk's content (took another action) to Fyk's competitor. This is the epitome of Facebook's anti-competitive animus, which this Court has properly determined in *Enigma* enjoys no 230(c) immunity at the "Good Samaritan" general directive threshold. That is where the District Court's 230(c) immunity analysis should have stopped over three years ago such that merits-based resolution of this approximately four-year-old case was long ago underway. But we will say a bit more in an abundance of caution; *i.e.*, as if the Good Samaritan general directive in the very title of 230(c) somehow meant nothing to 230(c)(1) and/or 230(c)(2).

This case is the epitome of an ICS (Facebook) taking action on the content of an ICP/user (Fyk); thus, there is zero legitimacy to Facebook somehow enjoying 230(c)(1) inaction immunity here. This case was/is the epitome of "bad faith" ICS (Facebook) removal of the content of an ICP/user (Fyk); thus, there is zero legitimacy to Facebook somehow enjoying 230(c)(2)(A) "good faith" action immunity here. This case was/is nowhere even close to ICP #1/user #1 taking action on the content of ICP #2/user #2 by way of tools/services provided by an ICS (Facebook); thus, there is zero legitimacy to Facebook somehow enjoying 230(c)(B) immunity here. Simply put, *Facebook's active crippling of Fyk's businesses was* conduct *for which Section 230(c) immunity is unavailing to Facebook*.

This Court must reverse the District Court's denial of relief and must right approximately four years of legal injustice endured by Fyk under the exact same anti-competitive animus non-immunity analysis employed by this Court in providing justice to Enigma. If justice is to be served, this case must be remanded to the District Court for vacating and setting aside of dismissal/judgment so that this case can finally move forward on the merits.

STATEMENT OF RELATED CASES

Fyk is unaware of another case pending before this Court involving the acute issues at play here.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32, undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(A) because the principal brief does not exceed 13,000 words. It includes 7,257 words even including this certificate. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Respectfully Submitted,

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Dated: March 3, 2022

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Constance J. Yu

APPELLANT FYK NOTICE OF FILING SUPPLEMENTAL AUTHORITY: *JANE DOE* [DE 15] (APRIL 14, 2022)

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Via ECF

U.S. Court of Appeals for the Ninth Circuit

RE: Jason Fyk v. Facebook, Inc., No. 21-16997

Appellant's Notice of Filing Supplemental Authority in Further Support of Appellant's 3/3/2022 Opening Brief

Dear your Honors:

I, along with Constance J. Yu, Esq., represent Plaintiff-Appellant, Jason Fyk ("Fyk"), in regards to the above-captioned matter. On March 3, 2022, Fyk filed his Opening Brief. Pursuant to Fed. R. App. P. 28 (j) and 9th Cir. R. 28-6 (along with advisory committee notes), Fyk respectfully submits the following (which post-dated the March 3, 2022, Opening Brief) as supplemental authority in further support of his pending Opening Brief: *Doe v. Facebook, Inc.*, 595 U.S. ____, 2022 WL 660628 (Mar. 7, 2022), enclosed herewith for the Court's ease of reference.

This Doe case is Justice Thomas' Statement respecting the denial of certiorari. We, however,

deemed it important and worthwhile to bring the enclosed to the Court's attention, as the enclosed represents another instance where Justice Thomas (at minimum within the SCOTUS) supports Fyk's interpretation/application of CDA immunity; e.g., "It is hard to see why the protection § 230(c)(1) grants publishers against being held strictly liable for third parties' content should protect Facebook from liability for its own 'acts and omissions,'" id. at *1 (emphasis in original), with the subject Fyk case being one that seeks to hold Facebook accountable for Facebook's "own" actions, namely actions of an anti-competitive animus.

Undersigned hereby certifies that the above body of this letter does not exceed 350 words pursuant to Fed. R. App. P. 28(j) and 9th Cir. R. 28-6; indeed, the above body totals 200 words.

Respectfully Submitted,

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Enclosure (Doe v. Facebook)

STATEMENT OF JUSTICE THOMAS IN *JANE DOE V. FACEBOOK* DENIAL OF CERTIORARI [DE 15A] (MARCH 7, 2022)

SUPREME COURT OF THE UNITED STATES

JANE DOE

v.

FACEBOOK, INC.

Case No. 21-16997

OPINION

The petition for a writ of certiorari is denied.

Statement of Justice THOMAS respecting the denial of certiorari.

In 2012, an adult, male sexual predator used Facebook to lure 15-year-old Jane Doe to a meeting, shortly after which she was repeatedly raped, beaten, and trafficked for sex. Doe eventually escaped and sued Facebook in Texas state court, alleging that Facebook had violated Texas' anti-sex-trafficking statute and committed various common-law offenses. Facebook petitioned the Texas Supreme Court for a writ of mandamus dismissing Doe's suit. The court held that a provision of the Communications Decency Act known as § 230 bars Doe's common-law claims, but not her statutory sex-trafficking claim.

Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The Texas Supreme Court emphasized that courts have uniformly treated internet platforms as "publisher[s]" under § 230(c) (1), and thus immune, whenever a plaintiff's claim "'stem[s] from [the platform's] publication of information created by third parties.'" *In re Facebook, Inc.*, 625 S.W.3d 80, 90 (Tex. 2021) (quoting *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (CA5 2008)). As relevant here, this expansive understanding of publisher immunity requires dismissal of claims against internet companies for failing to warn consumers of product defects or failing to take reasonable steps "to protect their users from the malicious or objectionable activity of other users." 625 S.W.3d, at 83. The Texas Supreme Court acknowledged that it is "plausible" to read § 230(c)(1) more narrowly to immunize internet platforms when plaintiffs seek to hold them "strictly liable" for transmitting third-party content, *id*, at 90-91, but the court ultimately felt compelled to adopt the consensus approach, *id*, at 91.

This decision exemplifies how courts have interpreted § 230 "to confer sweeping immunity on some of the largest companies in the world," *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 592 U. S. ___, ___ 141 S.Ct. 13, 13, 208 L.Ed.2d 197 (2020) (statement of THOMAS, J., respecting denial of certiorari), particularly by employing a "capacious conception of what it means to treat a website operator as [a] publisher or speaker," *id.*, at ___, 141 S.Ct., at 17 (internal quotation marks omitted). Here, the Texas Supreme Court afforded publisher immunity even

though Facebook allegedly "knows its system facilitates human traffickers in identifying and cultivating victims," but has nonetheless "failed to take any reasonable steps to mitigate the use of Facebook by human traffickers" because doing so would cost the company users—and the advertising revenue those users generate. Fourth Amended Pet. in No. 2018—69816 (Dist. Ct., Harris Cty., Tex., Feb. 10, 2020), pp. 20, 22, 23; see also Reply Brief 3, n. 1, 4, n. 2 (listing recent disclosures and investigations supporting these allegations).

It is hard to see why the protection § 230(c)(1) grants publishers against being held strictly liable for third parties' content should protect Facebook from liability for its own "acts and omissions." Fourth Amended Pet., at 21.

At the very least, before we close the door on such serious charges, "we should be certain that is what the law demands." *Malwarebytes*, 592 U.S., at ___, 141 S.Ct. at, 18. As I have explained, the arguments in favor of broad immunity under § 230 rest largely on "policy and purpose," not on the statute's plain text. *Id*, at ___, 141 S.Ct., at 15. Here, the Texas Supreme Court recognized that "[t]he United States Supreme Court—or better yet, Congress—may soon resolve the burgeoning debate about whether the federal courts have thus far correctly interpreted section 230." 625 S.W.3d, at 84. Assuming Congress does not step in to clarify § 230's scope, we should do so in an appropriate case.

Unfortunately, this is not such a case. We have jurisdiction to review only "[f]inal judgments or decrees" of state courts. 28 U.S.C. § 1257(a). And finality typically requires "an effective determination of the

litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co. v. Railroad Comm'n of Cal*, 324 U.S. 548, 551, 65 S.Ct. 770, 89 L.Ed. 1171 (1945). Because the Texas Supreme Court allowed Doe's statutory claim to proceed, the litigation is not "final." Conceding as much, Doe relies on a narrow exception to the finality rule involving cases where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). But that exception cannot apply here because the Texas courts have not yet conclusively adjudicated a personal-jurisdiction defense that, if successful, would "effectively moot the federal-law question raised here." *Jefferson v. City a/Tarrant*, 522 U.S. 75, 82, 118 S.Ct. 481, 139 L.Ed.2d 433 (1997).

I, therefore, concur in the Court's denial of certiorari. We should, however, address the proper scope of immunity under § 230 in an appropriate case.

APPELLEE FACEBOOK ANSWERING BRIEF [DE 16] (MAY 4, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK

Petitioner-Appellant,

v.

FACEBOOK, INC.,

Respondent-Appellee.

No. 21-459

Appeal from the United States District Court
Northern District of California
Honorable Jeffrey S. White, Presiding
Case No. 4:18-cv-05159-JSW

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Meta Platforms, Inc. (f/k/a Facebook, Inc.) is a publicly traded company and has no parent corporation; no publicly held corporation owns 10% or more of its stock.

Keker, Van Nest & Peters LLP

By: /s/ William S. Hicks
Paven Malhotra
William S. Hicks

Dated: May 4, 2022

I. Introduction

In 2018, Appellant Jason Fyk sued Appellee Facebook, Inc.[1] after it disabled some of his Facebook pages for violation of its policies. Facebook moved to dismiss Fyk's lawsuit, and the District Court granted that motion after determining that each of his claims was barred under Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1) (hereinafter, "Section 230(c)(1)"). A panel of the Ninth Circuit affirmed that decision in June 2020.[2] Seven months

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[1] On October 28, 2021, Facebook, Inc. changed its name to Meta Platforms, Inc. Because the original complaint was filed prior to the name change and for ease of reference, Defendant-Appellee continues to refer to the Defendant identified in the pleadings as "Facebook, Inc." as "Facebook, Inc." here.

[2] *Fyk v. Facebook, Inc.*, 808 F. App'x 597 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1067 (2021) (hereinafter, "*Fyk I*").

later, the U.S. Supreme Court denied Fyk's Petition for Writ of Certiorari.

Undeterred, Fyk then returned to the District Court where he filed a motion for relief from judgment under Rule 60(b).[3] The District Court denied that motion. Fyk now appeals the District Court's decision denying Rule 60(b) relief.

Fyk's primary contention is that the Ninth Circuit's 2019 decision in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*[4] marked a change in the controlling law that resuscitates his underlying legal claims. More specifically, he contends that *Enigma* announced a "general directive" holding that neither Section 230(c)(1) nor its sister Section 230(c)(2) protects content moderation decisions like those made by Facebook if such decisions were motivated by anti-competitive animus. Fyk argues that the District Court erred by rejecting this reading of *Enigma*. Fyk's argument is meritless, however, and the District Court properly rejected it.

The District Court correctly recognized that *Enigma* considered only whether Section 230(c)(2)[5] "immunizes blocking and filtering decisions that are driven by anticompetitive animus."[6] *Enigma* never

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[3] Fed. R. Civ. P.

[4] 946 F.3d 1040 (9th Cir. 2019).

[5] Section 230(c)(2) of the CDA applies to certain actions "taken in good faith." 47 U.S.C. § 230(c)(2)(A). Section 230(c)(1) includes no such requirement.

[6] *Enigma*, 946 F.3d at 1050; ER 4.

mentions Section 230(c)(1), much less does it provide any "general directive" that applies to all of 230(c).

Moreover, this Court's decision in *Fyk I* already analyzed and rejected the very argument Fyk presents for a second time in the current appeal. In that decision, which was issued five months after *Enigma* was decided, this Court rejected Fyk's argument that Section 230(c)(1)'s application turns on the interactive computer service provider's motives in removing content. *Fyk I*, 808 F. App'x at 598. Consequently, any holding in *Enigma* concerning the availability of Section 230(c)(2) immunity for decisions that were allegedly driven by anticompetitive motives is irrelevant when assessing the scope of protections available under Section 230(c)(1). Through the instant appeal, Fyk seeks simply to rewrite the Communications Decency Act and relitigate issues that he has already argued and lost.

Accordingly, this Court should affirm the District Court's order.

II. Jurisdictional Statement

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332. The District Court entered final judgment in this case on June 18, 2019, after granting Facebook's Motion to Dismiss without leave to amend.[7] On November 21, 2021, the District Court denied Fyk's Rule 60(b) motion seeking to vacate and set aside the order and judgment of dismissal.

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[7] ER 86-89; *Fyk v. Facebook, Inc.*, Case No. 18-05159-JSW (N.D. Cal. June 18, 2019), Dkt. 39.

III. Issues Presented

(1) Did the District Court abuse its discretion in denying Fyk's motion for relief under Rule 60(b)(5)?

(2) Did the District Court abuse its discretion in denying Fyk's motion for relief under Rule 60(b)(6)?

(3) Did the District Court abuse its discretion in declining to grant relief pursuant to Rule 60(b)(3)?

IV. Statement of the Case

A. Procedural Background

On August 22, 2018, Fyk filed a complaint in the U.S. District Court for the Northern District of California alleging four causes of action: (1) intentional interference with prospective economic advantage, (2) violation of California Business & Professions Code Sections 17200-17210 (Unfair Competition), (3) civil extortion, and (4) fraud/intentional misrepresentation.[8] Fyk alleged that he had created a series of Facebook pages that "were humorous in nature, designed to get a laugh out of [his] viewers/followers."[9] At some point, Facebook disabled certain of those pages for violation of its policies.[10] Fyk alleged, however, that Facebook was actually motivated by a desire to make room for its own sponsored advertisements and to "strong-arm" Fyk into paying to advertise.[11]

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[8] ER 193-202.

[9] ER 179.

[10] ER 182-84

[11] *See* ER 185-90. Fyk ultimately decided to sell the pages to a third party. *See* ER 191.

On November 1, 2018, Facebook moved the District Court to dismiss the Complaint because the claims were barred by Section 230(c)(1) and, in any event, because the Complaint failed to state any claim for relief.[12]

On June 18, 2019, the District Court issued an order dismissing Fyk's claims with prejudice as barred by Section 230(c)(1).[13] In a well-reasoned decision, the District Court correctly held that Section 230(c)(1) barred all of Fyk's claims because they sought to hold Facebook liable as the "publisher or speaker" of content created and provided by Fyk himself.[14]

In September 2019, Fyk appealed the District Court's order to this Court, arguing that the District Court had erred in its application of Section 230(c)(1).[15] Among other things, Fyk argued that the District Court erred in dismissing his Complaint because "Facebook [allegedly] took action (motivated in bad faith and/or in money) as to his businesses/pages that rose far above a 'Good Samaritan' nature, thereby divesting Facebook of any 'Good Samaritan' immunity/protection rights under the Internet's 'Good Samaritan' law – Subsection 230(c) of the CDA.").[16]

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[12] ER 158-75.

[13] *Fyk*, Case No. 18-cv-05159-JSW, Dkt. 38; ER 86-89 (hereinafter, the "June 2019 Order").

[14] *See* ER 87-89. The District Court did not address Facebook's contention that the Complaint failed to state any claims.

[15] SER 1-44.

[16] SER 94.

On June 12, 2020, this Court issued its decision in *Fyk I*, affirming the District Court's June 2019 Order and holding that "[t]he district court properly determined that Facebook has § 230(c)(1) immunity from Fyk's claims in this case." *Fyk I*, 808 F. App'x at 597. In so holding, this Court expressly rejected Fyk's contention that the alleged motives of an interactive computer service provider are relevant to the analysis of Section 230(c)(1). As the Court explained, "[u]nlike 47 U.S.C. § 230(c)(2)(A), nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service." *Fyk I*, 808 F. App'x at 598.

In November 2020, Fyk filed a Petition for Writ of Certiorari to the U.S. Supreme Court challenging this Court's opinion in *Fyk I*.[17] The Supreme Court denied that Petition on January 11, 2021. *See Fyk v. Facebook*, *Inc.*, 141 S. Ct. 1067 (2021).

On March 22, 2021, Fyk moved the District Court to vacate and set aside its June 2019 Order under Rule 60(b)(5) and (6) on the purported basis that there had been an intervening change in the controlling law.[18] In particular, Fyk argued that this Court's 2019 decision in *Enigma Software Grp. USA, LLC v. Malwarebytes*, Inc., 946 F.3d 1040, 1050 (9th Cir. 2019), and Justice Thomas's subsequent "statement respecting the denial of certiorari" of the *Enigma* decision, changed the controlling precedent applied by the

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[17] App. Opening Br. at 10.

[18] ER 21-34 (3/22/2021 Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment) (hereinafter, the "Rule 60 Motion").

District Court.[19] According to Fyk, the *Enigma* decision "establishes clear, new precedent confirming that immunity is unavailable when a plaintiff alleges anti-competitive conduct."[20]

On November 1, 2021, the District Court issued an order denying Fyk's Rule 60 motion.[21] The District Court held that the Ninth Circuit's *Enigma* opinion "did not reverse any case law upon which the Order was based" because it "did not involve the application of 230(c)(1); instead, the court examined 230(c)(2)."[22] The District Court also explained that "Justice Thomas's statement, made 'respecting the denial of certiorari' to the *Enigma* opinion, is not the holding of the Supreme Court and it therefore does not 'constitute[] binding precedent.'"[23] The District Court further held that Fyk had failed to establish the "extraordinary circumstances" required for relief under Rule 60(b)(6).[24]

B. Fyk's Appeal

Fyk advances three arguments on appeal.

First, he argues that the District Court abused its discretion when it declined to vacate the June 2019 Order pursuant to Rule 60(b)(5). In particular, he

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[19] ER 25.

[20] ER 26.

[21] ER 3-4 (11/01/2021 Order Denying Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) (hereinafter, the "November 2021 Order" or "Order").

[22] ER 4.

[23] *Id.*

[24] *Id.*

challenges the District Court's determination that *Enigma* did not change the controlling law concerning Section 230(c)(1).[25]

Second, Fyk contends that the District Court abused its discretion when it determined that he failed to show the "extraordinary circumstances" required to vacate a final judgment pursuant to Rule 60(b)(6).[26] Specifically, Fyk contends that the District Court erred by not analyzing certain factors that this Court has identified for determining when a change in law constitutes "extraordinary circumstances" sufficient to reopen a final judgment.

Finally, Fyk argues that the District Court abused its discretion by declining to vacate the dismissal order under Rule 60(b)(3) based on Facebook's alleged "false characterization of Fyk's content" in its motion to dismiss.[27]

V. Standard of Review

This Court reviews the denial of a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) for an abuse of discretion. *Riley v. Filson*, 933 F.3d 1068, 1071 (9th Cir. 2019). A district court's exercise of its discretion may not be reversed absent "a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005). "An appeal from a denial of a Rule 60(b) motion brings up

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[25] App. Opening Br. at 4-5.

[26] App. Opening Br. at 6.

[27] App. Opening Br. at 23.

only the denial of the motion for review, not the merits of the underlying judgment." *Floyd v. Laws*, 929 F.2d 1390, 1400 (9th Cir. 1991).

A district court may grant relief under Rule 60(b)(3) only if the moving party establishes by clear and convincing evidence "that a judgment was obtained by fraud, misrepresentation, or misconduct, and that the conduct complained of prevented the moving party from fully and fairly presenting the case." *In re M/V Peacock on Compl. of Edwards*, 809 F.2d 1403, 1404-05 (9th Cir. 1987); *accord De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir. 2000).

Rule 60(b)(5) provides for relief from a final judgment only when "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). "[T]o grant a Rule 60(b)(5) motion to modify a court order, a district court must find 'a significant change either in factual conditions or in law.'" *S.E.C. v. Coldicutt*, 258 F.3d 939, 942 (9th Cir. 2001) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)). "Relief from a court order should not be granted, however, simply because a party finds 'it is no longer convenient to live with the terms' of the order." *Id.*

"A movant seeking relief under Rule 60(b)(6) [must] show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). The standard for a Rule 60(b)(6) motion is high, and that relief should only be granted "sparingly" to avoid "manifest injustice."

Navajo Nation v. Dep't of the Interior, 876 F.3d 1144, 1173 (9th Cir. 2017).

VI. Summary of Argument

In the proceedings below, Fyk sought relief under Rule 60(b)(5) and (b)(6) on the same purported basis that there had been an intervening change in the controlling legal authority. But in declining to grant Rule 60(b)(5) relief, the District Court correctly concluded that Fyk had failed to identify any such change. Contrary to Fyk's argument on appeal, the District Court properly determined that the Ninth Circuit's *Enigma* opinion was limited to Section 230(c)(*2*). *Enigma* did not change (or even mention) the controlling law concerning Section 230(c)(*1*).

The District Court was also correct in denying Fyk's request for Rule 60(b)(6) relief, which was based on the same supposed change in law. Fyk argues that the District Court erred by purportedly failing to analyze certain factors outlined in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), for determining whether a "clear and authoritative" change in law constitutes "extraordinary circumstances." But the District Court was not obliged to analyze such factors, having correctly determined at the outset that the law had not changed.

As for Fyk's Rule 60(b)(3) argument, Fyk failed to properly raise that issue before the District Court, and so it is waived. Even had Fyk preserved that issue for appeal, his argument would fail on the merits because the District Court's dismissal order is not based on any misconduct on the part of Facebook, nor has Fyk demonstrated that the conduct complained of prevented him from fairly presenting his case.

As Fyk has not satisfied his burden, this Court should affirm the District Court's Order denying relief under Rule 60(b).

VII. Argument

A. The District Court Did Not Abuse Its Discretion in Holding That the *Enigma* Decision Did Not Change the Relevant Underlying Law

Rule 60(b)(5) provides for relief from a final judgment only when "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). "[I]n order to grant a Rule 60(b)(5) motion to modify a court order, a district court must find 'a significant change either in factual conditions or in law.'" *Coldicutt*, 258 F.3d at 942 (quoting *Rufo*, 502 U.S. at 384). Here, Fyk's Rule 60 Motion failed to demonstrate that *Enigma* effected any change in the controlling law concerning Section 230(c)(1), much less a "significant change." Accordingly, the District Court properly denied Rule 60(b)(5) relief.[28]

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[28] Even had Fyk identified a significant change in law, Rule 60 (b)(5) relief would not be warranted because the District Court's order of dismissal has no "prospective application." *Harvest v. Castro*, 531 F.3d 737, 748 (9th Cir. 2008) ("To be sure, Rule 60(b)(5) applies only to those judgments that have prospective application."). As explained in Facebook's response to Fyk's Rule 60 Motion, *see* ER 18, a judgment has "prospective application" only if "it is executory or involves the supervision of changing conduct or conditions." *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995) (internal quotes omitted). The District Court's dismissal

Section 230(c)(1) provides that "[n]o 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." The Communications Decency Act expressly preempts any cause of action that would hold an internet platform liable as a speaker or publisher of third-party speech.[29]

In *Barnes v. Yahoo!,* this Court explained that Section 230(c)(1) protects the exercise of a "publisher's traditional editorial functions" such as "reviewing, editing, and deciding whether to publish or to withdraw from publication third party content." 570 F.3d at 1102. "[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove." *Id.* at 1103. "[B]ecause such conduct is publishing conduct . . . [this Court] ha[s] insisted that section 230 protects from liability any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." *Id.* (internal quotations omitted and emphasis in original).

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order is not executory, nor does it require ongoing supervision. "That [Fyk] remains bound by the dismissal is not a 'prospective effect' within the meaning of rule 60(b)(5) any more than if [he] were continuing to feel the effects of a money judgment against him." *Id.* (quoting *Gibbs v. Maxwell House*, 738 F.2d 1153, 1155-56 (11th Cir.1984), and holding that a dismissal order did not have "prospective application").

[29] 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with" the CDA.).

In its June 2019 Order, the District Court correctly dismissed Fyk's Complaint after concluding that all requirements for Section 230(c)(1) immunity were met. In affirming that decision, this Court expressly rejected Fyk's argument that Section 230(c)(1) does not immunize editorial decisions taken with discriminatory or anticompetitive motives.[30] As this Court explained in *Fyk I*, "[u]nlike 47 U.S.C. § 230(c)(2)(A), nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of the interactive computer service." *Fyk I*, 808 F. App'x at 598 (emphasis added). In *Fyk I*, this Court also "reject[ed] Fyk's argument that his case is like *Fair Housing* [*v. Council of San Fernando Valley v. Roommates.Com, LLC*][31] because Facebook allegedly 'discriminated' against him by singling out his pages." *Id*. In rejecting that contention, this Court explained that Fyk's argument "mistakes the alleged illegality of the particular content at issue in *Fair Housing* with an antidiscrimination rule that we have never adopted to apply § 230(c)(1) immunity." *Id*.

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[30] *See* SER 12 ("[T]his lawsuit is about the several unlawful (*i.e.,* fraudulent, extortionate, unfairly competitive) methods selectively and discriminatorily employed by Facebook to 'develop' Fyk's 'information content' for an entity Facebook values more (Fyk's competitor, who paid Facebook more), in interference with Fyk's economic advantage to augment Facebook's corporate revenue."); SER 0041 (arguing that Facebook forfeited CDA immunity by alleging taking action "in direct competition with Fyk").

[31] 521 F.3d 1157, 1172 (9th Cir. 2008) (holding that defendant who "both elicit[ed] . . . allegedly illegal content and ma[de] aggressive use of it in conducting its business" was not entitled to immunity under Section 230(c)(1)).

Fyk now seeks to vacate the District Court's June 2019 Order under Rule 60(b)(5)[32] on the purported basis that the *Enigma* decision somehow changed the controlling law concerning Section 230(c)(1). According to Fyk, *Enigma* "establishes clear, new precedent confirming that immunity is unavailable when a plaintiff alleges anticompetitive conduct – a decision that directly contradicts . . . the Ninth Circuit's narrower conclusion [in *Fyk I*] that 'nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service.'"[33] Fyk is mistaken.

As an initial matter, this Court decided *Fyk I* months after the *Enigma* decision.[34] Thus, this Court's confirmation in *Fyk I* that "nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service," *Fyk I*, 808 F. App'x at 598, conclusively refutes Fyk's assertion that this Court's earlier *Enigma* decision changed the controlling law concerning Section 230(c)(1) in the manner he suggests.

Moreover, the Ninth Circuit's *Enigma* decision does not even address Section 230(c)(1). As the District Court rightly explained in denying Fyk's request for

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[32] Under Rule 60(b)(5), a court may relieve a party from a final judgment, among other reasons, if "the judgment . . . is based on an earlier judgment that has been reversed or vacated." Fed. R. Civ. P. 60(b)(5).

[33] ER 26; *see also* App. Opening Br. at 4-5.

[34] This Court issued its decision in *Enigma*, 946 F.3d 1040, on December 31, 2019. That opinion amended and superseded an earlier decision, which issued on September 12, 2019. *Id.* at 1044. This Court's opinion in *Fyk I* issued on June 12, 2020.

Rule 60(b)(5) relief, the legal question in *Enigma* was "whether § 230(c)(2)[35] immunizes blocking and filtering decisions that are driven by anticompetitive animus." *Enigma*, 946 F.3d at 1050 (emphasis added); *id.* at 1045 ("This appeal centers on the immunity provision contained in § 230(c)(2) of the Communications Decency Act ('CDA'), 47 U.S.C. § 230(c) (1996).") (emphasis added).[36] The *Enigma* decision never once mentions Section 230(c)(1), much less does it purport to reverse Ninth Circuit precedents interpreting that subsection. Thus, the District Court did not abuse its discretion in holding that *Enigma* "did not reverse any case law upon which the Order was based."[37]

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[35] This Court has repeatedly recognized, including in *Fyk I*, that subsections (c)(1) and (c)(2) of the CDA provide separate and independent grants of immunity. *See Fyk I*, 808 F. App'x at 598 ("We reject Fyk's argument that granting § 230(c)(1) immunity to Facebook renders § 230(c)(2)(A) mere surplusage. As we have explained, § 230(c)(2)(a) 'provides an additional shield from liability.'") (quoting *Barnes*, 570 F.3d at 1105); *id.* ("[T]he persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but any provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue can take advantage of subsection (c)(2).").

[36] The *Enigma* Court answered that question in the negative, narrowly holding that "if a provider's basis for objecting to and seeking to block materials is because those materials benefit a competitor, the objection would not fall within any category listed in [§ 230(c)(2)(A)] and the immunity would not apply." 946 F.3d at 1052; *id.* at 1045 ("We hold that the phrase 'otherwise objectionable' [in § 230(c)(2)(A)] does not include software that the provider finds objectionable for anticompetitive reasons.").

[37] ER 4.

In his opening brief, Fyk argues repeatedly that the *Enigma* holding is not "confined" to subsection (c)(2) of the CDA.[38] Fyk is incorrect. The issue presented in *Enigma* was limited to subsection (c)(2) of Section 230, and the Court's holding is strictly confined to that subsection. *Enigma*, 946 F.3d at 1049-52. This is unsurprising because the defendant in *Enigma* moved to dismiss under subsection (c)(2), and the district court in *Enigma* based its immunity decision on that subsection. *See id.* at 1048; *see also Galvan v. Alaska Dep't of Corr.*, 397 F.3d 1198, 1204 (9th Cir. 2005) ("Courts generally do not decide issues not raised by the parties."). Nothing supports Fyk's contention that *Enigma* announced a "'Good Samaritan' general directive that applies to all of 230(c)."[39]

Accordingly, this Court should affirm the District Court's decision denying relief under Rule 60(b)(5).

B. Given Fyk's Failure to Identify Any Change in the Controlling Law, the District Court Did Not Abuse Its Discretion in Holding That Fyk Failed to Demonstrate the "Extraordinary Circumstances" Required for Relief Under Rule 60(b)(6)

"A movant seeking relief under Rule 60(b)(6) [must] show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535. This Court has recognized that the standard for a Rule 60(b)(6) motion is high, and that relief

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[38] *See, e.g.*, App. Opening Br. at 16 ("nowhere in the Court's holding is the exception to immunity for anti-competitive animus confined to just 230(c)(2)"); *id.* at 15

[39] App. Opening Br. at 13. injustice.

should only be granted "sparingly" to avoid "manifest" *Navajo Nation*, 876 F.3d at 1173. As Fyk failed to meet this standard, the District Court properly declined to grant relief under Rule 60(b)(6).[40]

In his opening brief, Fyk asserts that the District Court abused its discretion by purportedly failing to analyze certain factors outlined by the Ninth Circuit in *Phelps* for determining whether a change in law constitutes "extraordinary circumstances."[41] Fyk is wrong, and his reliance on *Phelps* is misplaced.

In *Phelps*, this Court recognized that a change in controlling law may in some circumstances present "extraordinary circumstances" if it is "clear and authoritative." *Phelps*, 569 F.3d at 1131. But the *Phelps* court also recognized that such a change will not always provide the extraordinary circumstances necessary to reopen a case. *Id.*[42] Thus, when a movant seeks Rule 60(b)(6) relief based on an alleged change in law, the first step in the analysis is to whether there has, in fact, been such a change. *Id*. Although the *Phelps* court goes on to outline various factors that districts courts may consider in determining whether a change

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[40] *See* ER 4.

[41] *See* App. Opening Br. at 23 ("The District Court's [alleged] failure to apply the *Phelps* factors in considering Fyk's Motion for Reconsideration based on new law not in existence at the time of its initial dismissal was an abuse of discretion and warrants reversal."); *id*. at 12.

[42] *See also Jones v. Ryan*, 733 F.3d 825, 839 (9th Cir. 2013) ("it is clear that a change in the law will not *always* provide the truly extraordinary circumstances necessary to reopen a case") (emphasis in original).

in law (if one exists) constitutes "extraordinary circumstances," *see id.* at 1135-38, nothing in *Phelps* or any other case requires courts to consider these additional factors where, as here, the law has not changed.

In *Riley v. Filson*, for instance, the Ninth Circuit affirmed the denial of Rule 60(b)(6) relief based solely on its determination there had been no intervening change in law. *See* 933 F.3d at 1073. Because "there ha[d] been no change in the law, the central factor in this analysis," the *Riley* court did not reach the other *Phelps* factors. *Id.*; *see also id.* at 1071 ("Here, the key issue is whether there was 'a change in the law,' and so we do not need to reach the other five factors if there was no change.").

This case is no different. As discussed above, the District Court correctly rejected Fyk's argument that there was a change in the controlling law.[43] Having done so, the District Court did not abuse its discretion in declining to consider whether, if there had been such a change, other *Phelps* factors might have contributed to a finding of "extraordinary circumstances."

C. Fyk's Request for Relief Under Rule 60(b)(3) Is Untimely and Meritless

Fyk's Rule 60(b)(3) argument fails at the outset because he did not properly raise it in his Rule 60 Motion. It is axiomatic that "an appellate court will not consider issues not properly raised before the district court." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Here, the argument section of Fyk's Rule 60 Motion mentioned Rule 60(b)(3) only once, in passing,

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[43] ER 4.

at the end of a lengthy footnote.[44] "The summary mention of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal." *Hilao v. Est. of Marcos*, 103 F.3d 767, 778 n.4 (9th Cir. 1996). Accordingly, Fyk's request for relief pursuant to Rule 60(b)(3) has been waived. *Id.*; *see also, e.g., Aramark Facility Servs. v. Serv. Employees Intern. Union, Local 1877*, 530 F.3d 817, 824 n.2 (9th Cir. 2008) (arguments made in passing and inadequately briefed are waived). Although Fyk's reply brief includes a cursory discussion of Rule 60(b)(3), *see* ER 14, the District Court appropriately declined to address such arguments raised for the first time on reply. *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief."); *accord Greisen v. Hanken*, 925 F.3d 1097, 1115 (9th Cir. 2019).

Even had Fyk properly raised the Rule 60(b)(3) issue before the District Court, his arguments would fail on the merits. To qualify for relief under Rule 60 (b)(3), the moving party must establish by clear and convincing evidence "that a judgment was obtained by fraud, misrepresentation, or misconduct, and that the conduct complained of prevented the moving party from fully and fairly presenting" *In re M/V Peacock on Complaint of Edwards*, 809 F.2d at 1404-05. Fyk failed to make any such showing in his Rule 60 Motion, and his arguments on appeal fare no better.

On appeal, Fyk asserts that Facebook's motion to dismiss allegedly misrepresented that one of Fyk's Facebook pages was "dedicated to public urination,"

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[44] *See* ER 29, n.3 the case.

and that this "demonstrably false statement was featured by the District Court in the first very first paragraph of the dismissal Order." App. Opening Br. at 23-24.[45] But Fyk does not seriously contend that the District Court based its dismissal order on this alleged mischaracterization, as required to support relief from judgment under Rule 60(b)(3). Nor can he. The reasoning behind the District Court's dismissal was that Section 230(c)(1) barred Fyk's claims because they "seek to hold an interactive computer service [provider] liable as a publisher of third party content."[46] In the legal analysis reaching that conclusion, the District Court did not rely upon, or even mention, the statement about which Fyk complains.

Moreover, this Court has already made clear that there was nothing improper about the District Court's statement. In addressing a similar argument made by Fyk in his initial appeal,[47] *Fyk I* explained that "[t]he

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[45] Fyk's Complaint alleges that Facebook "destroyed and/or severely devalued" various of his Facebook pages, including www.facebook.com/takeapissfunny. ER 183. As set forth in Mr. Fyk's Complaint, that page concerned "[t]ake the piss funny pics and videos" and had approximately 4,300,000 followers. *Id.* In the first paragraph of its dismissal order, the District Court noted by way of background that "Plaintiff had used Facebook's free online platform to create a series of, among other amusing things, pages dedicated to videos and pictures of people urinating." ER 86.

[46] ER 88-89.

[47] In his first appeal, Fyk argued that the District Court deviated from the Rule 12(b)(6) standard by "embracing a Facebook 'fact' that was not true (*e.g.*, the inaccurate assertion that Fyk supposedly maintained a page dedicated to featuring public urination), in violation of well-settled law concerning a trial court's having to accept as true the facts pleaded in the four corners of the Complaint." SER 12.

district court did not deviate from the Rule 12(b)(6) standard by alluding to the allegation in Fyk's complaint that Facebook de-published one of his pages concerning urination, nor did that allusion affect the analysis." *Fyk I*, 808 F. App'x at 597 n.1 (emphasis added).

Fyk also argues that Rule 60(b)(3) relief is warranted because the District Court supposedly accepted Facebook's "mischaracterization of Fyk's Verified Complaint as a 230(c)(1) case rather than the 230(c)(2)(A) case that this case actually was/is."[48] But this makes no sense. On a 12(b)(6) motion, the district court is only required to accept factual allegations as true. *Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173, 1177 (9th Cir. 2021). It is in no way obligated to accept as true a plaintiff's legal arguments or characterizations of the relevant law. Fyk provides no support for the radical notion that the defendant's assertion of a legal theory with which the plaintiff disagrees could ever provide a basis for Rule 60(b)(3) relief from a resulting judgment.

VIII. Conclusion

For the foregoing reasons, the Order of the District Court should be affirmed.

Keker, Van Nest & Peters LLP

By: /s/ William S. Hicks
Paven Malhotra
William S. Hicks

Dated: May 4, 2022

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[48] App. Opening Br. at 23.

APPELLANT FYK NOTICE OF FILING SUPPLEMENTAL AUTHORITY: *JARESKY*
[DE 26-1]
(JUNE 3, 2022)

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Via ECF

U.S. Court of Appeals for the Ninth Circuit

RE: Jason Fyk v. Facebook, Inc., No. 21-16997

Appellant's Notice of Filing Supplemental Authority in Further Support of Appellant's 5/22/2022 Opening Brief [D.E. 23]

Dear your Honors:

I, along with Constance J. Yu, Esq., represent Plaintiff-Appellant, Jason Fyk ("Fyk"), in regards to the above-captioned matter. On May 25, 2022, Fyk filed his Reply Brief. Pursuant to Fed. R. App. P. 28(j) and 9th Cir. R. 28-6 (along with advisory committee notes), Fyk respectfully submits the following (which was learned of shortly after the filing of the Reply Brief) as supplemental authority in further support of his pending Reply Brief: *Jarkesy v. SEC*, No. 20-61007 (5th Cir. May 18, 2022), enclosed herewith for the Court's ease of reference.

This *Jarkesy* case deals with the mandate that Congress supply an intelligible principle where (as here) delegating administrative enforcement authority

of a law. As this *Jarkesy* case concludes, if Congress does not supply an intelligible principle under such a delegation setting, then the law is unconstitutional. So, it is either Title 47, United States Code, all of Section 230(c) is governed by the overarching "Good Samaritan" intelligible principle (as Fyk's briefing argues, most recently his Reply Brief) or Section 230 (c) is unconstitutional. Either way, Facebook cannot enjoy *carte blanch*e 230(c)(1) immunity sans "Good Samaritan" threshold requirement; i.e., as Fyk's briefing (most recently his Reply Brief) argues, the *Enigma* anti-competitive animus "Good Samaritan" threshold analysis applies to all of Section 230(c), not just Section 230(c)(2).

Undersigned hereby certifies that the above body of this letter does not exceed 350 words pursuant to Fed. R. App. P. 28(j) and 9th Cir. R. 28-6; indeed, the above body totals 214 words.

Respectfully Submitted,

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Enclosure (Jarkesy v. SEC)

JARESKY: FIFTH CIRCUIT OPINION GRANTING PETITION FOR REVIEW [DKT 26-1A] (MAY 18, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE R. JARKESY, JR.; PATRIOT28, L.L.C.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

No. 20-61007

Petition for Review of an Order of the United States Securities and Exchange Commission No. 3-15255

Before: DAVIS, ELROD, and OLDHAM, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

Congress has given the Securities and Exchange Commission substantial power to enforce the nation's securities laws. It often acts as both prosecutor and judge, and its decisions have broad consequences for personal liberty and property. But the Constitution constrains the SEC's powers by protecting individual rights and the prerogatives of the other branches of

government. This case is about the nature and extent of those constraints in securities fraud cases in which the SEC seeks penalties.

The SEC brought an enforcement action within the agency against Petitioners for securities fraud. An SEC administrative law judge adjudged Petitioners liable and ordered various remedies, and the SEC affirmed on appeal over several constitutional arguments that Petitioners raised. Petitioners raise those same arguments before this court. We hold that: (1) the SEC's in-house adjudication of Petitioners' case violated their Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I's vesting of "all" legislative power in Congress; and (3) statutory removal restrictions on SEC ALJs violate the Take Care Clause of Article II. Because the agency proceedings below were unconstitutional, we GRANT the petition for review, VACATE the decision of the SEC, and REMAND for further proceedings consistent with this opinion.

I.

Petitioner Jarkesy established two hedge funds and selected Petitioner Patriot28 as the investment adviser. The funds brought in over 100 investors and held about $24 million in assets. In 2011, the SEC launched an investigation into Petitioners' investing activities, and a couple of years later the SEC chose to bring an action within the agency, alleging that Petitioners (along with some former co-parties) committed fraud under the Securities Act, the Securities

Exchange Act, and the Advisers Act. Specifically, the agency charged that Petitioners: (1) misrepresented who served as the prime broker and as the auditor; (2) misrepresented the funds' investment parameters and safeguards; and (3) overvalued the funds' assets to increase the fees that they could charge investors.

Petitioners sued in the U.S. District Court for the District of Columbia to enjoin the agency proceedings, arguing that the proceedings infringed on various constitutional rights. But the district court, and later the U.S. Court of Appeals for the D.C. Circuit, refused to issue an injunction, deciding that the district court had no jurisdiction and that Petitioners had to continue with the agency proceedings and petition the court of appeals to review any adverse final order. *See darkest P. SEC*, 48 F. Supp. 3d 32, 40 (D.D.C. 2014), *aff'd*, 803 F.3d 9, 12 (D.C. Cir. 2015).

Petitioners' proceedings moved forward. The ALJ held an evidentiary hearing and concluded that Petitioners committed securities fraud. Petitioners then sought review by the Commission. While their petition for Commission review was pending, the Supreme Court held that SEC ALJs had not been properly appointed under the Constitution. *Lucia P. SEC*, 138 S. Ct. 2044, 2054-55 (2018). In accordance with that decision, the SEC assigned Petitioners' proceeding to an ALJ who was properly appointed. But Petitioners chose to waive their right to a new hearing and continued under their original petition to the Commission.

The Commission affirmed that Petitioners committed various forms of securities fraud. It ordered Petitioners to cease and desist from committing further violations and to pay a civil penalty of $300,000, and

it ordered Patriot28 to disgorge nearly $685,000 in ill-gotten gains. The Commission also barred Jarkesy from various securities industry activities: associating with brokers, dealers, and advisers; offering penny stocks; and serving as an officer or director of an advisory board or as an investment adviser.

Critical to this case, the Commission rejected several constitutional arguments Petitioners raised. It determined that: (1) the ALJ was not biased against Petitioners; (2) the Commission did not inappropriately prejudge the case; (3) the Commission did not use unconstitutionally delegated legislative power—or violate Petitioners' equal protection rights—when it decided to pursue the case within the agency instead of in an Article III court; (4) the removal restrictions on SEC ALJs did not violate Article II and separation-of-powers principles; and (5) the proceedings did not violate Petitioners' Seventh Amendment right to a jury trial. Petitioners then filed a petition for review in this court.

II.

Petitioners raise several constitutional challenges to the SEC enforcement proceedings.[1] We agree with Petitioners that the proceedings suffered from three independent constitutional defects: (1) Petitioners were deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with

[1] Multiple *amici* have filed briefs with this court as well: the Cato Institute, Phillip Goldstein, Mark Cuban, Nelson Obus, and the New Civil Liberties Alliance. Each argues that the SEC proceedings exceeded constitutional limitations for reasons that Petitioners raise.

an intelligible principle by which to exercise the delegated power; and (3) statutory removal restrictions on SEC ALJs violate Article II.

A.

Petitioners challenge the agency's rejection of their constitutional arguments. We review such issues *de novo*. *See Emp. Sols. Staffing Grp. II, L.L.C. v. Off. of Chief Admin. Hearing Officer*, 833 F.3d 480, 484 (5th Cir. 2016); *Trinity Marine Prods., Inc. v. Chao*, 512 F.3d 198, 201 (5th Cir. 2007).

B.

Petitioners argue that they were deprived of their Seventh Amendment right to a jury trial. The SEC responds that the legal interests at issue in this case vindicate distinctly public rights, and that Congress therefore appropriately allowed such actions to be brought in agency proceedings without juries. We agree with Petitioners. The Seventh Amendment guarantees Petitioners a jury trial because the SEC's enforcement action is akin to traditional actions at law to which the jury-trial right attaches. And Congress, or an agency acting pursuant to congressional authorization, cannot assign the adjudication of such claims to an agency because such claims do not concern public rights alone.

1.

Thomas Jefferson identified the jury "as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution." Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in The Papers of Thomas Jefferson 267

(Julian P. Boyd ed., 1958). And John Adams called trial by jury (along with popular elections) "the heart and lungs of liberty." The Revolutionary Writings of John Adams 55 (C. Bradley Thompson ed., 2000); *see also* Jennifer W. Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 Tex. Tech L. Rev. 303, 303-04 (2012) (explaining that the jury is "as central to the American conception of the consent of the governed as an elected legislature or the independent judiciary").[2]

Civil juries in particular have long served as a critical check on government power. So precious were civil juries at the time of the Founding that the Constitution likely would not have been ratified absent assurance that the institution would be protected expressly by amendment. 2 The Debate on the Constitution 549, 551, 555, 560, 567 (Bernard Bailyn ed. 1993) (collecting various state ratification convention documents calling for the adoption of a civil jury trial

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[2] Veneration of the jury as safeguard of liberty predates the American Founding. Our inherited English common-law tradition has long extolled the jury as an institution. William Blackstone said that trial by jury is "the glory of the English law" and "the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected, either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." *Mitchell v. Harmony*, 54 U.S. 115, 142-43 (1851) (quoting 4 William Blackstone, Commentaries on the Laws of England 227-29 (Oxford, Clarendon Pr. 1992) (1765)); *see also* Jennifer W. Elrod, *W(h)ither The Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 3, 7 (2011). Indeed, King George III's attempts to strip colonists of their right to trial by jury was one of the chief grievances aired against him and was a catalyst for declaring independence. The Declaration of Independence para. 20 (U.S. 1776).

amendment); The Federalist No. 83 (Alexander Hamilton) ("The objection to the plan of the convention, which has met with most success in this State [*i.e.*, New York], and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases."); Mercy Otis Warren, Observations on the Constitution (1788), in 2 The Debate on the Constitution 290 (Bernard Bailyn ed. 1993) (worrying that the unamended Constitution would lead to "[t]he abolition of trial by jury in civil causes"); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) ("One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases.").[3]

Trial by jury therefore is a "fundamental" component of our legal system "and remains one of our most vital barriers to governmental arbitrariness." *Reid v. Covert*, 354 U.S. 1, 9-10 (1957). "Indeed, '[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions. . . . '" *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 341 (1979) (Rehnquist, J., dissenting) (quoting Leonard Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 281 (1960)). Because "[m]aintenance of the jury as a fact-finding body is of

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[3] *See also* Kenneth Klein, *The Validity of The Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 Hastings Const. L.Q. 1013, 1015 (1994) ("At the time the Constitution was proposed, the people of the United States greatly distrusted government, and saw the absence of a guaranteed civil jury right as a reason, standing alone, to reject adoption of the Constitution; only by promising the Seventh Amendment did the Federalists secure adoption of the Constitution in several of the state ratification debates.").

such importance and occupies so firm a place in our history and jurisprudence[,] . . . any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

The Seventh Amendment protects that right. It provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. The Supreme Court has interpreted "Suits at common law" to include all actions akin to those brought at common law as those actions were understood at the time of the Seventh Amendment's adoption. *Tull v. United States*, 481 U.S. 412, 417 (1987). The term can include suits brought under a statute as long as the suit seeks common-law-like legal remedies. *Id.* at 418-19. And the Court has specifically held that, under this standard, the Seventh Amendment jury-trial right applies to suits brought under a statute seeking civil penalties. *Id.* at 418-24.

That is not to say, however, that Congress may never assign adjudications to agency processes that exclude a jury. *See Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 (1977). "[W]hen Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (internal quotations omitted).

Whether Congress may properly assign an action to administrative adjudication depends on whether the proceedings center on "public rights." *Atlas Roofing*, 430 U.S. at 450. "[I]n cases in which 'public rights' are being litigated[,] *e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact[,] the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." *Id.* Describing proper assignments, the Supreme Court identified situations "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, [and] a vast range of other cases as well are not at all implicated." *Id.* at 458.

The Supreme Court refined the public-right concept as it relates to the Seventh Amendment in *Granfinanciera, S.A. P. Nordberg*, 492 U.S. 33 (1989). There, the Court clarified that Congress cannot circumvent the Seventh Amendment jury-trial right simply by passing a statute that assigns "traditional legal claims" to an administrative tribunal. *Id.* at 52. Public rights, the Court explained, arise when Congress passes a statute under its constitutional authority that creates a right so closely integrated with a comprehensive regulatory scheme that the right is appropriate for agency resolution. *Id.* at 54.

The analysis thus moves in two stages. First, a court must determine whether an action's claims arise "at common law" under the Seventh Amendment. *See Tull*, 481 U.S. at 417. Second, if the action involves

common-law claims, a court must determine whether the Supreme Court's public-rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial. *See Granfinanciera*, 492 U.S. at 54; *Atlas Roofing*, 430 U.S. at 455. Here, the relevant considerations include: whether "Congress 'creat[ed] a new cause of action, and remedies therefor, unknown to the common law,' because traditional rights and remedies were inadequate to cope with a manifest public problem"; and whether jury trials would "go far to dismantle the statutory scheme" or "impede swift resolution" of the claims created by statute. *Granfinanciera*, 492 U.S. at 60-63 (quoting *Atlas Roofing*, 430 U.S. at 454 n.11, 461 (first and second quotations)).

2.

The rights that the SEC sought to vindicate in its enforcement action here arise "at common law" under the Seventh Amendment. Fraud prosecutions were regularly brought in English courts at common law. *See* 3 William Blackstone, Commentaries on the Laws of England *42 (explaining the common-law courts' jurisdiction over "actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party"). And even more pointedly, the Supreme Court has held that actions seeking civil penalties are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims. *Tull*, 481 U.S. at 418-19. Thus, "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Id.* at 422.

Applying that principle, the Court in *Tull* held that the right to a jury trial applied to an action brought by an agency seeking civil penalties for violations of the Clean Water Act. *Id.* at 425. Likewise here, the actions the SEC brought seeking civil penalties under securities statutes are akin to those same traditional actions in debt. Under the Seventh Amendment, both as originally understood and as interpreted by the Supreme Court, the jury-trial right applies to the penalties action the SEC brought in this case.

That conclusion harmonizes with the holdings of other courts applying *Tull*. The Seventh Circuit followed the Supreme Court's lead in that case and has specifically said that when the SEC brings an enforcement action to obtain civil penalties under a statute, the subject of the action has the right to a jury trial. *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) ("Because the SEC was seeking both legal and equitable relief (the former under the Insider Trading Sanctions Act, 15 U.S.C. § 78u-1, which (in subsection (a)(1)) authorizes the imposition of civil penalties for insider trading at the suit of the SEC[)] . . . [the defendant] was entitled to and received a jury trial."); *see also id.* (explaining that another circuit was wrong to tacitly assume "that civil penalties in SEC cases are not a form of legal relief"[4]). Some district courts have applied *Tull* similarly. *See, e.g.*, *SEC v. Badian*, 822 F. Supp. 2d 352, 365 (S.D.N.Y. 2011) (explaining that "whether the facts are such that the defendants can be subjected to a civil

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[4] The Seventh Circuit was referring to the Ninth Circuit's opinion in *SEC v. Clark*, 915 F.2d 439, 442 (9th Cir. 1990). *Clark* did not address the issue whatsoever.

penalty . . . is a question for the jury, [and] the determination of the severity of the civil penalty to be imposed . . . is a question for the Court, once liability is established"); *SEC v. Solow*, 554 F. Supp. 2d 1356, 1367 (S.D. Fla. 2008) (applying *Tull* for the proposition that civil penalties are "legal, as opposed to equitable, in nature," and that it therefore "was [the defendant's] constitutional right to have a jury determine his liability, with [the court] thereafter determining the amount of penalty, if any").

Other elements of the action brought by the SEC against Petitioners are more equitable in nature, but that fact does not invalidate the jury-trial right that attaches because of the civil penalties sought. The Supreme Court has held that the Seventh Amendment applies to proceedings that involve a mix of legal and equitable claims—the facts relevant to the legal claims should be adjudicated by a jury, even if those facts relate to equitable claims too. *See Ross P. Bernhard*, 396 U.S. 531, 537-38 (1970); *see also Lipson*, 278 F.3d at 662 (noting that the defendant was entitled to a jury trial because the SEC sought legal relief in the form of penalties, even though the SEC also sought equitable relief). Here, the SEC sought to ban Jarkesy from participation in securities industry activities and to require Patriot28 to disgorge ill-gotten gains—both equitable remedies. Even so, the penalty facet of the action suffices for the jury-trial right to apply to an adjudication of the underlying facts supporting fraud liability.

3.

Next, the action the SEC brought against Petitioners is not the sort that may be properly assigned

to agency adjudication under the public-rights doctrine. Securities fraud actions are not new actions unknown to the common law. Jury trials in securities fraud suits would not "dismantle the statutory scheme" addressing securities fraud or "impede swift resolution" of the SEC's fraud prosecutions. And such suits are not uniquely suited for agency adjudication.

Common-law courts have heard fraud actions for centuries, even actions brought by the government for fines. *See* Blackstone, *supra* at *42; *see also Tull*, 481 U.S. at 422 ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law."). Naturally, then, the securities statutes at play in this case created causes of action that reflect common-law fraud actions. The traditional elements of common-law fraud are (1) a knowing or reckless material misrepresentation, (2) that the tortfeasor intended to act on, and (3) that harmed the plaintiff. *In re Deepwater Horizon*, 857 F.3d 246, 249 (5th Cir. 2017). The statutes under which the SEC brought securities fraud actions use terms like "fraud" and "untrue statement[s] of material fact" to describe the prohibited conduct. *See* 15 U.S.C. §§ 77a-77aa, 78j(b), 80b-6. When "Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) (explaining that "if a word is obviously transplanted from another

legal source, whether the common law or other legislation, it brings the old soil with it").

Accordingly, the Supreme Court has often looked to common-law principles to interpret fraud and misrepresentation under securities statutes. *See, e.g*, *Omnicare, Inc. v. Laborers Dist. Council Indus. Pension Fund*, 575 U.S. 175, 191 (2015) (considering the Restatement (Second) of Torts to determine whether material omissions are actionable under a securities statute); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343-44 (2005) (relying on "the common-law roots of the securities fraud action" in "common-law deceit and misrepresentation actions" to interpret the statutory securities-fraud action); *SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 192-95 (1963) (considering the principles of common-law fraud to determine the requirements of fraud under the Advisers Act). Thus, fraud actions under the securities statutes echo actions that historically have been available under the common law.

Next, jury trials would not "go far to dismantle the statutory scheme" or "impede swift resolution" of the statutory claims. *See Granfinanciera*, 492 U.S. at 60-63. For one, the statutory scheme itself allows the SEC to bring enforcement actions either in-house or in Article III courts, where the jury-trial right would apply. *See* Dodd-Frank Act § 929P(a), 15 U.S.C. § 78u-2(a). If Congress has not prevented the SEC from bringing claims in Article III courts with juries as often as it sees fit to do so, and if the SEC has in fact brought many such actions to jury trial over the

years,[5] then it is difficult to see how jury trials could "dismantle the statutory scheme." Congress could have purported to assign such proceedings solely to administrative tribunals, but it did not. And there also is no evidence that jury trials would impede swift resolution of the claims.[6] In this case, for example, the SEC took seven years to dispose of Petitioners' case and makes no argument that proceedings with a jury trial would have been less efficient.

Relatedly, securities-fraud enforcement actions are not the sort that are uniquely suited for agency adjudication. Again, Congress has not limited the SEC's ability to bring enforcement actions in Article III courts. Consider the statutory scheme in *Atlas Roofing* for contrast. The statutes in that case were new and somewhat unusual. They provided elaborate enforcement mechanisms for the sorts of claims that

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[5] Indeed, the SEC regularly brings securities-fraud actions in Article III courts and adjudicates them through jury trials. *See, e.g.*, *SEC v. Fowler*, 6 F.4th 255, 258-60 (2d Cir. 2021); *SEC v. Johnston*, 986 F.3d 63, 71 (1st Cir. 2021); *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 772 (5th Cir. 2017); *SEC v. Quan*, 817 F.3d 583, 587 (8th Cir. 2016); *SEC v. Miller*, 808 F.3d 623, 626 (2d Cir. 2015); *SEC v. Jasper*, 678 F.3d 1116, 1119, 1121-22 (9th Cir. 2012); *SEC v. Seghers*, 298 F. App'x 319, 321 (5th Cir. 2008).

[6] The dissenting opinion contends that these considerations are "not decisive" (that the SEC has for decades sued in Article III courts under securities statutes) or "not determinative" (that those same suits are not unique to agency adjudication). To disregard these facts is to ignore the Supreme Court's explanation for what public rights are made of. And in any event, though the facts may not in isolation make up a private right, they together establish (along with the other considerations discussed above) that the right being vindicated here is a private right, not a public one.

likely could not have been brought in legal actions before that point. *See Atlas Roofing*, 430 U.S. at 445 (describing how the statutes required factfinders to undertake detailed assessments of workplace safety conditions and to make unsafe-conditions findings even if no injury had occurred). But the federal courts have dealt with actions under the securities statutes for many decades, and there is no reason to believe that such courts are suddenly incapable of continuing that work just because an agency may now share some of the workload. In fact, for the first decades of the SEC's existence, securities-fraud actions against non-registered parties could be brought *only* in Article III courts. Thomas Glassman, *Ice Skating Uphill: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. Bus. & Sec. L. 47, 50-52 (2015).[7]

The SEC counters that the securities statutes are designed to protect the public at large, and that some circuits have identified SEC enforcement actions as vindicating rights on behalf of the public. Indeed, the SEC says, the statutes allow for enforcement proceedings based on theories broader than actions like fraud that existed at common law.

Those facts do not convert the SEC's action into one focused on public rights. Surely Congress believes that the securities statutes it passes serve the public

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[7] Moreover, the Supreme Court has noted that agency adjudicators generally do not have special expertise to address structural constitutional claims—precisely the issues central to this case. *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021) ("[T]his Court has often observed that agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise.").

interest and the U.S. economy overall, not just individual parties. Yet Congress cannot convert any sort of action into a "public right" simply by finding a public purpose for it and codifying it in federal statutory law. *See Granfinanciera*, 492 U.S. at 61 (explaining that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity"). Purely private suits for securities fraud likely would have a similar public purpose—they too would serve to discourage and remedy fraudulent behavior in securities markets. That does not mean such suits concern public rights at their core. Granted, some actions provided for by the securities statutes may be new and not rooted in any common-law corollary. The fact remains, though, that the enforcement action seeking penalties in this case was one for securities fraud, which is nothing new and nothing foreign to Article III tribunals and juries.

That being so, Petitioners had the right for a jury to adjudicate the facts underlying any potential fraud liability that justifies penalties. And because those facts would potentially support not only the civil penalties sought by the SEC, but the injunctive remedies as well, Petitioners had a Seventh Amendment right to a jury trial for the liability-determination portion of their case.

4.

The dissenting opinion cannot define a "public right" without using the term itself in the definition. That leads to a good bit of question-begging. It says at

times that the "SEC's enforcement action" is itself "a 'public right' because it is a case 'in which the Government sues in its sovereign capacity to enforce public rights." *Post* at 37. So the action is a public right because (1) the SEC is the government, and (2) it is vindicating a public right. And what is that public right being vindicated? The dissenting opinion does not say. In reality, the dissenting opinion's rule is satisfied by the first step alone: The action is itself a "public right" because the SEC is the government. And the not-so-far-removed consequences that flow from that conclusion: When the federal government sues, no jury is required. This is perhaps a runner-up in the competition for the "Nine Most Terrifying Words in the English Language."[8] But fear not, the dissenting opinion's proposal runs headlong into *Granfinanciera*: "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity" 492 U.S. at 61. With that limit in place, the dissenting opinion's bright-line rule burns out. Congress cannot change the nature of a right, thereby circumventing the Seventh Amendment, by simply giving the keys to the SEC to do the vindicating.

In this light, this approach treats the government's involvement as a sufficient condition for converting "private rights" into public ones. But from 1856 to 1989, the government's involvement in a suit was only a necessary condition, <u>not</u> a sufficient condition, for

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[8] *Cf.* Ronald Reagan, Presidential News Conference (Aug. 12, 1986), https:www.presidency.ucsb.edu/documents/the-presidents-news-conference-957.

determining whether a suit vindicated public rights. *See Granfinanciera*, 492 U.S. at 65-66, 68-69 (Scalia, J., concurring in part) (referring to *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 U.S. (How.) 272, 283 (1856), and *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 68-69 (1982) (plurality op.)); *cf. N. Pipeline Constr. Co.*, 458 U.S. at 69 n.23 ("It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'"). Then *Granfinanciera* said that a dispute between two private parties could still vindicate "public rights," such that the government was no longer a necessary condition for such suits. *See* 492 U.S. at 53-55. The dissenting opinion thus says that, after *Granfinanciera*, the government is no longer a necessary condition, but it is now a sufficient condition. That is at odds with *Granfinanciera* and does not follow from any of the Court's previous decisions, which stressed that the government's involvement alone does not convert a suit about private rights into one about public rights.

The question is not just whether the government is a party, but also whether the right being vindicated is public or private, and how it is being vindicated. Tracing the roots of, and justification for, the public-rights doctrine, the Supreme Court has explained "that certain prerogatives were [historically] reserved to the political Branches of Government." *N. Pipeline Constr. Co.*, 458 U.S. at 67. Specifically, "[t]he public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently . . . judicial.'" *Id.* at

68 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)).

The inquiry is thus inherently historical. The dissenting opinion tries to avoid the history by again emphasizing that *Granfinanciera* dealt with private parties, not the government. But again, if the right being vindicated is a private one, it is not enough that the government is doing the suing. That means we must consider whether the form of the action—whether brought by the government or by a private entity—is historically judicial, or if it reflects the sorts of issues which courts of law did not traditionally decide.

As discussed in Part II.B.2, history demonstrates that fraud claims like these are "traditional legal claims" that arose at common law. Even aside from post-*Atlas Roofing* refinements of the "public rights" doctrine, this fact, among others, distinguishes that case. In *Atlas Roofing*, OSHA empowered the government to pursue civil penalties and abatement orders whether or not any employees were "actually injured or killed as a result of the [unsafe working] condition." 430 U.S. at 445; *see also id.* at 461 ("[Congress] created a new cause of action, and remedies therefor, unknown to the common law . . . ."). The government's right to relief was exclusively a creature of statute and was therefore distinctly public in nature.

In contrast, fraud claims, including the securities-fraud claims here, are quintessentially about the redress of private harms. Indeed, the government alleges that Petitioners defrauded particular investors. *Cf.* 15 U.S.C. §§ 77q(a), 78j(b), 80b-6. As explained above, these fraud claims and civil penalties are analogous to traditional fraud claims at common law

in a way that the "new" claims and remedies in *Atlas Roofing* were not. *See Atlas Roofing*, 430 U.S. at 461.

That being so, *Granfinanciera's* considerations about whether Congress created a new action unfamiliar to the common law, and whether jury trial rights are incompatible with the statutory scheme, are appropriate for us to address even if the suit involves the federal government. And as discussed above: (1) this type of action was commonplace at common law, (2) jury trial rights are consistent and compatible with the statutory scheme, and (3) such actions are commonly considered by federal courts with or without the federal government's involvement. Thus, the agency proceedings below violated Petitioners' Seventh Amendment rights, and the SEC's decision must be vacated.

C.

Petitioners next argue that Congress unconstitutionally delegated legislative power to the SEC when it gave the SEC the unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency. Because Congress gave the SEC a significant legislative power by failing to provide it with an intelligible principle to guide its use of the delegated power, we agree with Petitioners.[9]

"We the People" are the fountainhead of all government power. Through the Constitution, the People

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[9] This is an alternative holding that provides ground for vacating the SEC's judgment. "This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum." *Texas v. United States*, 809 F.3d 134, 178 n.158 (5th Cir. 2015) (quoting *United States v. Potts*, 644 F.3d 233, 237 n.3 (5th Cir. 2011)).

delegated some of that power to the federal government so that it would protect rights and promote the common good. *See* The Federalist No. 10 (James Madison) (explaining that one of the defining features of a republic is "the delegation of the government . . . to a small number of citizens elected by the rest"). But, in keeping with the Founding principles that (1) men are not angels, and (2) "[a]mbition must be made to counteract ambition," *see* The Federalist No. 51 (James Madison), the People did not vest all governmental power in one person or entity. It separated the power among the legislative, executive, and judicial branches. *See* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."). The legislative power is the greatest of these powers, and, of course, it was given to Congress. U.S. Const. art. I, § 1.

The Constitution, in turn, provides strict rules to ensure that Congress exercises the legislative power in a way that comports with the People's will. Every member of Congress is accountable to his or her constituents through regular popular elections. U.S. Const. art I, §§ 2, 3; *id.* amend. XVII, cl. 1. And a duly elected Congress may exercise the legislative power only through the assent of two separately constituted chambers (bicameralism) and the approval of the President (presentment). U.S. Const. art. I, § 7. This process, cumbersome though it may often seem to eager onlookers,[10] ensures that the People can be

[10] Indeed, President Woodrow Wilson, the original instigator of the agency that became the SEC, believed agencies like that one

heard and that their representatives have deliberated before the strong hand of the federal government raises to change the rights and responsibilities attendant to our public life. *Cf.* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1017 (2006). ("[T]he Framers weighed the need for federal government efficiency against the potential for abuse and came out heavily in favor of limiting federal government power over crime.").

But that accountability evaporates if a person or entity other than Congress exercises legislative power. *See Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) ("[B]y directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow."). Thus, sequestering that power within the halls of Congress was essential to the Framers. As John Locke—a particularly influential

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could solve the "problem" of congressional gridlock and the burden of popular accountability. *See Cochran v. SEC*, 20 F.4th 194, 218 (5th Cir. 2021) (Oldham, J., concurring) ("Wilson's 'new constitution' would ditch the Founders' tripartite system and their checks and balances for a 'more efficient separation of politics and administration, which w[ould] enable the bureaucracy to tend to the details of administering progress without being encumbered by the inefficiencies of politics.'" (quoting Ronald J. Pestritto, Woodrow Wilson and the Roots of Modern Liberalism 227 (2005))), *cert. granted sub nom.*, *SEC v. Cochran*, 21-1239, 2022 WL 1528373 (U.S. May 16, 2022); *see also id.* ("Wilson's goal was to completely separate 'the province of constitutional law' from 'the province of administrative function.'" (quoting Philip Hamburger, Is Administrative Law Unlawful? 464 (2014))).

thinker at the Founding—explained, not even the legislative branch itself may give the power away:

> The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them.

Id. at 2133-34 (quoting John Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration § 141, p. 71 (1947)).[11]

Article I of the Constitution thus provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). In keeping with Founding conceptions of separation of powers,[12] the Supreme Court

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[11] Locke's perspective on the legislature's delegation of its power was influential in the United States around the time of the framing of the Constitution. *See* Hamburger, *supra* at 384.

[12] Principles of non-delegation had even taken hold in England before the American Founding. *See* Hamburger, *supra* at 381 (explaining that "even under [King] James I, the judges recognized that the king's prerogative power came from his subjects—that he was exercising a power delegated by the people" and, as a result, he could not transfer the royal powers to anyone else);

has made clear that Congress cannot "delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."). According to the Supreme Court's more recent formulations of that longstanding rule,[13] Congress may grant regulatory power to another entity only if it provides an "intelligible principle" by which the recipient of the power can exercise it. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). 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

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see also id. ("[P]arliamentary subdelegations were widely understood to be unlawful.").

[13] Some contemporary academics have argued that the non-delegation doctrine lacks a sound historical basis. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); *but see* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021) (arguing that the doctrine was present at the Founding); Philip Hamburger, *Delegating or Divesting?*, 115 Nw. U. L. Rev. Online 88 (2020) (similar). Of course, our role as an inferior court is to faithfully apply Supreme Court precedent, so we do not reach the proper historical scope of the non-delegation doctrine. *See Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019).

an intelligible principle such that the agency exercises only executive power.[14]

We first conclude that Congress has delegated to the SEC what would be legislative power absent a guiding intelligible principle. Government actions are "legislative" if they have "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." *INS v. Chadha*, 462 U.S. 919, 952 (1983). The Supreme Court has noted that the power to assign disputes to agency adjudication is "peculiarly within the authority of the legislative department." *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).[15] And, as discussed above, in some special circumstances *Congress* has the power to assign to agency adjudication matters traditionally at home in Article III courts. *Atlas Roofing*, 430 U.S. at 455. Through Dodd-Frank § 929P (a), Congress gave *the SEC* the power to bring securities fraud actions for monetary penalties within

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[14] Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547, 1558 (2015) ("[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." (emphasis and footnote omitted)).

[15] Moreover, at the Virginia Ratifying Convention in 1788, then-delegate John Marshall suggested that it is proper to the legislative power to determine the expedience of assigning particular matters for jury trial. *See* John Marshall on the Fairness and Jurisdiction of the Federal Courts, in 2 The Debate on the Constitution 740 (Bernard Bailyn ed. 1993) ("The Legislature of Virginia does not give a trial by jury where it is not necessary. But gives it wherever it is thought expedient. The Federal Legislature will do so too, as it is formed on the same principles.").

the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so. *See* 15 U.S.C. § 78u-2(a). Thus, it gave the SEC the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not. That was a delegation of legislative power. As the Court said in *Crowell v. Benson*, "the mode of determining" which cases are assigned to administrative tribunals "is completely within congressional control." 285 U.S. 22, 50 (1932) (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451).

The SEC argues that by choosing whether to bring an action in an agency tribunal instead of in an Article III court it merely exercises a form of prosecutorial discretion—an executive, not legislative, power. That position reflects a misunderstanding of the nature of the delegated power. Congress did not, for example, merely give the SEC the power to decide whether to bring enforcement actions in the first place, or to choose where to bring a case among those district courts that might have proper jurisdiction. It instead effectively gave the SEC the power to decide which defendants should receive certain legal processes (those accompanying Article III proceedings) and which should not. Such a decision—to assign certain actions to agency adjudication—is a power that Congress uniquely possesses. *See id.*

Next, Congress did not provide the SEC with an intelligible principle by which to exercise that power. We recognize that the Supreme Court has not in the past several decades held that Congress failed to provide a requisite intelligible principle. *Cf. Whitman P. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474-75 (2001) (cataloguing the various congressional directives that

the Court has found to be "intelligible principle[s]"). But neither in the last eighty years has the Supreme Court considered the issue when Congress offered no guidance whatsoever. The last time it did consider such an open-ended delegation of legislative power, it concluded that Congress had acted unconstitutionally: In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 405-06 (1935), the Court considered a statutory provision granting the President the authority to prohibit the transportation in interstate commerce of petroleum and related products. The Court scoured the statute for directives to guide the President's use of that authority, but it found none. *Id.* at 414-20. It therefore explained:

> [I]n every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that section 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule.

Id. at 430.

Congress's grant of authority to the SEC here is similarly open-ended. Even the SEC agrees that Congress has given it exclusive authority and absolute discretion to decide whether to bring securities fraud enforcement actions within the agency instead of in an Article III court. Congress has said nothing at all indicating how the SEC should make that call in any given case. If the intelligible principle standard means

anything, it must mean that a total absence of guidance is impermissible under the Constitution.[16] *See Gundy*, 139 S. Ct. at 2123 (Kagan, J., plurality op.) (noting that "we would face a nondelegation question" if the statutory provision at issue had "grant[ed] the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time" (emphasis added)). We therefore vacate the SEC's judgment on this ground as well.

D.

The SEC proceedings below suffered from another constitutional infirmity: the statutory removal restrictions for SEC ALJs are unconstitutional.[17] SEC ALJs

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[16] As a member of this court aptly noted just last year, the fact that the modern administrative state is real and robust does not mean courts are never called to declare its limits. *See Cochran*, 20 F.4th at 222 (Oldham, J., concurring) ("If administrative agencies 'are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people,' the Court warned that 'we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.'" (quoting *Jones v. SEC*, 298 U.S. 1, 24-25 (1936))).

[17] Because we vacate the SEC's judgment on various other grounds, we do not decide whether vacating would be the appropriate remedy based on this error alone. *See Collins v. Yellen*, 27 F.4th 1068, 1069 (5th Cir. 2022) (remanding to the district court to determine what remedy, if any, is appropriate in light of the Supreme Court's holding that removal restrictions applicable to the Director of the Federal Housing Finance Agency were unconstitutional).

perform substantial executive functions. The President therefore must have sufficient control over the performance of their functions, and, by implication, he must be able to choose who holds the positions. Two layers of for-cause protection impede that control; Supreme Court precedent forbids such impediment.

Article II provides that the President must "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Supreme Court has held that this provision guarantees the President a certain degree of control over executive officers; the President must have adequate power over officers' appointment and removal.[18] *Myers v. United States*, 272 U.S. 52, 117 (1926). Only then can the People, to whom the President is directly accountable, vicariously exercise authority over high-ranking executive officials. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010). Yet not all removal restrictions are constitutionally problematic. "Inferior officers" may retain some amount of for-cause protection from firing. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 691-92 (1988). Likewise, even principal officers may retain for-cause protection when they act as part of an expert board. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020).

But a problem arises when both of those protections act in concert. In *Free Enterprise Fund*, the Supreme Court considered the constitutionality of two layers of for-cause protection for members of the Public Company Accounting Oversight Board (PCAOB).

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[18] Of course, the President's authority over appointments derives from the Appointments Clause as well. *See* U.S. Const. art. II, § 2, cl. 2.

561 U.S. at 492. The members of the board answered to the SEC Commissioners. But the SEC could remove them only for "willful violations of the [Sarbanes-Oxley] Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing." *Id.* at 503.

On top of that, the President could only remove SEC Commissioners for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 486-87, 502. The Supreme Court held that this extensive system insulating PCAOB members from removal deprived the President of the ability to adequately oversee the Board's actions. *Id.* at 492, 496.

The question here is whether SEC ALJs serve sufficiently important executive functions, and whether the restrictions on their removal are sufficiently onerous, that the President has lost the ability to take care that the laws are faithfully executed. Petitioners' argument on this point is straightforward: SEC ALJs are inferior officers; they can only be removed by the SEC Commissioners if good cause is found by the Merits Systems Protection Board; SEC Commissioners and MSPB members can only be removed by the President for cause; so, SEC ALJs are insulated from the President by at least two layers of for-cause protection from removal, which is unconstitutional under *Free Enterprise Fund*. The SEC responds that this case is not like *Free Enterprise Fund*. First, it contends that SEC ALJs primarily serve an adjudicatory role. Second, it asserts that the for-cause protections for ALJs are not as stringent as those which applied to PCAOB members at the time of *Free Enterprise Fund*—or, at

least, that this court should read the removal protections for ALJs that way to avoid constitutional problems.

We agree with Petitioners and hold that the removal restrictions are unconstitutional. The Supreme Court decided in *Lucia* that SEC ALJs are "inferior officers" under the Appointments Clause because they have substantial authority within SEC enforcement actions. *Lucia P. SEC*, 138 S. Ct. 2044, 2053 (2018). And in *Free Enterprise Fund* it explained that the President must have adequate control over officers and how they carry out their functions. 561 U.S. at 492, 496. If principal officers cannot intervene in their inferior officers' actions except in rare cases, the President lacks the control necessary to ensure that the laws are faithfully executed. So, if SEC ALJs are "inferior officers" of an executive agency, as the Supreme Court in *Lucia* indicated was the case at least for the purposes of the Appointments Clause, they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions. Specifically, SEC ALJs exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding. *Lucia*, 138 S. Ct. at 2053-54. But 5 U.S.C. § 7521(a) provides that SEC ALJs may be removed by the Commission "only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before the Board." (Parenthetical not in original.) And the SEC Commissioners may only be removed by the President for good cause.

The dissenting opinion's response is all built on dicta from *Free Enterprise Fund*. There, in noting what issues the Court was leaving open, the Court identified characteristics that were true of ALJs that were not true of PCAOB members: "[U]nlike members of the [PCAOB], many" ALJs "perform adjudicative rather than enforcement or policymaking functions." *Free Enterprise Fund*, 561 U.S. at 507 n.10. Far from "stat[ing]" that this "may justify multiple layers of removal protection," *post* at 22, the Court merely identified that its decision does not resolve the issue presented here. In any event, the Court itself said in *Myers* that "quasi[-]judicial" executive officers must nonetheless be removable by the President "on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." 272 U.S. at 135.[19] So even if ALJs' functions are more adjudicative than PCAOB

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[19] The dissenting opinion deems this proposition from *Myers* to be *obiter dicta* that the Court subsequently disregarded in *Humphrey's Executor v. United States*, 295 U.S. 602, 626-28 (1935). *Post* at 54 n.113. But that itself is to disregard the Supreme Court's more recent guidance, which fortifies the Court's "landmark decision" in *Myers* and narrowed *Humphrey's Executor*. *See Seila Law*, 140 S. Ct. at 2191-92, 2197-99 & n.2 (limiting the *Humphrey's Executor* exception to *Myers* to cases involving "for-cause removal protections [given] to a multimember body of experts, balanced along partisan lines, that perform[] legislative and judicial functions and [are] said not to exercise any executive power," while casting doubt on the existence of wholly non-executive, quasi-legislative or quasi-judicial agency powers altogether); *see also City of Arlington v. F.C.C.*, 569 U.S. 290, 305 n.4 (2013) (noting that "[agency] activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power'" (citing U.S. Const. art. II, § 1, cl. 1)).

members, the fact remains that two layers of insulation impedes the President's power to remove ALJs based on their exercise of the discretion granted to them.[20]

Finally, the SEC urges us to interpret the for-cause protections for ALJs to instead allow removal for essentially any reason. Even if we could do so (and the statutory language likely does not give us that flexibility), that would not solve the Article II problem. As noted above, the MSPB is part of the mix as well. Furthermore, MSPB members "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). So, for an SEC ALJ to be removed, the MSPB must find good cause and the Commission must choose to act on that

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[20] In the next breath, the dissenting position draws from a law review article that "[t]he ALJs' role is similar to that of a federal judge." *Post* at 52. It then concludes that they must be insulated from removal by the president to maintain their independence. But that analogy runs out under a little scrutiny. The SEC's ALJs are not mere neutral arbiters of federal securities law; they are integral pieces within the SEC's powerful enforcement apparatus. The ALJs report to the Commission itself and act under authority delegated by it. SEC Organization Chart (2020), https://www.sec.gov/about/secorg.pdf; 15 U.S.C. § 78d-1(a); 17 C.F.R. § 200.30-10. As the amicus brief by the Cato Institute points out, these administrative proceedings differ significantly from cases resolved in federal district courts and reviewed by federal courts of appeals. Cato Amicus Br. at 19-31. First, the Commission has *ex parte* discussions with the prosecutors to determine whether to pursue securities-fraud claims. Then the Commission itself decides what claims should be brought by the prosecutors. Only then do ALJs resolve the claims, which are then again reviewed by the Commission. Suffice it to say, even if ALJs have some of the same "tools of federal trial judges," *Lucia*, 138 S. Ct. at 2053, they use those tools at the direction of and with the power delegated to them by the Commission.

finding. And members of both the MSPB and the Commission have for-cause protection from removal by the President. Simply put, if the President wanted an SEC ALJ to be removed, at least two layers of for-cause protection stand in the President's way.

Thus, SEC ALJs are sufficiently insulated from removal that the President cannot take care that the laws are faithfully executed. The statutory removal restrictions are unconstitutional.

III.

In sum, we agree with Petitioners that the SEC proceedings below were unconstitutional. The SEC's judgment should be vacated for at least two reasons: (1) Petitioners were deprived of their Seventh Amendment right to a civil jury; and (2) Congress unconstitutionally delegated legislative power to the SEC by failing to give the SEC an intelligible principle by which to exercise the delegated power. We also hold that the statutory removal restrictions for SEC ALJs are unconstitutional, though we do not address whether vacating would be appropriate based on that defect alone.[21]

We GRANT the petition for review, VACATE the decision of the SEC, and REMAND for further proceedings consistent with this opinion.

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[21] Petitioners also argue that the SEC violated their equal protection rights, and that its decision was infected with bias and violated their due process rights. Because we vacate the SEC's decision on other grounds, we decline to reach these issues.

DISSENTING OPINION OF JUSTICE W. EUGENE DAVIS

W. Eugene Davis, Circuit Judge, dissenting:

The majority holds that (1) administrative adjudication of the SEC's enforcement action violated Petitioners' Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated an Article I legislative power to the executive branch when it gave the SEC the discretion to choose between bringing its enforcement action in an Article III court or before the agency without providing an intelligible principle to guide the SEC's decision; and (3) the removal protections on SEC administrative law judges violate Article II's requirement that the President "take Care that the Laws be faithfully executed." I respectfully disagree with each of these conclusions.

I.

The majority holds that the Seventh Amendment grants Petitioners the right to a jury trial on the facts underlying the SEC's enforcement action, and administrative adjudication without a jury violated that right. In reaching this conclusion, the majority correctly recognizes that a case involving "public rights" may be adjudicated in an agency proceeding without a jury notwithstanding the Seventh Amendment.[1]

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[1] *See, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) ("If a claim that is legal in nature asserts a 'public right,' . . . then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity. The Seventh Amendment protects a litigant's right to a jury trial only if a

But, the majority then erroneously concludes that the SEC's enforcement action does not involve "public rights." In my view, the majority misreads the Supreme Court's decisions addressing what are and are not "public rights."

A.

As declared by Professors Wright and Miller, "A definitive statement by the Supreme Court regarding congressional authority in this context is found in *Atlas Roofing v. Occupational Safety & Health Review Commission*."[2] That case concerned the Occupational Safety and Health Act ("OSHA" or "the Act"), which created a new statutory duty on employers to avoid maintaining unsafe or unhealthy working conditions. OSHA also empowered the Federal Government, proceeding before an administrative agency without a jury, to impose civil penalties on those who violated the Act.[3] Two employers who had been cited for violating the Act argued that a suit in a federal court by the Government seeking civil penalties for violation of a statute is classically a suit at common law for which the Seventh Amendment provides a right to a jury trial; therefore, Congress cannot deprive them of that right by simply assigning the function of adjudicating

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cause of action is legal in nature and it involves a matter of 'private right.'" (citation omitted)).

[2] 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302.2, at 59 (4th ed. 2020) (citing *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977)) (italics added).

[3] *Atlas Roofing*, 430 U.S. at 445.

the Government's right to civil penalties to an administrative forum where no jury is available.[4] The Court, in a unanimous opinion, disagreed:

> At least in cases in which "public rights" are being litigated— *e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible. . . . This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency.[5]

Atlas Roofing drew its definition of "public rights" from, inter alia, *Crowell v. Benson*, which described "public rights" in slightly broader terms: matters "which arise between the Government and persons

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[4] *Id.* at 449-50.

[5] *Id.* at 450, 455 (emphasis added; paragraph break omitted); *see also id.* at 458 ("Our prior cases support administrative factfinding in only those situations involving 'public rights,' *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.").

subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[6]

The Supreme Court has never retreated from its holding in *Atlas Roofing*.[7] In fact, the Court implicitly re-affirmed *Atlas Roofing*'s definition of "public rights" as recently as 2018, when it decided *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*.[8] That case involved the Leahy-Smith America Invents Act, which granted the Patent and Trademark Office ("PTO") the power to reconsider a previously-issued patent via an administrative process called "inter partes review."[9] This was a departure from historical practice, which placed this function in Article III courts alone.[10] The petitioner argued that inter partes review violated both Article III and the Seventh Amendment.[11] The Court disagreed and explained that Congress has "significant latitude" to assign adjudication of "public rights" to non-Article III tribunals that do not use a

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[6] *Id.* at 452 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)) (emphasis added); *see also id.* at 456, 457, 460 (citing *Crowell*, 285 U.S. 22).

[7] Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 95 (2016).

[8] 138 S. Ct. 1365 (2018).

[9] *Id.* at 1370-72.

[10] *Id.* at 1384 (Gorsuch, J., dissenting) ("[F]rom the time it established the American patent system in 1790 until about 1980, Congress left the job of invalidating patents at the federal level to courts alone.").

[11] *Id.* at 1372.

jury.[12] Moreover, the Court, quoting *Crowell*, defined "public rights" as "matters 'which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'"[13]

As mentioned, *Atlas Roofing*'s definition of "public rights" is a slightly narrower version of *Crowell*'s definition. Thus, when *Oil States* reaffirmed *Crowell*, it necessarily re-affirmed *Atlas Roofing*'s definition as well.[14]

Oil States is also significant because it held that historical practice is not determinative in matters governed by the public rights doctrine, as such matters "'from their nature' can be resolved in multiple ways."[15] Accordingly, the Court rejected the view that "because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so."[16]

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[12] *Id.* at 1373, 1379.

[13] *Id.* at 1373 (quoting *Crowell*, 285 U.S. at 50).

[14] *Oil States* did not purport to provide an exhaustive definition of "public rights," and the opinion alludes to the possibility that, under certain circumstances, matters not involving the Government may also fall within the realm of "public rights." *See id.* However, the Court did not need to address these other, "various formulations" of "public rights," because inter partes review fell squarely within *Crowell*'s definition. *See id.* This court reached a similar conclusion in *Austin v. Shalala*, discussed below.

[15] *Id.* at 1378 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

[16] *Id.*; *see also id.* ("That Congress chose the courts in the past does not foreclose its choice of the PTO today.").

Like *Oil States*, this court relied on *Crowell* to define "public rights" in *Austin v. Shalala*.[17] That case involved the Government's action to recover overpayment of social security benefits via an administrative proceeding before the Social Security Administration.[18] *Austin* rejected the plaintiff's argument that the proceeding violated her Seventh Amendment right, explaining that "if Congress may employ an administrative body as a factfinder in imposing money penalties for the violation of federal laws"—as was done in *Atlas Roofing* and in the securities statutes at issue here—"it plainly may employ such a body to recover overpayments of government largess."[19]

Consistent with the above cases, our sister circuits routinely hold that an enforcement action by the Government for violations of a federal statute or regulation is a "public right" that Congress may assign to an agency for adjudication without offending the Seventh Amendment.[20] For example, the Eleventh Circuit relied solely on *Atlas Roofing* when it rejected a Seventh Amendment challenge to administrative

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[17] 994 F.2d 1170, 1177 (5th Cir. 1993).

[18] *Id.* at 1173.

[19] *Id.* at 1177-78 (citing *Oceanic Steam Navigation Co. v. Stranahan*, 412 U.S. 320, 339 (1909)).

[20] *See, e.g.*, *Imperato v. SEC*, 693 F. App'x 870, 876 (11th Cir. 2017) (unpublished) (administrative adjudication for violations of the Securities Exchange Act); *Crude Co. v. FERC*, 135 F.3d 1445, 1454-55 (Fed. Cir. 1998) (Mandatory Petroleum Allocation Regulations); *Cavallari v. Office of Comptroller of Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (Financial Institutions Reform, Recovery and Enforcement Act); *Sasser v. Adm'r EPA*, 990 F.2d 127, 130 (4th Cir. 1993) (Clean Water Act).

adjudication of an *SEC* enforcement action and declared "it is well-established that the Seventh Amendment does not require a jury trial in administrative proceedings designed to adjudicate statutory 'public rights.'"[21]

The SEC's enforcement action satisfies *Atlas Roofing*'s definition of a "public right," as well as the slightly broader definition set forth in *Crowell* and applied in *Oil States* and *Austin*. The broad congressional purpose of the securities laws is to "protect investors."[22] For example, the Securities Act of 1933 was "designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing."[23] The Dodd-Frank Act, which, inter alia, expanded the SEC's authority to pursue civil penalties in administrative proceedings,[24] was "intended to improve investor protection," particularly in light of

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[21] *Imperato*, 693 F. App'x at 876 (citing *Atlas Roofing*, 430 U.S. at 455-56).

[22] *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 592 (5th Cir. 1974).

[23] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). In a similar vein, the Investment Advisers Act of 1940 seeks to "protect[] investors through the prophylaxis of disclosure," in order to eliminate "the darkness and ignorance of commercial secrecy," which "are the conditions upon which predatory practices best thrive." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 200 (1963).

[24] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Sec. 929P, 124 Stat. 1376, 1862-64 (2010) (codified at 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80a-9(d), 80b-3(i)).

the Bernard Madoff Ponzi scheme.[25] Other circuits have consistently recognized that "[w]hen the SEC sues to enforce the securities laws, it is vindicating public rights and furthering public interests, and therefore is acting in the United States' sovereign capacity."[26] Thus, the SEC's enforcement action is a "public right" because it is a case "in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."[27] It is also a matter "which arise[s] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[28]

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[25] Mark Jickling, Congressional Research Service, R41503 The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title IX, Investor Protection at i (2010).

[26] *SEC v. Diversified*, 378 F.3d 1219, 1224 (11th Cir. 2004*), abrogated on other grounds by Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *see also SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993); *United States v. Badger*, 818 F.3d 563, 566 (10th Cir. 2016).

[27] *Atlas Roofing*, 430 U.S. at 450.

[28] *Crowell*, 285 U.S. at 22; *Oil States*, 138 S. Ct. at 1373; *Austin*, 994 F.2d at 1177.

The majority asserts that "[t]he dissenting opinion cannot define a 'public right' without using the term itself in the definition." First, I rely on definitions the Supreme Court has provided. Second, while *Atlas Roofing* does use "public rights" to define "public rights," *Crowell* does not. Furthermore, *Granfinanciera* observed that *Atlas Roofing* "left the term 'public rights' undefined" and so looked to *Crowell* to fill in any perceived gap. *Granfinanciera*, 492 U.S. at 51 n.8; *see also id.* at 53 (noting that, under *Atlas Roofing*, a "public right" is simply "a statutory cause

Because the SEC's enforcement action is a "public right," the Seventh Amendment does not prohibit Congress from assigning its adjudication to an administrative forum that lacks a jury.[29] As discussed below, the fact that the securities statutes at issue resemble (but are not identical to) common-law fraud does not change this result.[30] It also makes no difference that federal courts have decided claims under the securities statutes for decades.[31]

B.

The majority's conclusion that the SEC's enforcement action is not a "public right" is based primarily on an erroneous reading of *Granfinanciera, S.A. P. Nordberg*.[32] Specifically, the majority interprets that case as abrogating *Atlas Roofing*. *Granfinanciera* did nothing of the sort.

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of action [that] inheres in, or lies against, the Federal Government in its sovereign capacity").

[29] *Atlas Roofing*, 430 U.S. at 450; *Granfinanciera*, 492 U.S. at 52-54; *Oil States*, 138 S. Ct. at 1379.

[30] *See Granfinanciera*, 492 U.S. at 52 ("Congress may fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable" if the action involves "public rights.").

[31] *See Oil States*, 138 S. Ct. at 1378 ("[W]e disagree with the dissent's assumption that, because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so. Historical practice is not decisive . . . [in] matters governed by the public-rights doctrine. . . . That Congress chose the courts in the past does not foreclose its choice of the PTO today.")

[32] 492 U.S. 33.

In *Granfinanciera*, a bankruptcy trustee sued in bankruptcy court (where a jury was unavailable) to avoid allegedly fraudulent transfers the defendants had received from the debtor.[33] The defendants argued that they were entitled to a jury trial under the Seventh Amendment.[34] A key issue was whether the trustee's claim involved "public" or "private" rights. The Court held that the action was a private right.[35]

Unlike *Atlas Roofing*, *Granfinanciera* did not involve a suit by or against the Federal Government. This distinction is important. In discussing what constitutes a "public right," *Granfinanciera*, citing *Atlas Roofing*, recognized that "Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity."[36] *Granfinanciera* then clarified that "the class of 'public rights' whose adjudication Congress may assign to administrative agencies . . . is more expansive than *Atlas Roofing*'s discussion suggests";[37] *i.e.*, the "Government need not be a party for a case to revolve around 'public rights'"

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[33] *Id.* at 36.

[34] *Id.* at 40.

[35] *Id.* at 55, 64.

[36] *Granfinanciera*, 492 U.S. at 53 (citing *Atlas Roofing*, 430 U.S. at 458) (emphasis added).

[37] *Id.* at 53 (emphasis added).

provided certain other criteria are met.[38] Nevertheless, and contrary to what is implied by the majority, *Granfinanciera*'s recognition that the public-rights doctrine can extend to cases where the Government is not a party in no way undermines or alters *Atlas Roofing*'s holding that a case where the Government sues in its sovereign capacity to enforce a statutory right is a case involving "public rights."[39]

Because the bankruptcy trustee's suit involved only private parties and not the Government, *Granfinanciera*'s analysis is solely concerned with whether the action was one of the "seemingly 'private' right[s]" that are within the reach of the public-rights doctrine. Thus, any considerations or requirements discussed in *Granfinanciera* that go beyond *Atlas Roofing* or *Crowell* apply only to cases not involving the Government.

This understanding of *Granfinanciera* is supported by our subsequent decision in *Austin*, which stated:

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[38] *Id.* at 54 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586, 596-99 (1985)).

[39] *Granfinanciera* itself makes this clear when it states:

> The crucial question, in cases not involving the Federal Government, is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.

Id. at 54-55 (quoting *Thomas*, 473 U.S. at 593-94) (footnote omitted; emphasis added; bracketed alterations in original).

> Although the definition is somewhat nebulous, at a minimum, suits involving public rights are those "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell v. Benson*, 285 U.S. 22, 50, 52 S. Ct. 285, 292, 76 L.Ed. 598 (1932). Beyond that, certain other cases are said to involve public rights where Congress has created a "seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Granfinanciera*, 492 U.S. at 54. . . . [40]

Similarly, while *Oil States* acknowledged that *Crowell* did not provide the sole definition of what constitutes a "public right," it did not discuss any of the other "formulations" because *Crowell*'s definition was met.[41]

The majority overlooks the fact that *Granfinanciera*'s expansion of the public-rights doctrine applies only when the Government is not a party to the case. As a result, the majority applies "considerations" that have no relevance here. For example, the majority, quoting *Granfinanciera*, states that "jury trials would not 'go far to dismantle the statutory scheme' or 'impede swift resolution' of statutory claims." Again, *Granfinanciera* discussed these considerations in the context of a suit between private persons, not a case

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[40] *Austin*, 994 F.2d at 1177 (emphasis added).

[41] *Oil States*, 138 S. Ct. at 1373.

involving the Government acting in its sovereign capacity under an otherwise valid statute creating enforceable public rights.[42] Indeed, neither *Austin* nor *Oil States*, both of which were decided after *Granfinanciera* and which found public rights to exist, mentions these considerations.[43]

The majority also states that the securities statutes at issue created causes of action that "reflect" and "echo" common-law fraud. But this does not matter, because, as *Granfinanciera* itself recognized, the public-rights doctrine allows Congress to "fashion causes of action that are closely analogous to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable."[44]

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[42] *Granfinanciera*, 492 U.S. at 61, 63.

[43] The same goes for the out-of-circuit decisions cited in footnote 20 above. *Atlas Roofing*, in a footnote, does make a passing reference to "go far to dismantle the statutory scheme." 430 U.S. at 454 n.11. But the Court was merely describing its reasoning in another bankruptcy case. Nothing in *Atlas Roofing* suggests that this consideration is relevant to whether Congress may assign the Government's enforcement action to an administrative proceeding lacking a jury.

[44] *Granfinanciera*, 492 U.S. at 52 (citations omitted); *see also id.* at 53 ("Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity." (citing *Atlas Roofing*, 430 U.S. at 458)); *accord Crude Co.*, 135 F.3d at 1455 ("The public right at issue is not converted into a common law tort simply because the theory of liability underlying the enforcement action is analogous to a common law tort theory of vicarious liability.").

The majority asserts that *Atlas Roofing* is distinguishable from the SEC's enforcement action because "OSHA empowered the government to pursue civil penalties regardless of whether any employe[e]s were 'actually injured or killed as a result of the [unsafe working] condition.'"[45] But the securities statutes share this feature: The SEC may impose civil penalties on a person who makes a material misrepresentation even if no harm resulted from the misrepresentation.[46] The statutory cause of action created by the securities statutes is as "new" to the common law as the one created by OSHA.[47]

Relatedly, the majority harps on the fact that federal courts have dealt with actions under the securities statutes for decades. But *Oil States* makes clear that

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[45] Majority Op. at 17-18 (quoting *Atlas Roofing*, 430 U.S. at 445).

[46] *See* 15 U.S.C. §§ 78u-2(c), 77h-1(g)(1), 80a-9(d)(3), 80b-3(i)(3).

[47] *Atlas Roofing* recognized that, before (and after) OSHA, a person injured by an unsafe workplace condition may have an action at common law for negligence. *See Atlas Roofing*, 430 U.S. at 445. Through OSHA, specific safety standards were promulgated, and the Government could bring an enforcement action for a violation even if no one was harmed by the violation. *Id.* Similarly, before enactment of the securities statutes, an investor who was defrauded in the course of a securities transaction had a common-law action for fraud. Like OSHA, the securities statutes expressly prohibited certain conduct and empowered the SEC to bring an enforcement action for a violation, even if no one was actually harmed by the violation.

"[h]istorical practice is not decisive here."[48] "That Congress chose the courts in the past does not foreclose its choice of [an administrative adjudication] today."[49]

The majority also states that "securities-fraud enforcement actions are not the sort that are uniquely suited for agency adjudication." Again, this is not relevant. As *Oil States* explained, "the public-rights doctrine applies to matters 'arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.'"[50] Indeed, "matters governed by the public-rights doctrine 'from their nature' can be resolved in multiple ways."[51]

Finally, it should be emphasized that *Tull v. United States*[52] does not control the outcome here. That case concerned the Government's suit in district court seeking civil penalties and an injunction for violations of the Clean Water Act.[53] *Tull* did not involve an administrative proceeding. Thus, while *Tull* concluded that the Government's claim was analogous to

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[48] 138 S. Ct. at 1378.

[49] *Id. Oil States* likewise refutes the majority's assertion that "[t]he inquiry is thus inherently historical." I add that the majority's support for this proposition consists of a concurring opinion in *Granfinanciera* and the plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (plurality), which addressed whether a bankruptcy court may decide a breach of contract action between two private parties.

[50] *Id.* at 1373 (citing *Crowell*, 285 U.S. at 50) (emphasis added).

[51] *Id.* at 1378 (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451).

[52] 481 U.S. 412 (1987).

[53] *Id.* at 414-15.

a "Suit at common law" for Seventh Amendment purposes,[54] the Court did not engage in the "quite distinct inquiry" into whether the claim was also a "public right" that Congress may assign to a non-Article III forum where juries are unavailable.[55] *Tull* itself acknowledges in a footnote prior decisions "holding that the Seventh Amendment is not applicable to administrative proceedings," making clear that it was not deciding whether the defendant would be entitled to a jury in an administrative adjudication.[56]

C.

In summary, the SEC's enforcement action against Petitioners for violations of the securities laws is a "public right" under Supreme Court precedent as well as our own. Accordingly, Congress could and did validly assign adjudication of that action to an administrative forum where the Seventh Amendment does not require a jury.

II.

I also disagree with the majority's alternative holding that Congress exceeded its power by giving the SEC the authority to choose to bring its enforcement action in either an agency proceeding without a jury or to a court with a jury. The majority reasons that giving the SEC this power without providing guidelines on the use of that power violates Article I by delegating

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[54] *Id.* at 425.

[55] *Granfinanciera*, 492 U.S. at 42 n.4; *accord Sasser*, 990 F.2d at 130.

[56] *Tull*, 481 U.S. at 418 n.4 (citing *Atlas Roofing*, 430 U.S. at 454; *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974)).

its legislative authority to the agency. The majority's position runs counter to Supreme Court precedent. As set forth below, by authorizing the SEC to bring enforcement actions either in federal court or in agency proceedings, Congress fulfilled its legislative duty.

In support of its determination that Congress unconstitutionally delegated its authority to the SEC, the majority relies on *Crowell v. Benson*, wherein the Supreme Court explained that "the mode of determining" cases involving public rights "is completely within congressional control."[57] *Crowell* did not state that Congress cannot authorize that a case involving public rights may be determined in either of two ways. By passing Dodd-Frank § 929P(a), Congress established that SEC enforcement actions can be brought in Article III courts or in administrative proceedings. In doing so, Congress fulfilled its duty of controlling the mode of determining public rights cases asserted by the SEC.

The majority maintains that because the SEC has "the power to decide which defendants should receive certain legal processes (those accompanying Article III proceedings) and which should not," then such a decision falls under Congress's legislative power. The Supreme Court's decision in *United States P. Batchelder*[58] demonstrates that the majority's position on this issue is incorrect.

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[57] 285 U.S. at 50 (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451).

[58] 442 U.S. 114 (1979).

In *Batchelder*, the issue presented was whether it was constitutional for Congress to allow the Government, when prosecuting a defendant, to choose between two criminal statutes that "provide[d] different penalties for essentially the same conduct."[59] The defendant had been convicted under the statute with the higher sentencing range, and the Court of Appeals determined that the delegation of authority to prosecutors to decide between the two statutes, and thus choose a higher sentencing range for identical conduct, was a violation of due process and the nondelegation doctrine.[60] Specifically, the Court of Appeals determined that "such prosecutorial discretion could produce 'unequal justice'" and that it might be "impermissibl[e] [to] delegate to the Executive Branch the Legislature's responsibility to fix criminal penalties."[61]

The Supreme Court disagreed. The Court explained that "[t]he provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose."[62] The Court further stated: "In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws."[63] The Court concluded: "Having informed the courts, prosecutors, and defendants of

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[59] *Id.* at 116.

[60] *Id.* at 123, 125-26.

[61] *Id.* at 125-26.

[62] *Id.* at 126.

[63] *Id.*

the permissible punishment alternatives available under each Title, Congress has fulfilled its duty."[64]

The Supreme Court has analogized agency enforcement decisions to prosecutorial discretion exercised in criminal cases.[65] If the Government's prosecutorial authority to decide between two criminal statutes that provide for different sentencing ranges for essentially the same conduct does not violate the nondelegation doctrine, then surely the SEC's authority to decide between two forums that provide different legal processes does not violate the nondelegation doctrine. Thus, the SEC's forum-selection authority is part and parcel of its prosecutorial authority.[66]

Although no other circuit court appears to have addressed the particular nondelegation issue presented in this case, a district court did so in *Hill v. SEC*.[67] Like the majority does here, the plaintiff in *Hill* relied

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[64] *Id.* (citation omitted).

[65] *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch. . . . ").

[66] *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.") (citation omitted).

[67] 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (holding that SEC's forum-selection authority does not violate the nondelegation doctrine), *vacated and remanded on other grounds*, 825 F.3d 1236 (11th Cir. 2016).

on *I.N.S. v. Chadha*[68] to assert that the SEC's choice of forum is a legislative action because it "alter[s] the rights, duties, and legal relations of individuals."[69] *Chadha* addressed the question whether a provision in the Immigration and Nationality Act (INA) allowing one House of Congress to veto the Attorney General's decision to allow a particular deportable alien to remain in the United States violated the Presentment Clauses and bicameral requirement of Article I.[70] Specifically, it addressed whether Congress, after validly delegating authority to the Executive, can then alter or revoke that valid delegation of authority through the action of just one House.

I agree with the district court in *Hill* that if *Chadha*'s definition of legislative action is interpreted broadly and out of context, then any SEC decision which affected a person's legal rights—including charging decisions—would be legislative actions, which is contrary to the Supreme Court's decision in *Batchelder*.[71] *Chadha*, one of the primary authorities the majority relies on, does not touch on any issue involved in this case.

I agree with the persuasive and well-reasoned decision of the district court in *Hill* that "Congress has properly delegated power to the executive branch to

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68 462 U.S. 919 (1983).

69 *Hill*, 114 F. Supp. 3d at 1312 (quoting *Chadha*, 462 U.S. at 952).

70 462 U.S. at 923, 946.

71 *Hill*, 114 F. Supp. 3d at 1313.

make the forum choice for the underlying SEC enforcement action."[72] In sum, it is clear to me that Congress's decision to give prosecutorial authority to the SEC to choose between an Article III court and an administrative proceeding for its enforcement actions does not violate the nondelegation doctrine.

III.

Finally, the majority concludes that the statutory removal restrictions applicable to SEC administrative law judges are unconstitutional because they violate Article II's requirement that the President "take Care that the Laws be faithfully executed." Specifically, the majority determines that SEC ALJs enjoy at least two layers of for-cause protection, and that such insulation from the President's removal power is unconstitutional in light of the Supreme Court's decisions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[73] and *Lucia v. SEC*.[74] I disagree. Rather than support the majority's conclusion, these cases explain why the SEC ALJs' tenure protections are constitutional: ALJs perform an adjudicative function.

Free Enterprise concerned the Public Company Accounting Oversight Board ("PCAOB"), which Congress created in 2002 to regulate the accounting industry.[75] The PCAOB's powers included promulgating standards, inspecting accounting firms, initiating formal

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[72] *Id.*

[73] 561 U.S. 477 (2010).

[74] 138 S. Ct. 2044 (2018).

[75] *Id.* at 484-85.

investigations and disciplinary proceedings, and issuing sanctions.[76] In other words, PCAOB members were inferior officers who exercised "significant executive power."[77] The President could not remove the members of the PCAOB; rather, they could be removed by the Securities and Exchange Commission under certain, limited circumstances.[78] Furthermore, SEC Commissioners cannot themselves be removed by the President except for inefficiency, neglect of duty, or malfeasance in office.[79] While prior cases upheld restrictions on the President's removal power that imposed one level of protected tenure, *Free Enterprise* held that these dual for-cause limitations on the removal of PCAOB members unconstitutionally impaired the President's ability to ensure that the laws are faithfully executed, because "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the [PCAOB]."[80]

Free Enterprise, however, "did not broadly declare all two-level for-cause protections for inferior officers unconstitutional."[81] Furthermore, the Court expressly declined to address "that subset of independent agency

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[76] *Id.* at 485.

[77] *Id.* at 514.

[78] *Id.* at 486, 503.

[79] *Id.* at 487.

[80] *Id.* at 496.

[81] *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1122 (9th Cir. 2021).

employees who serve as administrative law judges."[82] The Court made two observations about ALJs that potentially distinguished them from the PCAOB: (1) whether ALJs are "Officers of the United States" was, at that time, a disputed question, and (2) "unlike members of the [PCAOB], many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions or possess purely recommendatory powers."[83]

The Supreme Court subsequently addressed the first observation in *Lucia v. SEC*.[84] There, the Court held that SEC ALJs are "inferior officers" within the meaning of the Appointments Clause in Article II.[85] However, the Court again expressly declined to decide whether multiple layers of statutory removal restrictions on SEC ALJs violate Article II.[86]

Thus, neither *Free Enterprise* nor *Lucia* decided the issue raised here: whether multiple layers of removal restrictions for SEC ALJs violate Article II. As the Ninth Circuit recently concluded, the question is open.[87]

It is important to recognize that the Constitution does not expressly prohibit removal protections for

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[82] *Free Enter. Fund*, 516 U.S. at 507 n.10.

[83] *Id.* (citations omitted; emphasis added).

[84] 138 S. Ct. 2044 (2018).

[85] *Id.* at 2055.

[86] *Id.* at 2051 & n.1.

[87] *See Decker Coal Co.*, 8 F.4th at 1122.

"Officers of the United States."[88] The concept that such protections may be unconstitutional is drawn from the fact that "Article II vests '[t]he executive Power . . . in a President of the United States of America,' who must 'take Care that the Laws be faithfully executed.'"[89] The test is functional, not categorical:

> The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.[90]

Consistent with this standard, *Free Enterprise* thoroughly explained why two levels of removal protection for the PCAOB interfered with the executive power.[91] The first step in the Court's analysis focused on the fact that the PCAOB exercised "significant executive power"[92] as it "determine[d] the policy and

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[88] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 4.2 (5th ed. 2015) ("No constitutional provision addresses the [President's] removal power.").

[89] *Free Enter. Fund*, 561 U.S. at 483 (quoting U.S. CONST., art. II §§ 1 & 3).

[90] *Morrison v. Olson*, 487 U.S. 654, 689-90 (1988) (footnote omitted; emphasis added).

[91] *Free Enter. Fund*, 561 U.S. at 495-96.

[92] *Id.* at 514.

enforce[d] the laws of the United States."[93] Then the Court explained how the PCAOB's removal protections subverted the President's ability to oversee this power.[94] The point here is that the function performed by the officer is critical to the analysis—the Court did not simply conclude that because members of the PCAOB were "Officers of the United States" (which was undisputed)[95] that dual for-cause protections were unconstitutional.

Unlike the PCAOB members who determine policy and enforce laws, SEC ALJs perform solely adjudicative functions. As the *Lucia* Court stated, "an SEC ALJ exercises authority 'comparable to' that of a federal district judge conducting a bench trial."[96] Their powers include supervising discovery, issuing subpoenas, deciding motions, ruling on the admissibility of evidence, hearing and examining witnesses, generally regulating the course of the proceeding, and imposing sanctions for contemptuous conduct or procedural violations.[97] After a hearing, the ALJ issues an initial decision that is subject to review by the Commission.[98] Commentators have similarly observed that "SEC

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[93] *Id.* at 484; *see also id.* at 508 (describing the PCAOB as "the regulator of first resort and the primary law enforcement authority for a vital sector of our economy").

[94] *Id.* at 498.

[95] *Id.* at 506.

[96] *Lucia*, 138 S. Ct. at 2049 (quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978)).

[97] *Id.*

[98] *Id.*

ALJs do not engage in enforcement or rulemaking"[99] and proceedings before them are "analogous to that which would occur before a federal judge."[100]

Free Enterprise stated, albeit in dicta, that the fact that an ALJ performs adjudicative rather than enforcement or policymaking functions may justify multiples layers of removal protection.[101] I believe this to be the case. The ALJs' role is similar to that of a federal judge;[102] it is not central to the functioning of the Executive Branch for purposes of the Article II removal precedents.[103] As the Southern District of New York concluded, invalidating the "good cause" removal restrictions enjoyed by SEC ALJs would only "undermine the ALJs' clear adjudicatory role and their ability to 'exercise[] . . . independent judgment on the evidence before [them], free from pressures by the parties or other officials within the agency.'"[104]

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[99] Mark, *supra*, at 107.

[100] David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1166 (2016).

[101] 561 U.S. at 507 n.10.

[102] *Lucia*, 138 S. Ct. at 2049.

[103] *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 669 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citing *Morrison*, 487 U.S. at 691-92).

[104] *Duka v. SEC*, 103 F. Supp. 3d 382, 395-96 (S.D.N.Y. 2015), *abrogated on other grounds by Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016) (quoting *Butz*, 438 U.S. at 513-14). *See also* Mark, *supra*, at 102-08 (arguing that multiple layers of removal protection for SEC ALJs do not violate Article II); Zaring, *supra*, at 1191-95 (same).

In fact, the Ninth Circuit recently employed similar reasoning in *Decker Coal Co. v. Pehringer*, which held that two layers of removal protection for ALJs in the Department of Labor do not violate Article II.[105] Like SEC ALJs, the ALJs in *Decker Coal* performed "a purely adjudicatory function."[106] The majority's decision is in tension, if not direct conflict, with *Decker Coal*.

Free Enterprise also noted that the exercise of "purely recommendatory powers" may justify multiple removal protections.[107] When an SEC ALJ issues a decision in an enforcement proceeding, that decision is essentially a recommendation as the Commission can review it de novo.[108] Even when the Commission declines review, the ALJ's decision is "deemed the action of the Commission."[109] Furthermore, the Commission is not required to use an ALJ and may elect to preside over the enforcement action itself.[110] This further supports the conclusion that the SEC ALJs' removal protections do not interfere with the President's executive power.

The majority reasons that because *Lucia* determined that SEC ALJs are inferior officers under the Appointments Clause, "they are sufficiently important

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105 *Decker Coal Co.*, 8 F.4th at 1133.

106 *Id.*

107 *Free Enter. Fund*, 561 U.S. at 507 n.10.

108 *See Lucia*, 138 S. Ct. at 2049 (citing 17 C.F.R. § 201.360(d)); 5 U.S.C. § 557(b).

109 *Lucia*, 138 S. Ct. at 2049 (quoting 15 U.S.C. § 78d-1(c)).

110 *Id.* (citing 17 C.F.R. § 201.110).

to executing the laws that the Constitution requires that the President be able to exercise authority over their functions," and, consequently, multiple for-cause protections inhibit the President's ability to take care that the laws be faithfully executed. But nowhere does the majority explain how the ALJs' tenure protections interfere with the President's ability to execute the laws. The majority does not mention *Free Enterprise*'s observation that the performance of "adjudicative rather than enforcement or policymaking functions" or "possess[ing] purely recommendatory powers" distinguishes ALJs from the PCAOB and may justify multiples layers of removal protection for ALJs.[111] The majority does not mention that *Lucia* found SEC ALJs to be similar to a federal judge.[112] The majority does not mention *Decker Coal*. Instead, the majority applies what is essentially a rigid, categorical standard, not the functional analysis required by the Supreme Court's precedents.[113]

Accordingly, I disagree with the majority that multiple layers of removal protection for SEC ALJs violate Article II. Because SEC ALJs solely perform an adjudicative function, and because their powers are recommendatory, these removal restrictions do

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111 561 U.S. at 507 n.10.

112 138 S. Ct. at 2049.

113 *Morrison*, 487 U.S. at 689-90. The majority also cites *Myers v. United States*, 272 U.S. 52, 135 (1926), for the proposition that quasi-judicial executive officers must be removable by the President. But that part of *Myers* is dicta, which is why the Court disregarded it in *Humphrey's Executor v. United States*, 295 U.S. 602, 626-28 (1935).

not interfere with the President's ability to "take Care that the Laws be faithfully executed."

IV.

I find no constitutional violations or any other errors with the administrative proceedings below. Accordingly, I would deny the petition for review.

APPELLANT FYK NOTICE OF FILING SUPPLEMENTAL AUTHORITY: *RUMBLE*
[DE 26-1]
(AUGUST 8, 2022)

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Via ECF

U.S. Court of Appeals for the Ninth Circuit

RE: Jason Fyk v. Facebook, Inc., No. 21-16997

Appellant's Notice of Filing Supplemental Authority in Further Support of Appellant's 5/22/2022 Opening Brief [D.E. 23]

Dear your Honors:

I, along with Constance J. Yu, Esq., represent Plaintiff-Appellant, Jason Fyk ("Fyk"), in regards to the above-captioned matter. On May 25, 2022, Fyk filed his Reply Brief. Pursuant to Fed. R. App. P. 28(j) and 9th Cir. R. 28-6 (and advisory committee notes), Fyk respectfully submits the following (learned of quite recently) as supplemental authority in further support of his pending appellate briefs: *Rumble, Inc. v. Google, LLC*, No. 21-cv-00229-HSG (N.D. Cal. July 29, 2022), enclosed for the Court's ease of reference.

This Rumble decision addresses whether a complaint involving anti-competition/unfair competition/ antitrust/monopolistic allegations (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,'" *id.* 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). These holdings square with the *Enigma* decisions cited throughout Fyk's pending appellate briefs (and underlying briefs, for that matter), which such decisions conclude that actions underlain by anti-competitive animus (as alleged by Fyk against Facebook, and as alleged by Rumble against Google) are not subject to dismissal at the CDA Good Samaritan immunity threshold.

In sum, just as Rumble was permitted to engage in discovery (*i.e.*, was "given the full benefit of their proof") vis-à-vis the District Court's denial of Google's motion to dismiss in a Sherman Act context (*i.e.*, federal anti-competition context), Fyk should have been given the benefit of engaging in discovery (i.e., "given the full benefit of [his] proof") vis-à-vis the District Court's denial of Facebook's motion to dismiss in the California Business & Professions Code §§ 17200-17210 context (*i.e.*, state anti-competition context).

Undersigned hereby certifies that the above body of this letter does not exceed 350 words pursuant to Fed. R. App. P. 28(j) and 9th Cir. R. 28-6; indeed, the above body totals 2350 words.

Respectfully Submitted,

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Enclosure (Rumble, Inc. v. Google, LLC)

RUMBLE: NORTHERN DISTRICT OF CALIFORNIA ORDER DENYING MOTION TO DISMISS AND TO STRIKE [DE 29A] (JULY 29, 2022)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RUMBLE, INC.,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Case No. 21-cv-00229-HSG

Before: Haywood S. GILLIAM, JR.,
United States District Judge.

Pending before the Court is Defendant's partial motion to dismiss and motion to strike, briefing for which is complete. *See* Dkt. No. 32 ("Mot."), 44 ("Opp."), 45 ("Reply"). Defendant asks the Court to dismiss Plaintiff's tying and search-dominance theories of liability and strike paragraphs 34, 35, and 75-176 of Plaintiff's First Amended Complaint. *See* Mot. at i. The Court held a hearing on the motion, *see* Dkt. No. 50, and now DENIES it.

I. Background

"Since 2013, Rumble has operated an online video platform." Dkt. No. 21 ("FAC") ¶ 14. Plaintiff alleges that "Rumble is one of the most respected independent and privately owned companies in the online video platform industry and market, and its business model is premised upon helping the 'little guy/gal' video content creators monetize their videos." *Id.* According to Plaintiff, "Rumble currently has more than 2 million amateur and professional video content-creators that now contribute to more than 100 million streams per month." *Id.* ¶ 22. Plaintiff alleges that "Rumble's success, however, has been far less than it could and should have been as a direct result of Google's unlawful anticompetitive, exclusionary and monopolistic behavior . . . ." *Id.* ¶ 23.

Rumble alleges that "Google has willfully and unlawfully created and maintained a monopoly in the online video platform market by pursuing at least two anticompetitive and exclusionary strategies":

> First, by manipulating the algorithms (and/or other means and mechanisms) by which searched-for-video results are listed, Google insures [sic] that the videos on YouTube are listed first, and that those of its competitors, such as Rumble, are listed way down the list on the first page of the search results, or not on the first page at all. Second, by pre-installation of the YouTube app (which deters smart phone manufacturers from pre-installing any competitive video platform apps) as the default online video app on Google smart phones, and by entering into anti-competitive, illegal tying agreements

> with other smartphone manufacturers to do the same (in addition to requiring them to give the YouTube app a prime location on their phones' opening page and making it not-deletable by the user), Google assures the dominance of YouTube and forecloses competition in the video platform market.

Id. ¶ 27; *see also id.* ¶ 194 (alleging that Google's "anticompetitive and exclusionary conduct . . . has included rigging its search engine algorithms such that YouTube videos will always be listed first in search results and requiring pre-installation and prominent placement of Google's YouTube apps on all Android smartphones in the United States"). Plaintiff further alleges that "manufacturers and carriers are beholden to Google's Android ecosystem, which Google uses to preserve its monopolies in general search, search advertising, general search text advertising and the online video platform market." *Id.* ¶ 147. Plaintiff alleges that Defendant's "chokehold on search is impenetrable, and that chokehold allows it to continue unfairly and unlawfully to self-preference YouTube over its rivals, including Rumble, and to monopolize the online video platform market." *Id.* ¶ 146.

Plaintiff alleges that Defendant uses various agreements with Android-based mobile smart device manufacturers and distributors to ensure its monopoly of the video platform market. *See id.* ¶¶ 75-89. According to Plaintiff, Defendant "requires Android device manufacturers that want to preinstall certain of Google's proprietary apps to sign an anti-forking

agreement." *Id.* ¶ 84.[1] Plaintiff alleges that once an Android device manufacturer signs an anti-forking agreement, Google will only provide access to its vital proprietary apps and application program interfaces if the manufacturer agrees: "(1) to take (that is, pre-install) a bundle of other Google apps (such as its YouTube app); (2) to make certain apps undeletable (including its YouTube app); and (3) to give Google the most valuable and important location on the device's default home screen (including for its YouTube app)." *Id.* ¶ 85. As another example, Plaintiff asserts that "Google provides a share of its search advertising revenue to Android device manufacturers, mobile phone carriers, competing browsers, and Apple; in exchange, Google becomes the preset default general search engine for the most important search access points on a computer or mobile device." *Id.* ¶ 86. "And, by becoming the default general search engine, Google is able to continue its manipulation of video search results using its search engine to self-preference its YouTube platform, making sure that links to videos on the YouTube platform are listed above the fold on the search results page." *Id.*; *see also id.* ¶¶ 161-72 (alleging that Google's revenue sharing agreements allow it to maintain a monopoly in the general search market and online video platform market).

Plaintiff alleges that Defendant uses these agreements "to ensure that its entire suite of search-related products (including YouTube) is given premium place-

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[1] Plaintiff explains that "in general an anti-forking agreement sets strict limits on the manufacturers' ability to make and sell Android-based devices that do not comply with Google's technical and design standards." FAC ¶ 84.

ment on Android GMS devices." *Id.* ¶ 149. Rumble alleges that the agreements "effectuate a tie" that "reinforces Google's monopolies." *Id.* ¶ 151. Specifically, Plaintiff alleges that Defendant provides "Android device manufacturers an all-or-nothing choice: if a manufacturer wants Google Play or GPS, then the manufacturer must also preinstall, and in some cases give premium placement to, an entire suite of Google apps, including Google's search products and Google's YouTube app." *Id.* Plaintiff alleges that "[t]he forced preinstallation of Google's apps (including the YouTube app) deters manufacturers from preinstalling those of competitors, including Rumble's app. . . . [and] forecloses distribution opportunities to rival general search engines and video platforms, protecting Google's monopolies." *Id.* Moreover, Plaintiff alleges that "[i]n many cases" the agreements expressly prohibit the preinstallation of rival online video platforms, like Rumble. *See id.* ¶ 87.

According to Plaintiff, Defendant's "monopolist's stranglehold on search, obtained and maintained through anticompetitive conduct, including tying agreements in violation of antitrust laws, has allowed Google to unfairly and wrongfully direct massive video search traffic to its wholly-owned YouTube platform" and therefore secure monopoly profits from YouTube-generated ad revenue. *Id.* ¶ 176. Plaintiff alleges that because "a very large chunk of that video search traffic . . . should have rightfully been directly to Rumble's platform," Plaintiff and content creators who have exclusively licensed their videos to Rumble "have lost a massive amount of ad revenue they would otherwise have received but for Google's unfair, unlawful, exclusionary and anticompetitive conduct." *Id.*

Accordingly, Plaintiff alleges that Defendant's conduct violates Section 2 of the Sherman Act, which makes it unlawful for any person to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 2; *see id.* ¶¶ 55, 191-200.

II. Legal Standard

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Rule 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless, courts do not "accept as true allegations that are merely conclusory, unwarranted

deductions of fact, or unreasonable inferences." *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

III. Discussion

A. Motion to Dismiss

Plaintiff pleads a single cause of action alleging Defendant violated Section 2 of the Sherman Act. "The offense of monopoly under [Section 2] has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Plaintiff defines the relevant market as the "online video platform market," where platforms "allow content creators and other consumers to upload, view, share and download video content." FAC ¶ 55.

Without real dispute, Plaintiff has adequately alleged a Section 2 claim. First, it alleges that Defendant obtained and maintains monopoly power in the online video platform market, asserting that YouTube controls 73% of global online video activity. *Id.* ¶ 37, 63, 193. And second, Plaintiff alleges among other things that Defendant, with no valid business purpose or benefit to users, designs its search engine algorithms to show users YouTube links instead of links to its competitors' sites. *Id.* ¶ 71; *see also* ¶¶ 68-74. According to Plaintiff, "Rumble and consumers (*e.g.* content creators) are disadvantaged, and competition is harmed, in the defined market because Google provides self-

preferencing search advantages to its wholly-owned YouTube platform as a part of its scheme to maintain its monopoly power, and to reap a monopolist's financial rewards." *Id.* ¶ 74.

Instead, Defendant's motion is based on the somewhat counterintuitive premise that Plaintiff has pled too much. Defendant argues that Plaintiff's amended complaint should be broken into distinct theories of liability based on (1) self-preferencing, (2) tying of the YouTube app to other Google apps, and (3) unlawfully dominating the search market with agreements involving distribution of Defendant's search product. Mot. at 1. Defendant does not dispute that Plaintiff has adequately pled a Section 2 claim based on the first theory of liability, self-preferencing, but argues that the second and third theories, tying and unlawful domination of the search market, should be dismissed. *Id.* at 1-2.

The only authority Defendant cites for the premise that a court can disaggregate a single Section 2 cause of action into subtheories, then scrutinize and potentially dismiss some subtheories without dismissing the entire cause of action, comes from two unpublished district court cases, one from the Northern District of California and another from the District of Delaware. *See* Mot. at 3; *Staley v. Gilead Scis., Inc.*, No. 19-cv-02573, 2020 WL 5507555, at *11 (N.D. Cal. July 29, 2020); *see also In re Sensipar (Cinacalcet Hydrochloride Tablets) Antitrust Litig.*, No. 19-CV-01461, 2020 WL 7022364, at *3-4 (D. Del. Nov. 30, 2020).[2] Defendant

[2] In its Reply, Defendant cites two additional authorities referencing the expense of antitrust discovery, but these cases are also not controlling, and do not support (or even discuss) the premise that a court can dismiss select subtheories within a

does not cite, and the Court has been unable to find, any Supreme Court or Ninth Circuit authority ratifying this approach. And the sort of parsing urged by Defendants is at least arguably in tension with the Supreme Court's direction 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." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). 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." *California Comput. Prods., Inc. v. Int'l Bus. Machs. Corp.*, 613 F.2d 727, 737 (9th Cir. 1979) (quoting *United States v. Columbia Steel Co.*, 334 U.S. 495, 531-532 (1948). Ultimately, in the absence of controlling authority supporting Defendant's proposed approach, the Court declines to reach the viability of each of the purported subtheories, given that Plaintiff undisputedly has adequately pled a Section 2 claim based on self-preferencing. Defendant's motion to dismiss is accordingly DENIED.[3]

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single cause of action. *See* Reply at 4, *Kelsey K. v. NFL Enters., LLC*, 757 F. App'x 524, 527 (9th Cir. 2018) (affirming denial of discovery where "no plausible claim for relief has been pled"); *Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1025 (N.D. Cal. 2015).

[3] Plaintiff also contends that Defendant's motion to dismiss is procedurally improper under Federal Rule of Civil Procedure 12 (g)(2). Opp. at 19-20. However, the Court finds that the allegations in the original complaint were insufficient to place Defend-

B. Motion to Strike

Defendant also moves to strike paragraphs 34, 35, and 75 through 176 of the amended complaint. *See* Mot. at 2. These paragraphs generally concern Plaintiff's allegations that Google has unlawfully achieved and continues to maintain a monopoly in the online video platform market by conditioning access to its mobile operating system and Defendant's other popular services on preinstallation of the YouTube app and in some cases "expressly prohibiting the preinstallation of any rival . . . apps (which would include the Rumble app)[.]" *See* FAC ¶¶ 34, 87. Plaintiff argues that the allegations Defendant seeks to strike relate to forms of exclusionary conduct that are properly considered in adjudicating a monopolization claim, and further argues that "antitrust claims are to be adjudicated as a whole, . . . not parsed into discrete pieces." Opp. at 20.

Rule 12(f) of the Federal Rules of Civil Procedure states that a district court "may strike from a pleading

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ant on notice of the additional theories described in the new allegations it seeks to dismiss. The Court's finding is consistent with the purpose of the federal rules, as described by the Ninth Circuit. *See In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 318 (9th Cir. 2017) (reading "12(g)(2) in light of the general policy of the Federal Rules of Civil Procedure, expressed in Rule 1"). And to the extent Defendant could have raised its arguments in a prior motion, the Court nonetheless exercises its discretion to consider those arguments in the interest of judicial economy. *See id.* (quoting *Banko v. Apple, Inc.*, No. 13-02977 RS, 2013 WL 6623913, at *2 (N.D. Cal. Dec. 16, 2013) ("Although Rule 12(g) technically prohibits successive motions to dismiss that raise arguments that could have been made in a prior motion . . . courts faced with a successive motion often exercise their discretion to consider the new arguments in the interests of judicial economy.").

an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are "regarded with disfavor" because they are often used as delaying tactics and because of the limited importance of pleadings in federal practice. *Z.A. ex rel. K.A. v. St. Helena Unified Sch. Dist.*, No. 09-CV-03557-JSW, 2010 WL 370333, at *2 (N.D. Cal. Jan. 25, 2010). Where there is any doubt about the relevance of the challenged allegations, courts in this Circuit err on the side of permitting the allegations to stand. *See id.* (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), *rev'd on other grounds*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S. Ct. 1023 (1994)); *accord Pilgram v. Lafave*, No. 12-CV-5304 GAF-EX, 2013 WL 12124126, at *5 (C.D. Cal. Feb. 7, 2013); *Art Attacks Ink, LLC v. MGA Ent., Inc.*, No. 04-CV-1035-BLM, 2006 WL 8439887, at *4 (S.D. Cal. June 21, 2006). This is particularly true when the moving party shows no prejudice and when striking the allegations will not streamline the ultimate resolution of the action. *St. Helena Unified Sch. Dist.*, 2010 WL 370333 at *2.

For the same reasons underlying the Court's denial of the motion to dismiss, Defendant has not shown that the allegations are so redundant, immaterial, impertinent, or scandalous as to justify striking them. As noted above, substantial authority suggests that, depending on the factual record as it actually develops, all of the interrelated conduct alleged in the complaint could be relevant to the Section 2 claim that is not being challenged in this motion. That fact alone weighs dispositively against striking the allegations targeted by Defendant. Obviously, whether those allegations end up being backed by sufficient evidence to

survive a summary judgment motion, or to warrant presentation to the jury at trial under the Federal Rules of Evidence, is a matter for a later stage of the case. Accordingly, Defendant's motion to strike is DENIED.

IV. Conclusion

Defendant's motion to dismiss and to strike is DENIED. The court SETS a telephonic case management conference on August 30, 2022 at 2:00 p.m. The parties shall submit an updated joint case management statement by August 23, 2022. All counsel shall use the following dial-in information to access the call:

Dial-In: 888-808-6929;

Passcode: 6064255

For call clarity, parties shall NOT use speaker phone or earpieces for these calls, and where at all possible, parties shall use landlines.

IT IS SO ORDERED.

/s/ Haywood S. Gilliam, Jr.
United States District Judge

Dated: 7/29/2022

APPELLANT FYK NOTICE OF FILING SUPPLEMENTAL AUTHORITY: *HENDERSON* [DE 38] (NOVEMBER 7, 2022)

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Via ECF

U.S. Court of Appeals for the Ninth Circuit

RE: Jason Fyk v. Facebook, Inc., No. 21-16997

Appellant's Notice of Filing Supplemental Authority in Further Support of Appellant's Appeal and Mot. For Reconsideration [D.E. 37]

Dear your Honors:

Plaintiff-Appellant ("Fyk") commenced the above-captioned appeal in late-2021 and filed his Motion for Reconsideration [D.E. 37] on November 2, 2022. Per Fed. R. App. P. 28(j) and 9th Cir. R. 28-6 (and AC notes), Fyk submits/encloses this November 3, 2022, decision (and cited journal) as supplemental authority in further support of his appellate briefs and [D.E. 37]: *Henderson, et al. v. The Source for Public Data, L.P., et al.*, No. 21-1678 (4th Cir. Nov. 3, 2022) and Candeub, *A., Reading Section 230 as Written*, 1 J. Free Speech L. 139 (2021).

The *Henderson* decision (squaring with *Enigma* and other supplemental cases, see [D.E. 29], [D.E. 26], [D.E. 15]) confirms what Fyk (not the District Court,

and not this Court in Fyk but in *Enigma*) has correctly said 47 U.S.C. § 230 ("CDA") immunity is/is not for ~ 51mos since suing Defendant-Appellee ("Facebook") for non-CDA-immune anti-competitive (etc.) illegalities. *See, e.g., Henderson* at 9 ("plainly" articulating the CDA immunity test, employing actual CDA language of "the publisher or speaker of any information" rather than "a publisher . . . ," which such word difference is critical in interpreting/applying CDA immunity as Fyk has correctly repeated for years); *id.* at 26-27 (Facebook became "an information content provider when[ ] [its] actions cross[ed] the line into substantively altering the content at issue in ways that ma[d]e it unlawful").

Since August 2018, Fyk has repeated (unheard sans Due Process) that the CDA "protects some parties operating online from specific claims that would lead to liability for conduct done offline[,] [b]ut is not a license to do whatever one wants online," *id.* at 4, especially where (as here) the activities of the Interactive Computer Service ("ICS"/Facebook) injured the Information Content Provider ("ICP"/Fyk), *id.* at 6 ("activities injured"), and Facebook's illegalities had nothing to do with some improper content within some Facebook publication; *i.e.*, Fyk has correctly said for years that this case has zero to do with some ICS content. *See id.* at 14 ("interpreting 'publisher' in § 230(c)(1) in line with [ ] common-law"). And "[s]o [this Court/the District Court should] not read the traditional editorial functions listed in *Zeran* so broadly as to include [Facebook's] substantive [changes] that introduced the [four Fyk claims; *e.g.*, unfair competition]." *Id.* at n. 26. Fyk's Verified Complaint allegations

"render § 230(c)(1) inapplicable to [his] four claims." *Id*. at 4.

Undersigned hereby certifies that the above body of this letter does not exceed 350 words pursuant to Fed. R. App. P. 28(j) and 9th Cir. R. 28-6; indeed, the above body totals 307 words.

Submitted By:,

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Enclosure (1-2)

***HENDERSON:* FOURTH CIRCUIT OPINION**
[DE 38A]
(NOVEMBER 3, 2022)

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TYRONE HENDERSON, SR.; GEORGE I. HARRISON, JR.; ROBERT MCBRIDE, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

THE SOURCE FOR PUBLIC DATA, L.P., D/B/A PUBLICDATA.COM; SHADOWSOFT, INC.; HARLINGTON-STRAKER STUDIO, INC.; AND DALE BRUCE STRINGFELLOW,

Defendants-Appellees.

FEDERAL TRADE COMMISSION; CONSUMER FINANCIAL PROTECTION BUREAU; NORTH CAROLINA; TEXAS; ALABAMA; ARIZONA; ARKANSAS; CONNECTICUT; GEORGIA; IOWA; MAINE; MICHIGAN; MINNESOTA; MISSISSIPPI; NEBRASKA; NEVADA; NORTH DAKOTA; OHIO; SOUTH CAROLINA; SOUTH DAKOTA; UTAH; VERMONT; VIRGINIA; NATIONAL CONSUMER LAW CENTER; NATIONAL FAIR HOUSING ALLIANCE; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,

Amici Supporting Appellants.

No. 21-1678

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:20-cv-00294-HEH)

Before: AGEE, RICHARDSON, and QUATTLEBAUM, Circuit Judges.

RICHARDSON, Circuit Judge:

Section 230(c)(1) of the Communications Decency Act protects some parties operating online from specific claims that would lead to liability for conduct done offline. But it is not a license to do whatever one wants online. Protection under § 230(c)(1) extends only to bar certain claims imposing liability for specific information that another party provided.

Public Data sought § 230(c)(1) protection against four claims brought against it for violating the Fair Credit Reporting Act ("FCRA"). The district court agreed that the claims were precluded by § 230(c)(1). Plaintiffs appealed, arguing that § 230(c)(1) does not apply. We agree. Plaintiffs have alleged facts that, if true, render § 230(c)(1) inapplicable to their four claims. So we reverse the district court and remand for further proceedings.

I. Background

Defendants are The Source of Public Data, L.P.; ShadowSoft, Inc.; Harlington-Straker Studio, Inc.; and Dale Bruce Stringfellow. Defendants' relation to

each other and to the website PublicData.com is complex but unimportant to this appeal. Rather than break out the white board and red string to understand how they fit together, we accept on appeal Plaintiffs' allegation that all Defendants are alter egos jointly responsible for any FCRA liability arising from the business activities conducted on PublicData.com.[1] So we refer to Defendants collectively as "Public Data."

Public Data's business is providing third parties with information about individuals. Plaintiffs allege that it involves four steps.

First, Public Data acquires public records, such as criminal and civil records, voting records, driving information, and professional licensing. These records come from various local, state, and federal authorities (and other businesses that have already collected those records).

Second, Public Data "parses" the collected information and puts it into a proprietary format. This can include taking steps to "reformat and alter" the raw documents, putting them "into a layout or presentation [Public Data] believe[s] is more user-friendly." J.A. 16. For criminal records, Public Data "distill[s]" the data subject's criminal history into "glib statements," "strip[s] out or suppress[es] all identifying

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[1] This case comes to us on appeal from the district court's grant of a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Our review is de novo, and we apply the same standards as we would for a Rule 12(b)(6) motion. *Massey v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014). This means that we accept all well-pleaded facts in the complaint as true. *Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014). Given the procedural posture, our factual summary takes Plaintiffs' Second Amended Complaint at face value.

information relating to the charges," and then "replace[s] this information with [its] own internally created summaries of the charges, bereft of any detail." J.A. 30.

Third, Public Data creates a database of all this information which it then "publishes" on the website PublicData.com. Public Data does not look for or fix inaccuracies in the database, and the website disclaims any responsibility for inaccurate information. Public Data also does not respond to requests to correct or remove inaccurate information from the database.

Fourth, Public Data sells access to the database, "disbursing [the] information . . . for the purpose of furnishing consumer reports to third parties." J.A. 19. All things told, Plaintiffs allege that Public Data sells 50 million consumer searches and reports per year. Public Data knows that traffic includes some buyers using its data and reports to check creditworthiness and some performing background checks for employment purposes.

Plaintiffs allege that Public Data's activities injured them. Plaintiffs Henderson, Harrison, and McBride have each requested a copy of the records Public Data keeps on them, but Public Data has not provided those records. Plaintiff McBride also alleges that he applied for a job that required a background check. As part of that check, his potential employer used a background report from Public Data. Public Data's report on McBride was inaccurate because it

contained misleading and incomplete criminal history. McBride was not hired.[2]

Plaintiffs bring four claims against Public Data alleging it violated four provisions of the FCRA.[3] Underlying each claim is the contention that Public Data must comply with the FCRA because they produce "consumer report[s]" and are a "consumer reporting agency" under the Act.[4]

In Count One, Plaintiffs allege that Public Data violated § 1681g[5] by failing to provide them a copy of their own records and a notice of their FCRA rights

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[2] McBride alleges that he learned about the inaccurate information included in the report when he sued his potential employer and obtained the report in discovery.

[3] Plaintiffs together represent a putative class for Count One, Plaintiff McBride alone represents a class for Counts Two and Three, and Count Four is an individual claim brought by Plaintiff McBride. Given the posture of this case, we express no opinion on the class allegations or propriety of class certification.

[4] These terms are defined in 15 U.S.C. § 1681a(d) and (f), respectively. Since the only issue on appeal is whether 47 U.S.C. § 230 (c)(1) bars Plaintiffs' claims, we do not address whether Public Data qualifies as a "consumer reporting agency" under the FCRA.

[5] "Every consumer reporting agency shall, upon request . . . clearly and accurately disclose to the consumer" certain information including "[a]ll information in the consumer's file at the time of the request," "[t]he sources of the information," and the "[i]dentification of each person . . . that procured a consumer report" within the two years before the request, if procured "for employment purposes," or within one year otherwise. 15 U.S.C. § 1681g (a)(1)-(3).

when requested. In Count Three, Plaintiff McBride alleges that Public Data violated § 1681b(b)(1)[6] by failing to get certain certifications from employers it provided reports to, and by failing to provide those employers with a consumer-rights summary. Counts Two and Four both seek to impose liability for Public Data's failure to maintain proper procedures to ensure accurate information. Count Two alleges that Public Data violated § 1681k(a)[7] by failing to notify Plaintiffs when it provided their records for employment purposes and by failing to establish adequate procedures to ensure complete and up to date information in those records. And in Count Four, Plaintiff McBride alleges, for himself only, that Public Data violated § 1681e(b)[8]

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[6] Section 1681b(b)(1) requires that a consumer reporting agency obtain certifications from its employer-customers stating they will comply with § 1681b(b)(2)(A), and that the consumer reporting agency provide those employer-customers with a summary of the consumer's rights. 15 U.S.C. § 1681b(b)(1).

[7] "A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall—(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or (2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date." 15 U.S.C. § 1681k(a).

[8] "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum

by not implementing sufficient procedures to ensure accuracy in its reports.

Public Data moved for judgment on the pleadings, arguing that each claim was barred by § 230(c)(1). The district court agreed and granted judgment for Public Data. *See Henderson v. Source for Pub. Data*, 540 F. Supp. 3d 539, 543 (E.D. Va. May 19, 2021). Plaintiffs appealed, and we have jurisdiction under 28 U.S.C. § 1291.

II. Discussion

Section 230 provides internet platforms with limited legal protections. *See generally* Adam Candeub, *Reading Section 230 as Written*, 1 J. Free Speech L. 139 (2021). Subsection 230(c)(1) prohibits treating an interactive computer service as a publisher or speaker of any information provided by a third party. And § 230(c)(2) bars liability for a platform's actions to restrict access to obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise-objectionable material.

On appeal, this case deals exclusively with the protection provided by § 230(c)(1): "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." Read plainly, this text requires that a defendant like Public Data must establish three things to claim protection: (1) The defendant is a "'provider or user of an interactive computer service'"; (2) the plaintiff's claim holds the defendant "responsible 'as the publisher or

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possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b).

speaker of any information'"; and (3) the relevant information was "'provided by another information content provider.'" *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (quoting § 230(c)(1)).[9] These three requirements look first to the defendant's status (*i.e.*, are they a provider or user of an "interactive computer service"), then to the kind of claim the plaintiff has brought (*i.e.*, does the plaintiff treat the defendant as a publisher or speaker of information), and finally to the source of the information underlying the plaintiff's claim (*i.e.*, who provided the information).

Public Data asserts that its activities, as described in Plaintiffs' FRCA claims, satisfy all three § 230(c)(1) requirements, so that § 230(c)(1) bars those claims. Plaintiffs disagree. For this appeal, they admit that Public Data is an interactive computer service[10] but

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[9] There was some confusion below about these requirements. *See Henderson*, 540 F. Supp. 3d at 547. And that is understandable given that we have not been clear about separating (c)(1)'s three distinct requirements. *See Zeran v. American Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (discussing the protection in broad terms, without separating into distinct prongs). But when grappling with § 230(c)(1), we have applied these ideas, if not always in a neat and ordered row. *See id.* (discussing (1) "service providers" being (3) held "liable for information originating with a third-party user of the service," (2) "in a publisher's role"); *see also Nemet*, 591 F.3d at 254-55; *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139-40 (4th Cir. 2019). To avoid confusion, we follow our sister circuits and read the statute to create three requirements. *See HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 681 (9th Cir. 2019); *FTC v. LeadClick Media, LLC,* 838 F.3d 158, 173 (2d Cir. 2016); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267-68 (D.C. Cir. 2019).

[10] "The term 'interactive computer service' means any information service, system, or access software provider that provides or

challenge the other two requirements necessary for § 230(c)(1) protection. On the second requirement, Plaintiffs argue their claims do not treat Public Data as the publisher or speaker of the offending information. And on the third requirement, Plaintiffs allege that Public Data itself acted as an "information content provider" of the offending information such that the information did not come solely from "another information content provider."

We conclude that § 230(c)(1) does not bar Counts One and Three because those claims do not treat Public Data as a publisher or speaker of information. For Counts Two and Four, we need not determine whether this second requirement is met because we conclude that Plaintiffs have alleged enough facts to plausibly infer that Public Data is an information content provider that provided the improper information. As Public Data cannot establish at this stage that it meets the third requirement for Counts Two and Four, § 230(c)(1) does not now apply. So we reverse, and all claims are remanded for further proceedings consistent with this opinion.

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enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." § 230(f)(2). Hosting a website "enables computer access by multiple users to a computer server." *See LeadClick*, 838 F.3d at 174 ("Courts typically have held that internet service providers, website exchange systems, online message boards, and search engines fall within this definition.").

A. Requirement Two: Publisher or Speaker of Information

Section 230(c)(1)'s second requirement asks whether the plaintiff's legal claim requires that the defendant be "treated as the publisher or speaker of any information." 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. *See* § 230(c)(1) (No internet platform "shall be treated as the publisher or speaker of any information . . . "); *see also Zeran*, 129 F.3d at 330 (describing § 230(c)(1) as protecting a defendant from being "liable for information" when the defendant acts in the "publisher's role" for that information). 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, and (2) seeks to impose liability based on that information's improper content.

Our precedent demands that we ask whether the claim "thrust[s]" the interactive service provider "into the role of a traditional publisher." *Zeran*, 129 F.3d at 332. The term "publisher" as used in § 230(c)(1) "derive[s] [its] legal significance from the context of defamation law." *Id.*[11] Thus, the scope of "the role of

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11 When "a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) (internal citation and quotation marks omitted). "Publisher" is just such a transplanted word. Section 230(c)(1) altered the way common-law-defamation claims would apply to users and providers of interactive computer services that the common law would otherwise hold liable as publishers. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S.

a traditional publisher," and therefore the scope of what § 230(c)(1) protects, is guided by the common law. *See id.* ("[Defendant] falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity." (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 803 (5th ed. 1984)).[12]

At common law, a publisher was someone who intentionally or negligently disseminated information to third parties.[13] In this context, a third party is

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Ct. 13, 14 (2020) (Thomas, J., statement respecting denial of certiorari) (discussing *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, at *3–*4 (N.Y. Sup. Ct. May 24, 1995)); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) ("Section 230 marks a departure from the common-law rule that allocates liability to publishers . . . of tortious material written or prepared by others.").

[12] Defamation at common law distinguished between publisher and distributor liability but *Zeran* did not make this distinction. Instead, *Zeran* determined that distributor liability "is merely a subset, or a species, of publisher liability" and so treated them the same under § 230(c)(1). *Zeran*, 129 F.3d at 332. The decision has been questioned for failing to make this distinction. *See, e.g.*, *Malwarebytes*, 141 S. Ct. at 14-15 (Thomas, J., statement respecting denial of certiorari). But the approach taken in the Fourth Circuit since *Zeran* has been clear, and the parties have made no arguments based on this distinction.

[13] *See* Restatement (Second) of Torts § 577, at 201 (Am. L. Inst. 1965) ("Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed."); *Publish*, Black's Law Dictionary 1268 (8th ed. 2004) (defining "publish" as including "[t]o distribute copies . . . to the public" and "[t]o communicate (defamatory words) to someone other than the person defamed"); *Yousling v. Dare*, 98 N.W. 371, 371 (Iowa 1904) ("The cases . . . uniformly hold that . . . the sending of a communication containing defamatory language directly to the person defamed, without any proof that, through

someone other than the subject of the information disseminated.[14] Thus, for a claim to treat someone as a publisher under § 230(c)(1), the claim must seek to impose liability based on the defendant's dissemination of information to someone who is not the subject of the information.

But that alone is not enough. To meet the second requirement for § 230(c)(1) protection, liability under the claim must be "based on the content of the speech published" by the interactive service provider. *Erie Insurance Co.*, 925 F.3d at 139. At common law, defamation required publishing a "false and defamatory statement." Restatement (Second) of Torts § 558(a), at 155 (Am. L. Inst. 1965). The publisher was held liable because of the improper nature of the content of the published information.[15] In other words, to hold someone

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the agency or in pursuance of the intention of the sender, it has come to the knowledge of any one else, does not show such publication as to render the sender liable in damages.").

[14] *See* Restatement (Second) of Torts § 577 cmt. b, at 202 (Am. L. Inst. 1965); *Scottsdale Cap. Advisors Corp. v. The Deal, LLC*, 887 F.3d 17, 21 (1st Cir. 2018) ("[P]ublication, does not mean merely uttering or writing. Rather, 'publication' . . . means to communicate the defamatory material to a third party (that is, a party who is not the subject of the defamatory material) . . . "); *Sheffill v. Van Deusen*, 79 Mass. 304, 305 (1859) (asserting that there can be no publication unless the words spoken were heard by third persons).

[15] Other information-based torts at common law follow this mold, imposing liability on publishers for the improper nature of their disseminated content. For example, false-light claims hold a publisher liable only when there is "at least an implicit false statement of objective fact." *Flowers v. Carville*, 310 F.3d 1118, 1132 (9th Cir. 2002).

liable as a publisher at common law was to hold them responsible for the content's improper character. We have interpreted "publisher" in § 230(c)(1) in line with this common-law understanding. Thus for § 230(c)(1) protection to apply, we require that liability attach to the defendant on account of some improper content within their publication. *See Erie Ins. Co.*, 925 F.3d at 139-40 ("There is no claim made based on the content of speech published by [Defendant]—such as a claim that [Defendant] had liability as the publisher of a misrepresentation of the product or of defamatory content.").

This improper-content requirement helps dispel Public Data's notion that a claim holds a defendant

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And publisher liability at common law did not always require that the "impropriety" of the content be that it was false and defamatory. Claims based on publicity given to private life impose liability on a publisher for information that is "highly offensive to a reasonable person." Restatement (Second) of Torts § 652D, at 383 (Am. L. Inst. 1965). Reaching further back, publishers in England were prosecuted under a fourteenth century statute banning "constructive treason" for printing "seditious, poisonous, and scandalous" information even if that information was not false and defamatory. William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 100-101 (1984); Geoffrey R. Stone et al., Constitutional Law 1009-10 (8th ed. 2018). Similarly, while libel required that the published information dishonor another or provoke violence, "truth was no defense." Philip Hamburger, *The Development of the law of Seditious Libel and the Control of the Press*, 37 Stan. L. Rev. 661, 712 (1985).

While it is commonly accepted that Congress passed § 230 in part as reaction to a case involving a defamation suit against an internet company, *see Malwarebytes, Inc.*, 141 S. Ct. at 14 (Thomas, J., statement respecting denial of certiorari) (discussing *Stratton*, 1995 WL 323710), § 230(c)(1) protection is not limited to defamation suits.

liable as a publisher anytime there is a "but-for" causal relationship between the act of publication and liability. *See* Appellee's Response Brief 20-21 ("Put another way, had Public Data not published court records on its website, Plaintiffs could not have brought their Section 1681g(a) claim."). This "but-for" publication test would say a claim treats an entity as a "publisher" under § 230(c)(1) if liability hinges in any way on the act of publishing. This but-for test bears little relation to publisher liability at common law. To be held liable for information "as the publisher or speaker" means more than that the publication of information was a but-for cause of the harm. *See Erie Ins. Co.*, 925 F.3d at 139-40; *HomeAway.com*, 918 F.3d at 682.

Erie Insurance is a good example. There, we held that Amazon was not protected by § 230(c)(1) in a product-liability suit even though publishing information was a but-for cause of the harm—*i.e.*, the product was bought from Amazon's website, making the advertisement's publication a necessary link in the causal chain that led to setting the buyer's house on fire. *See Erie Insurance Co.*, 925 F.3d at 138-40. Though publishing information was a but-for cause, we refused to apply § 230(c)(1) protection because the plaintiff's product-liability claim was based on Amazon "as the seller of the defective product . . . [not] the content of speech published by Amazon." *Id.* at 139-40.

So, to paraphrase the test we began with, a claim only treats the defendant "as the publisher or speaker of any information" under § 230(c)(1) if it (1) bases the defendant's liability on the disseminating of information to third parties and (2) imposes liability based on the information's improper content.

Based on these two requirements, we can see that § 230(c)(1) does not provide blanket protection from claims asserted under the FCRA just because they depend in some way on publishing information. Yes, the FCRA imposes procedural obligations on any "consumer reporting agency." *See Ross v. FDIC*, 625 F.3d 808, 812 (4th Cir. 2010) ("The FCRA is a comprehensive statutory scheme designed to regulate the consumer reporting industry."). And each claim here alleges that Public Data ignored those obligations as a member of that regulated industry.[16] So publishing information online is a but-for cause of Public Data being a consumer reporting agency subject to the FCRA's requirements. Most of what Public Data allegedly does, after all, is publish things on the internet. That means that publishing information is

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[16] Each FCRA claim here is triggered by a defendant's status as a "consumer reporting agency" as defined in 15 U.S.C. § 1681a (f). *See* 15 U.S.C. §§ 1681g(a) ("Every consumer reporting agency shall"); 1681k(a) ("A consumer reporting agency . . . shall"); 1681b(b)(1) ("A consumer reporting agency may furnish a consumer report for employment purposes only if"); 1681e(b) ("Whenever a consumer reporting agency prepares a consumer report it shall").

A "consumer reporting agency" is defined as "any person which, for monetary fees . . . regularly engages . . . in the practice of assembling or evaluating consumer credit information . . . for the purpose of furnishing consumer reports to third parties." § 1681a (f). Circular as it is, "companies that regularly prepare consumer reports" are consumer reporting agencies. *Berry v. Schulman*, 807 F.3d 600, 605 (4th Cir. 2015). The district court did not determine whether Plaintiffs made sufficient allegations to prove that Public Data is a "consumer reporting agency," and we take no position on that question. Of course, Public Data may contest that claim below. But here we only consider the preliminary question of whether § 230 bars Plaintiffs' FCRA claims even if Public Data is a "consumer reporting agency."

one but-for cause of these FCRA claims against Public Data. If Public Data is a "consumer reporting agency" subject to FCRA liability, it is one because it is the publisher or speaker of consumer report information. Yet that alone is not sufficient, as we do not apply a but-for test. *See Erie Ins.*, 925 F.3d at 139-140; *HomeAway.com*, 918 F.3d at 682. We must instead examine each specific claim.[17]

It is also true that, at a high level, liability under the FCRA depends on the content of the information published. Both the definition of "consumer reporting agency" and the definition of "consumer reports" reference "credit information" or "information . . . bearing on a consumer's credit worthiness." § 1681a(d)(1), (f). If Public Data and its activities did not meet these definitions, there could be no liability under these FCRA claims. In this way, liability for each claim hinges on the published information's content. Yet, while the informational content matters, § 230(c)(1) protects Public Data only from claims that demand the information's content be improper before imposing liability. And, as a class, there is nothing improper

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17 Section 230(e) catalogues other laws for which § 230(c)(1) must not be construed to impair. And the FCRA is not on the that list. But that tells us little about whether § 230(c)(1) can bar specific FCRA claims because § 230(e) does not establish "an exception to a prohibition that would otherwise reach the conduct excepted." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 582 (1988). Instead, it suggests a "clarification of the meaning of [§ 230] rather than an exception" to its coverage. *Id.* at 586. In other words, a FCRA claim must first impose liability on the defendant as the publisher or speaker of information to trigger the FCRA in the first place. If it does, then § 230(c)(1) can apply to FCRA claims. And if it does not, then § 230(c)(1) will not apply.

about "credit information" or "information . . . bearing on a consumer's credit worthiness." Again, we must examine each specific claim in context to see if the claim treats Public Data as a publisher under § 230(c)(1).

Finally, when considering whether any claim treats Public Data as a publisher, our precedent teaches that we must look beyond the claim's formal elements. Beginning in *Zeran*, our Court has stressed a functional approach. In our functional analysis, we ask whether holding this defendant liable requires treating them as a publisher, not whether every abstract violation requires it. *See Zeran*, 129 F.2d at 332; *Erie Ins. Co.*, 925 F.3d at 139. To make this determination, we look to see what the plaintiff in our case must prove. If the plaintiff's recovery requires treating the defendant as a publisher, then the defendant has satisfied § 230(c)(1)'s second requirement.

Zeran itself is instructive. There, Kenneth Zeran made a negligence claim against AOL. *Zeran*, 129 F.3d at 332. A defendant can, of course, be negligent without publishing anything. Yet Zeran asserted that AOL was negligent "because it communicated to third parties an allegedly defamatory statement." *Id.* at 333. That is, Zeran's specific negligence claim treated the defendant as a publisher. So while not every negligence claim treats a defendant as a publisher, Zeran's negligence claim did; so we held that claim was foreclosed by § 230(c)(1). *Id.* at 332-33.

We thus turn to the four specific claims asserted.

Count One is based on FCRA § 1681g and does not seek to impose liability on Public Data as a speaker or publisher of any information. Section

1681g requires consumer reporting agencies to give consumers a copy of their own consumer report along with an FCRA notice upon request.[18] So it is based on a failure to disseminate information about an individual to that same individual, not a third party. Recall that "[p]ublication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." *See* Restatement (Second) of Torts § 577, at 201 (emphasis added). So Section 1681g does not seek to hold Public Data liable "as the publisher" under § 230(c)(1), and § 230(c)(1) does not bar Count One.

Like Count One, Count Three does not treat Public Data as a speaker or publisher. Count Three seeks to impose liability on Public Data for violating § 1681b(b)(1), which lays out two requirements that a consumer reporting agency must meet before they may provide a consumer report "for employment purposes." § 1681b(b)(1). First, the employer who gets the report must certify both that they have complied with the FCRA's requirements and that they will not use

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[18] *Zeran* left the door open to finding § 230(c)(1) protection applies when a claim holds a party liable for a decision not to publish, *Zeran*, 129 F.3d at 330, and we need not decide here if we should shut it. *Zeran* suggested that it might allow § 230(c)(1) to bar claims whenever avoiding liability under those claims would require acting as a publisher. *Id.* In other words, it is possible to read *Zeran* as applying § 230(c)(1) protection when an interactive service provider would be held liable for failing to publish information. *See id.; see also Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (implying that not providing a warning can be an act of publishing by considering whether § 230(c)(1) could bar a negligent-failure-to-warn claim). Since even in those circumstances the failure to publish would still need to relate to information meant to be disseminated to third-parties, we need not reach this question here.

the information in violation of state or federal law. § 1681b(b)(1)(A)(i)-(ii). And, second, the consumer reporting agency must also provide a summary of the consumer's FCRA rights to the employer. § 1681b(b)(1)(B).

The requirement that a consumer reporting agency obtain certification from an employer is easily disposed of because liability is in no way based on the improper content of any information spoken or published by Public Data. Here, if liability is based on information, it is only Public Data's failure to obtain the required information (certification) from the employer that matters.

Slightly more vexingly, Count Three also does not treat Public Data as a publisher because liability depends on Public Data's failure to provide a summary of consumer rights to the putative employer (§ 1681b(b)(1)'s second requirement). Even if Public Data's decision to not provide the required summary could be described as a publisher's decision, the information it failed to provide is proper and lawful content. And § 230(c)(1) applies only when the claim depends on the content's impropriety. Therefore, Public Data's failure to summarize consumer rights cannot fall within § 230(c)(1) protection.

Unlike Counts One and Three, Counts Two and Four may seek to hold Public Data liable as the publisher of information. Section 1681e(b), the basis for Count Four, requires that a consumer reporting agency "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." Likewise, liability under § 1681k(a), the gravamen of Count Two, requires that a consumer reporting agency

that is selling consumer reports "for employment purposes" which "are likely to have an adverse effect on a consumer's ability to obtain employment" must "maintain strict procedures" to ensure that any consumer information "is complete and up to date." §§ 1681k(a), 1681(k)(a)(2).[19] Thus, both claims seek to impose liability based on an agency's failure to maintain proper procedures to ensure accurate information. On its face, liability for failing to maintain proper procedures does not seem to fall within § 230(c)(1)'s ambit as we have described it. After all, the FCRA's statutory language here requires neither dissemination of information to third parties nor improper content. Yet a little digging uncovers two levels of complexity.

First, current Fourth Circuit precedent requires that a plaintiff bringing a claim under both § 1681e(b), and by implication § 1681k(a), show the defendant's "consumer report contains inaccurate information." *Dalton*, 257 F.3d at 415. Though the textual basis for requiring an inaccuracy is unclear, *Dalton* provided that liability under Counts 2 and 4 depend on inaccurate information.[20] And that suggests that Counts 2

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[19] Liability under § 1681k(a) also requires that the defendant fail to provide notifications to the consumer that the report was provided to a potential employer. § 1681k(a)(1). We have already explained why a consumer-notification requirement like this does not impose liability on Public Data as a publisher or speaker of information—it is a failure to disseminate information about an individual to that same individual, not a third party.

[20] *Dalton* held that violating § 1681e(b) requires inaccurate information. *Id.* While *Dalton* did not address § 1681k(a)'s reasonable-procedures requirement, we see no principled way to distinguish the two provisions and so read *Dalton* to require the same inaccuracy.

and 4 thus functionally impose liability on the defendant based on the information's impropriety.

Second, a private plaintiff bringing a claim in federal court, as is the case here, under § 1681e(b) or § 1681k(a) must show that Public Data disseminated information to third parties to satisfy Article III standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021). The statutory provisions might be violated without the dissemination of any information, as the FCRA itself does not condition these provisions on disseminating the report but on failing to follow proper procedures to ensure a report's accuracy. But a private plaintiff lacks standing to bring a reasonable-procedures claim unless the plaintiff's report was provided to a third party. *Id.* So it may be that these reasonable-procedures claims turn on Public Data providing the inaccurate information to a third party.[21] *See id*; *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016) (providing "entirely accurate" information without complying fully with the FCRA's procedures is a "bare procedural violation" that cannot "satisfy . . . Article III"). Considering past precedent and the Constitution's limited judicial power, perhaps Counts Two and Four functionally depend on Public Data disseminating inaccurate information to a third party. But we need not, and do not, decide whether our functional approach can stretch the meaning of being "treated as the publisher or speaker of any information" far enough to cover Counts Two and Four. For as we will see, Public Data was "another information content provider" for the information at issue in Counts 2 and 4. So, based on

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[21] Again, at least in federal court. *See TransUnion*, 141 S. Ct. at 2224 n.9 (Thomas, J., dissenting) (suggesting a non-publication claim could be brought in state court).

the third requirement, § 230(c)(1) protection fails for those two counts.

B. Requirement Three: Provided by Another Information Content Provider

The third and final requirement for § 230(c)(1) protection is that the information at issue in the plaintiff's claim be "provided by another information content provider." § 230(c)(1) (emphasis added). An "'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." § 230(f)(3).

Plaintiffs argue that this third requirement is not met because Public Data itself is an "information content provider" for the relevant information.[22] We agree. The plaintiffs' complaint plausibly alleges that

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[22] Public Data can be both "a provider or user of an interactive computer service" and also the "information content provider." And when a defendant is both, § 230(c)(1) provides no protection. Section 230(c)(1) applies only when the information for which liability is being imposed on the provider or user of an interactive computer service is "provided" by "another" information content provider. § 230(c)(1). The use of the modifier another shows that an interactive computer service provider can be an information content provider at the same time. *See* § 230(c)(1) ("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." (emphasis added)). And when a provider of an interactive computer service also provides the information at issue in a claim, it receives no protection under § 230(c)(1). *See Nemet*, 591 F.3d at 254. In other words, § 230(c)(1) does not protect entities for their own speech, it protects them only when they serve as a conduit for other's speech. *See Zeran*, 129 F.3d at 333.

Public Data is an information content provider for the information that creates liability under these two counts. So, on these alleged facts, § 230(c)(1) does not bar Counts Two and Four.[23]

Public Data is an "information content provider" if they are "responsible, in whole or in part, for the creation or development" of the information at issue. This Court has never fully defined the terms "creation" or "development" as they are used in the statute. But we have explained that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Zeran*, 129 F.3d at 330; *see also Nemet*, 591 F.3d at 258 ("creation" or "development" of information requires "something more than [what] a website operator performs as part of its traditional editorial function").

Other circuits have put more flesh onto these definitions, determining that an interactive computer service provider or user is responsible for the development[24] of the information at issue in the case if they "directly and 'materially' contributed to what made

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[23] Since we determine that Public Data is an information content provider, we do not address Plaintiffs' argument that "provided" in the statute means "provided to the internet user" not "provided to the internet company." Appellee's Brief 34-35; *see, e.g.*, *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th 2003) ("The structure and purpose of § 230(c)(1) indicate that the immunity applies only with regard to third-party information provided for use on the Internet.").

[24] Since we find that Public Data has "developed" the information at issue we need not consider whether it might also have "created" that information.

the content itself 'unlawful.'" *Force v. Facebook*, 934 F.3d 53, 68 (2d Cir. 2019) (quoting *LeadClick*, 838 F.3d at 174); *see Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (explaining that a defendant is an information content provider if they "contribute[d] materially to the alleged illegality of the conduct"); *Jones*, 755 F.3d at 413 ("Consistent with our sister circuits, we adopt the material contribution test."). And while this Court has never explicitly adopted "material contribution" as the test, we applied it in *Nemet* to determine that the website operator there was not an information content provider. *See Nemet*, 591 F.3d at 257-58 (noting that the plaintiff failed to allege that the website operator "contributed to the allegedly fraudulent nature of the comments at issue").

Additionally, the material-contribution test fits well within our broader § 230(c)(1) jurisprudence. *Zeran* and *Nemet* rest on the principle that liability for an interactive computer service user or provider must turn on "something more than . . . its traditional editorial function." *Nemet*, 591 F.3d at 258 (citing *Zeran*, 129 F.3d at 330). All the material-contribution test does is put a more helpful name to this "something more" standard. And defining "something more" as a material contribution makes sense. As *Zeran* notes, § 230 bars liability against "companies that serve as intermediaries for other parties' potentially injurious messages." *Zeran*, 129 F.3d at 330-31. But where a company materially contributes to a message's unlawful content, that company stops being a mere "intermediary" for another party's message. Instead, the company is adding new content to the message that harms the plaintiff. We thus hold that an interactive

computer service is not responsible for developing the unlawful information unless they have gone beyond the exercise of traditional editorial functions and materially contributed to what made the content unlawful.

Whether a defendant developed information such that they are an "information content provider" turns on whether the defendant has materially contributed to the piece(s) of information relevant to liability. Section 230(c)(1) applies if a defendant has materially contributed only to parts of the disseminated information that do not make the disseminated information unlawful (if § 230(c)(1) is otherwise applicable). For example, in *Jones*, the Sixth Circuit determined that a website had not materially contributed to defamatory content that it hosted. *Jones*, 755 F.3d at 416. This was so even though the website operator had authored his own comments underneath the alleged defamatory material. *Id.*

In drawing this conclusion, the court noted that "[t]o be sure, [the operator] was an information content provider as to his comment . . . [b]ut [Plaintiff] did not allege that [the operator's] comments were defamatory." *Id.* In other words, the § 230(c)(1)'s third requirement did not turn on whether the defendant materially contributed to some part of the total information disseminated—*i.e.*, the entire post—but on whether the defendant materially contributed to the defamatory aspect of the information. *Id.*; *see La Liberte v. Reid*, 966 F.3d 79, 89 (2d Cir. 2020) (applying liability when defendant was responsible for the content's defamatory portion). Our approach is the same. *See Nemet*, 591 F.3d at 255-60 (discussing twenty allegedly defamatory posts in separate groups based on

the defendant's involvement with the posts before concluding that the plaintiff failed to show that defendant "was responsible for the creation or development of the allegedly defamatory content at issue").

Plaintiffs have alleged enough facts to show that Public Data's own actions contributed in a material way to what made the content at issue in Counts Two and Four inaccurate and thus improper. Plaintiff McBride claims that the report Public Data sent to his potential employer was inaccurate because it omitted or summarized information in a way that made it misleading. And, from Plaintiffs' allegations, it is plausible that McBride's report was misleading based on Public Data's own actions.

As a general matter, Plaintiffs claim that Public Data handles criminal matters by "strip[ping] out or suppress[ing] all identifying information relating to the charges . . . [including] dispositions" and that it then "replace[s] this information with [its] own internally created summaries of the charges, bereft of any detail." J.A. 30. As to McBride's report specifically, Plaintiffs allege that the report "suggest[ed] that Plaintiff McBride had been convicted of each of the offenses listed," but that "the report was inaccurate and incomplete as it failed to indicate that several of the offenses listed had been nolle prossed." J.A. 37-38. These allegations, and all reasonable inferences, sufficiently allege that the inaccuracies in McBride's report resulted from Public Data's stripping out the nolle prosequi disposition for McBride's charges and adding in its own misleading summaries.

Thus, on Plaintiffs' allegations, Public Data's summaries and omissions materially contribute to the report's impropriety. They are not merely an exercise

of traditional editorial functions. When *Zeran* proclaimed that § 230(c)(1) barred claims based on a defendant's exercise of traditional editorial functions, it also provided a suggestive list including "deciding whether to publish, withdraw, postpone or alter content." *Zeran*, 129 F.3d at 330. Of course, in a sense, omitting the criminal charge dispositions is just "altering" their content, as is creating new charge summaries. Yet, *Zeran*'s list of protected functions must be read in its context, and that context cabins that list to merely "editorial" functions. It cannot be stretched to include actions that go beyond formatting or procedural alterations and change the substance of the content altered.[25] An interactive service provider becomes an information content provider whenever their actions cross the line into substantively altering the content at issue in ways that make it unlawful.[26]

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[25] An extreme example helps illustrate this point. Take a writer of a ransom note who cuts letters out of a magazine to list his demands. That writer might be said to be "altering" content. Yet, the note's writer is hardly acting as an "editor" of the magazine. Instead, he has substantively changed the magazine's content and transformed it from benign information about sports or entertainment into threatening information about bags of cash and ultimatums.

[26] Drawing this line here is reinforced by another contextual reading of *Zeran*'s list of traditional editorial functions. After listing some traditional editorial functions for which liability is barred, *Zeran* then said that § 230(c)(1) prevents suits that "cast [the defendant] in the same position as the party who originally posted the offensive messages." *Id.* at 333. *Zeran* saw § 230(c)(1) as vicarious liability protection that could not be used as a shield when the offensiveness of the message comes from the defendant themselves rather than a third party. *See id.*; *see also Nemet*, 591 F.3d at 254 ("Congress thus established a general rule that providers of interactive computer services are liable . . . for speech

Applying these principles to Counts Two and Four, Public Data—according to Plaintiffs' allegations—has materially contributed to what makes the content at issue unlawful. The content relevant to Counts Two and Four is only unlawful because it is inaccurate. But, as alleged, the content provided to Public Data about McBride was not inaccurate. Instead, through Public Data's actions, the records were changed so as to introduce the inaccuracies. Public Data thus made substantive changes to the records' content that materially contributed to the records' unlawfulness. That makes Public Data an information content provider, under the allegations, for the information relevant to Counts Two and Four, meaning that it is not entitled to § 230(c)(1) protection for those claims.

* * *

Section 230(c)(1) provides protection to interactive computer services. *Zeran*, 129 F.3d at 331. But it does not insulate a company from liability for all conduct that happens to be transmitted through the internet. Instead, protection under § 230(c)(1) extends only to bar certain claims, in specific circumstances, against particular types of parties. Here, the district court erred by finding that § 230(c)(1) barred all counts asserted against Public Data. To the contrary, on the facts as alleged, it does not apply to any of them. Counts One and Three are not barred because they do

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that is properly attributable to them"); *cf. La Liberte*, 966 F.3d at 89 (holding that there is no § 230 immunity for a defendant who posted a third-party's photo, but who supplied her own defamatory commentary to it). So we may not read the traditional editorial functions listed in *Zeran* so broadly as to include a defendant's substantive alterations that introduced the inaccuracy or falsity at issue in the claim.

not seek to hold Public Data liable as a publisher under the provision. Counts Two and Four are not barred because Public Data is itself an information content provider for the information relevant to those counts.

REVERSED AND REMANDED

JOURNAL PAPER: *READING SECTION 230 AS WRITTEN* BY PROF. ADAM CANDEBUB

*Adam Candeub**

Section 230 of the Communications Decency Act gives internet platforms legal protection for content moderation. Even though the statute is 25 years old, courts have not clearly stated which provision within section 230 protects content moderation. Some say section 230(c)(1), others section 230(c)(2). But section 230(c)(1) speaks only to liability arising from third-party content, codifying common carriers' liability protection for delivering messages.

And while section 230(c)(2) addresses content moderation, its protections extend only to content moderation involving certain types of speech. All content moderation decisions for reasons not specified in section 230(c)(2), such as based on material being considered "hate speech," "disinformation," or "incitement," stand outside section 230's protections. More important, because section 230(c)(2) regulates both First Amendment protected and unprotected speech, it does raise constitutional concerns, but they may not be fatal.

[. . .]

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INTRODUCTION

Those who want the dominant internet platforms to impose greater restrictions on expression often claim, "Freedom of speech is not freedom of reach."[1] The slogan asks social media platforms to refrain from amplifying hurtful, threatening, or otherwise injurious speech. The slogan's supporters do not appear to call for censorship—but only for social media to limit the ability to spread ideas they find dangerous or objectionable through the platforms' content moderation and promotion policies.

An alternative vision posits that democratic deliberation needs an agora, a place where citizens can discuss views in a free and open way, approaching each other as equals. Social media is, as the Supreme Court has declared, the "public square"[2] and therefore should afford a place for all citizens to engage in political debate with a relatively equal opportunity for reach. Dominant social media firms that have the power to control public discourse should refrain from censoring controversial or threatening ideas. Otherwise, political discussion devolves into something analogous to Karl Wittfogel's "beggar's democracy," in which we

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[1] *See, e.g.*, Renee Diresta, Free Speech Is Not the Same As Free Reach, WIRED (Aug. 30, 2018), https://tinyurl.com/ysfcrddx; Andrew Pulver, Sacha Baron Cohen: Facebook Would Have Let Hitler Buy Ads for 'Final Solution,' THE GUARDIAN (Nov. 22, 2019), https://tinyurl.com/ec33e3ed.

[2] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017) ("Social media . . . are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.").

are free to discuss only those matters about which the Big Tech oligarchs care little.[3]

Section 230 of the Communications Decency Act limits platforms' legal liability for the content moderation policies they impose. How courts apply this provision will advance one, or the other, vision of the internet.

Even though the statute is 25 years old, courts disagree as to which provision in section 230 protects content moderation. Some conclude that section 230 (c)(1) provides such protection.[4] But section 230(c)(1) speaks only to liability arising from third-party content, codifying common carriers' liability protection for the messages they deliver. Its text says nothing about platforms' <u>own</u> moderation. In his statement concerning a denial of certiorari, the only Supreme Court statement on section 230 to date, Justice Thomas has recognized how interpreting section 230 to cover content moderation departs from the statutory text.[5]

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[3] KARL WITTFOGEL, ORIENTAL DESPOTISM, A COMPARATIVE STUDY OF TOTAL POWER 125-26 (1957).

[4] *See, e.g., Levitt v. Yelp! Inc.*, No. C-10-1321 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014); *see* ERIC GOLDMAN, INTERNET LAW: CASES & MATERIALS 298 (2021), https://perma.cc/KVX9-7ENN

[5] *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 16 (2020) (Thomas, J., respecting the denial of certiorari) ("Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content. Section 230(c)(1) protects a company from publisher liability only when content is 'provided by another information content provider.' . . . But from the beginning, courts have held that § 230(c)(1) protects the 'exercise of a publisher's traditional

Rather, section 230(c)(2) protects content moderation, but only content moderation involving speech of the types it lists. As is argued in Interpreting 47 U.S.C. § 230(c)(2) (published in this volume),[6] this list should be read under the *ejusdem generis* canon of statutory construction and refers to categories of speech considered regulable in 1996, the year Congress wrote the statute. Restrictions based on justifications not specified in section 230(c)(2)—such as that certain posts constitute "hate speech," "disinformation," or "incitement" which do not reach the level of criminal behavior—stand outside section 230's protections.

Reading section 230(c)(2) as written poses a question that courts have ignored, largely because most content moderation cases have been decided under section 230(c)(1): Is Section 230(c)(2) an unconstitutional, content-based regulation of speech? This Article provides some tentative answers to that question.

The article proceeds as follows. Part I describes the well-known history that led to section 230's passage. Drawing on this history, as well as a textual analysis, Part II sets forth the most natural understanding of sections 230(c)(1) and (c)(2): the former limits platform liability for third party content and the latter limits platform liability for content moderation. This section critiques courts that have expanded section 230(c)(1) to include content moderation protection. Part III examines the relationship between sections 230(c)(1) and (f)(3). Parts IV and V set forth

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editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.'").

[6] Adam Candeub & Eugene Volokh, Interpreting 47 U.S.C. § 230 (c)(2), 1 J. FREE SPEECH L. 175 (2021).

textual analyses of sections 230(c)(1) and (c)(2) respectively. (Part V briefly summarizes the analysis from Interpreting 47 U.S.C. § 230(c)(2).) Part VI analyzes the constitutionality of section 230(c)(2), first under a non-*ejusdem generis* reading and then an *ejusdem generis* reading. Given precedent's lack of clarity, the Article concludes tentatively that even in the unlikely event that section 230 is ruled unconstitutional, severability would be the best remedy.

I. Section 230 and Congressional Purpose

Congress passed section 230 as part of the Communications Decency Act of 1996 (CDA), an effort to control pornography and other non-family-friendly material on the internet. As opposed to the outright speech bans in the CDA that were struck down in *Reno v. ACLU*,[7] section 230 aimed to empower parents to control internet content. It did so, in part, by overruling a New York state case, *Stratton Oakmont v. Prodigy*.[8] Early platforms, such as Prodigy and its numerous bulletin boards, claimed they could not offer porn-free environments because of *Stratton Oakmont*. Developing the common law of defamation, the court had ruled that Prodigy was a "publisher" for all statements on its bulletin board (and thus potentially liable for those statements) because it content-moderated posts to render its forum "family friendly."

Stratton Oakmont's legal conclusion created a Hobson's choice for platforms' content moderation: either moderate content and face liability for all posts

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[7] *Reno v. ACLU*, 521 U.S. 844, 859 n.25 (1997).

[8] 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

on your bulletin board, or don't moderate and have posts filled with obscenity or naked images. That legal rule was hardly an incentive for platforms to create family-friendly online environments.

Congress came to the rescue with section 230(c)(2),[9] which states that all internet platforms "shall not be held liable" for editing to remove content that they consider to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[10] Congress eliminated the Hobson's choice: when platforms content-moderate for these specific reasons, they would no longer be held liable for everything on their site.

Notice what section 230's text does not do: give platforms protection for content moderation for any reason not specified in section 230(c)(2). That would

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[9] 47 U.S.C. § 230(c)(2); 141 Cong. Rec. S8310-03 (daily ed. June 14, 1995) (statement of Sen. Coats) ("I want to be sure that the intent of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable. . . . Am I further correct that the subsection (f)(4) defense is intended to protect companies from being put in such a catch-22 position? If they try to comply with this section by preventing or removing objectionable material, we don't intend that a court could hold that this is assertion of editorial content control, such that the company must be treated under the high standard of a publisher for the purposes of offenses such as libel."); 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox, referring to *Stratton* decision as "backward"); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte, criticizing *Stratton* decision).

[10] The question of whether "otherwise objectionable" should be understood as an open-ended term is examined in Candeub & Volokh, *supra* note 6.

include "disinformation," "hate speech," "misgendering," "religious hatred," or for that matter the traffic prioritizations the platforms perform to give people content they want. Yet, some courts have blessed such an untextual expansion,[11] which is only possible under an all-inclusive reading of "otherwise objectionable" that seems implausible.[12]

Not only is the text silent about content moderation for such a broad range of reasons, but the legislative history is too. Representatives Christopher Cox and Ron Wyden floated a bill, titled "Internet Freedom and Family Empowerment Act,"[13] that became section 230.[14] It was an alternative to Senator J. James Exon's bill that criminalized the transmission of indecent material to minors, which was codified in section 223.[15] Both became part of the Communications

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[11] *See, e.g.*, *Fed. Agency of News LLC, et al. v. Facebook, Inc.*, 395 F. Supp. 3d 1295 (N.D. Cal. 2019) (dismissing discrimination claims under Title II and 42 U.S.C. § 1983); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d at 1095-96 (N.D. Cal. 2015) (holding that section 230 bars discrimination claims).

[12] *See* Candeub & Volokh, *supra* note 6.

[13] Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995-96).

[14] Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 69 (1996).

[15] *Id.*; Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 316 (2011); 141 Cong. Rec. H8468-69 (daily ed. Aug. 4, 1995). The Supreme Court declared unconstitutional Senator Exon's part of the CDA. *See Ashcroft v. ACLU*, 535 U.S. 564, 564 (2002) ("This Court found that the Communications Decency Act of 1996 (CDA)—Congress' first attempt to protect children from exposure

Decency Act, but the Supreme Court struck down Senator Exon's portion, leaving section 230.[16]

In comments on the House floor, Representative Cox explained that section 230 would reverse *Stratton Oakmont* and advance the regulatory goal of allowing families greater power to control online content, protecting them from "offensive material, some things in the bookstore, if you will that our children ought not to see. . . . I want to make sure that my children have access to this future and that I do not have to worry about what they might running into online. I would like to keep that out of my house and off of my computer. How should we do this?"[17] He stated that "[w]e want to encourage [internet services] . . . to everything possible for us, the customer, to help us control,

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to pornographic material on the Internet—ran afoul of the First Amendment in its regulation of indecent transmissions and the display of patently offensive material. That conclusion was based, in part, on the crucial consideration that the CDA's breadth was wholly unprecedented.").

[16] *Reno v. ACLU*, 521 U.S. 844, 859 n.24 (1997) ("Some Members of the House of Representatives opposed the Exon Amendment because they thought it 'possible for our parents now to childproof the family computer with these products available in the private sector.' They also thought the Senate's approach would 'involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected.' These Members offered an amendment intended as a substitute for the Exon Amendment, but instead enacted as an additional section of the Act entitled 'Online Family Empowerment.'").

[17] 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

at the portals of our computer, at the front door of our house, what comes in and what our children see."[18]

In fact, the comments in the Congressional record from every supporting legislator—and it received strong bipartisan support—reveal an understanding that the Online Family Empowerment amendment, now codified as section 230, was a non-regulatory approach to protecting children from pornography and other material perceived to be harmful that the federal government already regulated.[19]

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[18] *Id.* at H8470.

[19] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden) ("We are all against smut and pornography. . . . [rather] than give our Government the power to keep offensive material out the hands of children . . . We have the opportunity to build a 21st century policy for the Internet employing . . . the private sector"); 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Danner) ("I strongly support . . . address[ing] the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornography materials available on the Internet"); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. White) ("I have got small children at home. . . . I want to be sure can protect them from the wrong influences on the Internet."); *id.* (statement of Rep. Lofgren) ("[The Senate approach] will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment"); *id.* (statement of Rep. Goodlatte) ("Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet"); *id.* (statement of Rep. Markey) (supporting the amendment because it "deals with the content concerns which the gentlemen from Oregon and California have raised"); *id.* (statement of Rep. Fields) (congratulating the legislators for "this fine work").

II. The Relationship Between Sections 230(C)(1) & 230(C)(2)

Both section 230's text and congressional intent target a narrow set of harms: pornography, indecency, and other material considered regulable at the time. This understanding undermines the claim that section 230 claims must be read "broadly" as a seminal charter of online internet immunity carefully considered by Congress. Certain legislators, decades later, may make claims to that effect.[20] And some commentators have echoed these post hoc claims.[21] But, as the Supreme

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[20] Ron Wyden, *I Wrote This Law to Protect Free Speech. Now Trump Wants to Revoke It*, CNN BUSINESS PERSPECTIVES (June 9, 2020), https://tinylink.net/4KNX2 ("Republican Congressman Chris Cox and I wrote Section 230 in 1996 to give up-and-coming tech companies a sword and a shield, and to foster free speech and innovation online. Essentially, 230 says that users, not the website that hosts their content, are the ones responsible for what they post, whether on Facebook or in the comments section of a news article. That's what I call the shield. But it also gave companies a sword so that they can take down offensive content, lies and slime—the stuff that may be protected by the First Amendment but that most people do not want to experience online."); JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 64 (2019) (quoting a June 2017 interview with Ron Wyden, in which he says, "We really were interested in protecting the platforms from being held liable for the content posted on their sites and being sued out of existence").

[21] As an example, Jeff Kosseff's THE TWENTY-SIX WORDS THAT CREATED THE INTERNET recounts the legislative history of section 230, arguing that its motivation was to counter pornography and duly footnoting the legislative history. However, when the book goes on to claim that Section 230 sought to protect online actors from crushing liability, it cites to post-enactment claims by legislators. *See id.* ch. 3 ("Chris and Ron Do Lunch") and accompanying footnotes.

Court says, "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."[22]

While section 230(c)(2) dominated the legislative discussion, section 230(c)(1) has dominated judicial decisions.[23] Section 230(c)(1) eliminates internet platforms' "publisher or speaker" liability for the third-party user content they post. It states, "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."[24] In short, it treats internet platforms as conduits, such as the telephone or telegraph companies. Unlike publishers, these entities do not face strict liability under common law for the content they carry.

And section 230(c)(1), though not the focus of legislative attention as evidenced from the legislative history, makes good sense as written. Early platforms, such as AOL and Prodigy, would have been crushed with the legal liability of having to review all posts. Section 230(c)(1) said they were not liable for third party content—and Section 230(c)(2) said they would not become so even if they edited such content for certain, enumerated reasons. Thus, Section 230(c)(1) ratified and expanded on *Cubby v. Compuserve*, an

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22 *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011).

23 *See* Elizabeth Banker, Internet Ass'n, *A Review of Section 230's Meaning & Application Based on More Than 500 Cases* (July 27, 2020), https:perma.cc/4B7B-U88S.

24 47 U.S.C. § 230(c)(1).

early internet opinion that ruled that because Compuserve did not moderate or edit content, Compuserve had no liability for user posts.[25]

In a manner roughly analogous to the liability protections extended to conduits and common carriers, such as telegraphs and telephones,[26] section 230(c)(1)

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[25] *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

[26] Telegraph companies generally had no liability for the statements they transmitted, but they could be liable if they acted with malice or with knowledge that the sender was not privileged to make the statement. *See* RESTATEMENT (SECOND) OF TORTS § 612(2); *Mason v. Western Union Tel. Co.*, 125 Cal. Rptr. 53, 56 (1975); *Figari v. New York Tel. Co.*, 303 N.Y.S.2d 245, 259 (1969); *WesternUnion Tel. Co. v. Lesesne*, 182 F.2d 135, 137 (4th Cir. 1950); *Von Meysenbug v. Western Union Tel. Co.*, 54 F. Supp. 100, 101 (S.D. Fla. 1946); *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539 (1st Cir. 1940); *Klein v. Western Union Tel. Co.*, 13 N.Y.S.2d 441, 443 (App. Div. 1939); *Peterson v. W. Union Tel. Co.*, 65 Minn. 18, 23 (1896); Annotation, *Liability of Telegraph or Telephone Company for Transmitting or Permitting Transmission of Libelous or Slanderous Messages*, 91 A.L.R.3d 1015 (1979).

It is often said that telephone companies have absolute immunity. Cases support this claim, *see Anderson v. New York Tel. Co.*, 320 N.E.2d 647 (1974), and the Restatement of Torts also reaches this conclusion. RESTATEMENT (SECOND) OF TORTS § 581 cmt. b (1976). *Anderson* reasons that because telephone companies have an obligation to carry all messages, they should not be liable for them. But common carriage law predating *Anderson* and comprehensive public utility regulation took a different approach, reasoning that, because companies have the right to refuse unlawful messages, they are liable for their knowing transmission. *Godwin v. Carolina Tel. & Tel. Co.*, 136 N.C. 258, 48 S.E. 636, 637 (1904); Application of Manfredonio, 183 Misc. 770, 770-71, 52 N.Y.S.2d 392, 392 (Sup. Ct. 1944); *Lesesne v. Willingham*, 83 F. Supp. 918, 924 (E.D.S.C. 1949); Bruce Wyman, *Illegality As an Excuse for Refusal of Public Service*, 23 HARV. L. REV. 577,

removes liability for causes of action that include, in their elements, treating the "interactive computer service," *i.e.,* platform, as a publisher or speaker of another's words. The classic example is defamation: A Facebook user posts a defamatory statement, and the defamed plaintiff sues Facebook on the theory that, by allowing the post to stay up on its site, Facebook acted as a publisher of the post. The plaintiff's cause of action would include an element that treats the platform as "a publisher or speaker" of the user's words. Section 230(c)(1) would bar the action against Facebook, leaving the only action available to the plaintiff to be one against the user. Section 230(c)(1) thereby allowed AOL and Prodigy to run bulletin boards without the potential liability risk that hosting millions of user generated posts presents.

Taken together, both section 230's text and legislative history point to the same interpretation: Section 230(c)(1) allows platforms to accept posts from their users without liability for such speech, *i.e.*, the situation in *Cubby*. It generally shields platforms for liability created by speech that the platform hosts. Section 230(c)(2), in turn, protects platforms that want to content-moderate, giving them protection when removing, editing, or blocking third-party, user-generated content for certain enumerated reasons:[27]

584-85 (1910); *see also O'Brien v. W.U. Tel. Co.*, 113 F.2d 539, 543 (1st Cir. 1940) (so suggesting).

[27] This view of section 230(c)(1) has been explored in greater detail elsewhere. *See* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230,* 22 YALE J. L. & TECH. 391, 429 (2020); Edward Lee, *Moderating*

Section	Legal Protection
230(c)(1)	No liability as publishers based on third-party posts
230(c)(2)	No liability for content-moderating obscene, lewd, lascivious, filthy, excessively violent, and harassing content, and similar content
Not covered	No immunity for liability (if some cause of action so provides) for content-moderating types of speech not mentioned in 230(c)(2)

Some courts have taken a different approach, holding that section 230 bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content."[28] That language has been quoted extensively.[29]

The language comes from the influential *Zeran* case, but many courts forget the immediately preceding language. To quote *Zeran* fully, section 230

> creates a federal immunity to any cause of action that would make service providers liable for information originating with a

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Content Moderation: A Framework for Nonpartisanship in Online Governance, 70 AM. U. L. REV. 913, 945-62 (2021).

[28] *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

[29] According to a Westlaw search, at least 98 cases quote the language directly from *Zeran*. That count probably underestimates the influence of the language, because the quotation appears in other cases that are themselves quoted.

> third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.[30]

The "traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" are examples of third-party content decisions that section 230 protects. It does not protect platform as to their own editorial decisions or judgments.

When quoted out of context, the "its" would seem to suggest that section 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."

Numerous courts mischaracterize the *Zeran* language and interpret section 230 as immunizing platforms' own editorial decisions. To take a typical example, in *Levitt v. Yelp!*, the plaintiff alleged that Yelp! "manipulate[d] . . . review pages—by removing certain reviews and publishing others or changing their order of appearance."[31] The *Levitt* plaintiffs argued that Yelp!'s behavior constituted unfair or

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30 *Barrett v. Rosenthal*, 146 P.3d 510, 516 (Cal. 2006) (quoting *Zeran*, 129 F.3d at 330) (emphasis added).

31 *Levitt v. Yelp! Inc.*, No. C-10-1321 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), aff'd, 765 F.3d 1123 (9th Cir. 2014).

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 section 230(c)(1) immunized Yelp!'s conduct, supporting its conclusion by quoting the "traditional editorial functions" language of *Zeran*.[32] 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.

The *Levitt* court's reading of section 230(c)(1) would protect platforms from contract, consumer fraud or even civil rights claims, freeing them to discriminate against certain users and throw them off their platforms. Courts are thus relying upon Section 230 to immunize platforms for their own speech and actions—from contract liability with their own users,[33]

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[32] *Id.*

[33] *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016) (stressing that "the immunity bestowed on interactive computers service providers by § 230(c) prohibits all of Plaintiff's claims [including contract claims] against Facebook"), *aff'd*, 700 F. App'x 588 (9th Cir. 2017); *Lancaster v. Alphabet Inc.*, No. 15-CV-05299-HSG, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016) (finding that, where "plaintiff[s] asserting breach of the implied covenant of good faith and fair dealing sounding in contract," "CDA precludes any claim seeking to hold Defendants liable for

their own consumer fraud,[34] their own violation of users' civil rights,[35] and even assisting in terrorism.[36]

The only statement by a Supreme Court Justice on section 230 recognized the error of reading section 230(c)(1) to include a platform's "editorial functions." In his statement respecting the denial of certiorari, Justice Thomas strongly criticized "construing § 230 (c)(1) to protect any decision to edit or remove content." He realized that, for instance, "[w]ith no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content."[37]

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removing videos from Plaintiff's YouTube channel"); *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1307-08 (N.D. Cal. 2019) (asserting that CDA "immunizes Facebook from . . . the fourth cause of action for breach of contract [between plaintiff and Facebook]").

[34] *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 836 (2002) (interpreting that "Appellants' UCL cause of action is based upon . . . [the claim] that eBay misrepresented the forged collectibles offered for sale in its auctions").

[35] *Sikhs for Justice "SFJ", Inc.*, 144 F. Supp. 3d 1088, 1094-95 (N.D. Cal. 2015).

[36] *Force v. Facebook, Inc.*, 934 F.3d 53, 57 (2d Cir. 2019).

[37] *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 17 (2020). Goldman & Miers collect cases "show[ing] that Internet services have won essentially all of the lawsuits to date brought by terminated/removed users. Accordingly, Internet services currently have unrestricted legal freedom to make termination/removal decisions." Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 192 (2020). It is worth observing that most of the removals in the dataset have been under section 230 (c)(1), supporting Justice Thomas's concern that this provision

Similarly, in a recent statement, the Ninth Circuit in *Lemmon v. Snap* made clear that section 230(c)(1) only protects against claims that include speaking or publishing third party content and does not protect against claims merely involving a platform's "editorial functions." Clarifying the applicable law, the *Lemmon* court stated that section 230 only protects a defendant internet platform if the claims seek to treat the platform, "under a state law cause of action, as a publisher or speaker . . . of information provided by another information content provider."[38] This makes clear that section 230(c)(1) only applies to causes of action which contain as elements publishing or speaking third party information, such as defamation and criminal threat.

Last, reading section 230(c)(1) to protect content moderation reads section 230(c)(2) out of the statute. If section 230(c)(1) protects "editorial functions," that includes the removals and content moderation that

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has been overread; the text is clear that section 230(c)(2) controls removals. Judges across the country are expressing misgiving similar to Justice Thomas's. *See In re Facebook, Inc.*, __ S.W.3d __, 2021 WL 2603687, at *7 (Tex. June 25, 2021) ("We agree that Justice Thomas's recent writing lays out a plausible reading of section 230's text."); *Force v. Facebook, Inc.*, 934 F.3d 53, 77 (2d Cir. 2019) (Katzman, C.J., dissenting) ("Instead, we today extend a provision that was designed to encourage computer service providers to shield minors from obscene material so that it now immunizes those same providers for allegedly connecting terrorists to one another. Neither the impetus for nor the text of § 230(c)(1) requires such a result.").

[38] *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091 (9th Cir. 2021) (emphasis added) (quoting *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019), and *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009)).

section 230(c)(2) addresses. Reading one provision of a statute to render another superfluous violates the canon against surplusage, a basic rule of statutory construction. As the Supreme Court has held, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[39] The Court emphasizes that the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme."[40] Here, the expansive *Zeran* reading of section 230(c)(1) renders superfluous section 230(c)(2), the immediately succeeding provision. Justice Thomas has recognized this point.[41]

III. The Relationship Between Sections 230(C)(1) & 230(F)(3)

Section 230(f)(3) as well as section 230(c)(2) constrains the scope of section 230(c)(1), a point Justice Thomas recognized in *Malwarebytes*.[42] But courts have not carefully explained the relationship between these sections, as the recent *Gonzales* case (discussed below) indicates. A proper understanding of section

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[39] *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

[40] *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013).

[41] *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 17 (2020) (Thomas, J., respecting the denial of certiorari) (citing *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, *3 (M.D. Fla. Feb. 8, 2017) (rejecting the interpretation that § 230(c)(1) protects removal decisions because it would "swallow[] the more specific immunity in (c)(2)").

[42] *Id.* at 16-19.

230(f)(3) would limit a platform's protections under section (c)(1) against liability for third-party content, although concededly the statutory text does not define a sharp line between the provisions.

Section 230(f)(3) defines an "internet content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information."[43] The term "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[44] Section 230(c)(1) only protects "interactive computer services," and internet content providers do not receive section 230(c)(1) protection. Putting these provisions together, if an interactive computer service creates "in whole or part" content then it becomes an internet content provider, at least with respect to that content—and stands outside section 230(c)(1) protection.

While the mere deletion of a comment here or there likely does not constitute content creation or development, some types of content moderation do. Moderating and editing which, pursuant to a distinct plan or policy, change or shape the nature of online discussion likely cross the line into content creation. As a starting principle, an anthology editor does create or develop content when he selects certain

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[43] 47 U.S.C. § 230(f)(3).

[44] 47 U.S.C. § 230(f)(2).

works to publish or promote. Similarly, an editor that moderates content pursuant to a clear plan or bias creates content. For example, Thomas Bowdler developed content when he moderated the content of Shakespeare's plays to make them more acceptable to Victorian audiences.

Analogously, imposing complex content moderation regimes for acceptable posting very well might be closer to bowdlerizing than to deleting the odd comment. This would be particularly the case if the content moderation regime had biases that promoted or retarded certain types of discussions even in subtle ways—as social media critics allege. And, if so, then the platforms, when they engage in content moderation, are internet content providers that lack section 230(c)(2) protections because they are content creators under section 230(f)(3).

But the line between editing a few comments and Thomas Bowdler is not clear, and very few courts have attempted to draw the line. Courts have proposed differing tests, most influentially in the Ninth Circuit in *Fair Housing Council of San Fernando Valley v. Roommates.Com*. There, the court found that "[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information."[45] The court reasoned that, by requiring information from users that other users could use to make discriminatory judgments, the platform became a content creator and potentially liable under anti-discrimination laws. Other courts reason that a platform that

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[45] 521 F.3d 1157, 1166 (9th Cir. 2008).

makes a "material contribution" to online material becomes an internet content provider, leaving much vagueness as to how to define "material contribution."[46]

A recent case, *Gonzalez v. Google LLC,*[47] demonstrates the difficulty—and indeed perils—of drawing the line. The case involved allegations that internet platforms contributed to or promoted terrorist activity in violation of the Anti-Terrorism Act (ATA).[48] Plaintiffs alleged that "Google uses computer algorithms to match and suggest content to users based upon their viewing history. . . . [I]n this way, Google has 'recommended ISIS videos to users' and enabled users to 'locate other videos and accounts related to ISIS,' and that by doing so, Google assists ISIS in spreading its message."[49]

In *Gonzales*, over a vigorous and insightful dissent, the court distinguished *Roommates* on the grounds that "The Roommates website did not employ 'neutral tools'; it required users to input discriminatory content as a prerequisite to accessing its tenant-landlord matching service."[50] Rather, in *Gonzales*,

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[46] *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016).

[47] 2 F.4th 871 (9th Cir. 2021).

[48] 18 U.S.C. § 2333.

[49] *Gonzalez*, 2 F.4th at 881.

[50] *Id.* at 894.

"the algorithms do not treat ISIS-created content differently than any other third-party created content, and thus are entitled to § 230 immunity."[51]

This claim is strange. Platforms use algorithms to allow them to selectively distinguish, with ever greater power and specificity, different content for different users. If users type in searches of type X, they will receive promoted content of type X; if users type in searches of type Y, they will receive promoted content of type Y. The business model of these platforms requires them to identify different preferences of consumers and precisely match them to (i) content that will keep their attention focused on the platform and (ii) advertisers interested in sending them advertisements.

The problem with the *Gonzales* court's reading is that it is far from clear that there are "neutral" algorithms or even that the term is coherent. The court never defines "neutrality" and asserts, without justification, that "algorithms do not treat ISIS-created content differently than any other third-party created content, and thus are entitled to § 230 immunity." But, of course, platforms treat different content differently. That is their *raison d'etre*, as the more precise distinctions among users and their content leads to more effective matching for advertisers.

Indeed, Big Tech's defenders, at least when arguing against non-discrimination requirements, use this evident fact to argue that social media "neutrality" is impossible. For instance, Kir Nuthi explains that "[n]ondiscrimination is a central feature of traditional

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51 *Id.*

common carriers, but it is not a feature of social media. Unlike the railroads and communications companies of the Gilded Age, social media relies on the ability to contextualize and discriminate between different content."[52]

Section 230(f)(2) implies there is a point at which content moderation becomes content creation. The provision does not state where that point is, and courts have yet to provide useful tests to locate it. While this article does not suggest a test, a textual reading of section 230 must not read section 230(f)(2) out of the statute, and must recognize that the interactive computer services that cross a line into content provision lose their protection as to the content that they provide.

IV. Interpreting Section 230(C)(1)

Section 230(c)(1) states:

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.[53]

The first appellate decision interpreting this provision, *Zeran v. AOL*,[54] read the word "publisher" to include what the common law would consider "distributor" liability as well as "publisher" liability. Its

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[52] Kir Nuthi, *Conservatives Want Common Carriage. They're Not Going to Like It.*, TECHDIRT (June 8, 2021), https://tinyurl.com/32sdp82r.

[53] 47 U.S.C. § 230(c)(1).

[54] *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

opinion was extremely influential and, with perhaps one exception,[55] the courts of appeals have followed *Zeran*, conceding what can only be viewed as a first mover advantage. But as the recent statement from Justice Thomas points out, it is far from clear that this interpretation is correct.

At common law, a person is subject to "publisher" liability if he makes "an affirmative act of publication to a third party."[56] This "affirmative act requirement" ordinarily "depict[s] the defendant as part of the initial making or publishing of a statement."[57] A "distributor," under common law, in contrast, is "one who only delivers or transmits defamatory matter published by a third person."[58]

Publishers or speakers are subject to a higher liability standard, traditionally strict liability, although that standard is rarely imposed given the constitutional limits on libel law set forth in *New York Times v. Sullivan* and *Gertz*.[59] By contrast, distributors, which

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[55] *Chicago Lawyers' Committee For Civil Rights Under Law v. Craigslist*, 519 F.3d 666, 668-669 (7th Cir. 2008) ("Subsection (c)(1) does not mention 'immunity' or any synonym. Our opinion in *Doe* explains why § 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts").

[56] Benjamin C. Zipursky, *Online Defamation, Legal Concepts, and the Good Samaritan*, 51 VAL. U. L. REV. 1, 18 (2016); RESTATEMENT (SECOND) OF TORTS § 558 (1977) (listing a statement and publication as separate elements of defamation).

[57] Zipursky, *supra* note 56, at 19.

[58] RESTATEMENT (SECOND) OF TORTS § 581.

[59] *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON

do not exercise editorial control, face liability only when they have knowledge or constructive knowledge that the content they are transmitting is illegal.[60]

Following this common law understanding, the word "publisher" is ambiguous because it sometimes references initial publication and other times subsequent distribution of content.[61] Because a "distributor" can be thought of as a type of "publisher," the word "publisher" has developed a generic sense, referring to publishers and distributors, as well as a specific sense, referring to the "initial" maker of the statement.

It is not clear whether Congress intended the generic or the specific meaning of publisher. Like the term "congressman," which refers to both senators and representatives, but usually refers to representatives, "publisher" refers both to those who "actually publish" and those who republish or distribute.

Recognizing this textual ambiguity, Justice Thomas has written that "To be sure, recognizing some overlap between publishers and distributors is not unheard of. Sources sometimes use language that arguably blurs the distinction between publishers and distributors. One source respectively refers to them as 'primary

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TORTS § 113, at 810-11 (5th ed. 1984); *compare* RESTATEMENT (SECOND) OF TORTS § 581(1) *with New York Times Co. v. Sullivan*, 376 US 254 (1964), *and Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

60 *See generally Smith v. California*, 361 U.S. 147, 152-54 (1959).

61 *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 578 ("Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.").

publishers' and 'secondary publishers or disseminators,' explaining that distributors can be 'charged with publication.'"[62]

Nonetheless, because a distributor is a type of publisher, the *Zeran* court ruled that section 230(c)(1) protects against both types of liability. And the results of that decision have been dramatic—essentially eliminating any platform responsibility for the content they carry.

The *Zeran* court's textual reasoning is not solid. It simply states that distributors are a type of publisher and assumes Congress intended the generic, not specific, meaning. It ignores textual evidence in the statute that points in the opposite direction: If Congress wanted to eliminate both publisher and distributor liability, it would have created a categorical immunity in § 230(c)(1), stating that "No provider shall be held liable for information provided by a third party" and would not have used language that explicitly limited its protection to speaking and publishing third-party content. In fact, when Congress wants to use categorical language to block liability on any theory (and not just on a speaker-or-publisher theory), it does so—using such categorical language in the very next subsection, Section 230(c)(2).[63]

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62 *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15 (2020) (Thomas, J., respecting denial of certiorari) (quoting *Keeton et al.*, *supra* note 59, at 799, 803).

63 "No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy,

Second, as Justice Thomas recently observed in a statement respecting the denial of certiorari, "Congress expressly imposed distributor liability in the very same Act that included § 230. Section 502 of the Communications Decency Act makes it a crime to 'knowingly . . . display' obscene material to children, even if a third party created that content. This section is enforceable by civil remedy. It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability in the very Act in which Congress explicitly imposed it."[64] If the Act follows consistent usage throughout the statute, section 230 would not affect distributor liability.

The *Zeran* court also relied on policy arguments, worrying that,

> If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of

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excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2).

64 *Enigma Software Grp.*, 141 S. Ct. at 15 (emphasis in original) (citing 47 U.S.C. § 223(d)).

> postings on interactive computer services would create an impossible burden in the Internet context.[65]

This policy concern may have had some force in 1996. However, in today's world of AI and automated takedowns—and the large platforms' moderating teams that number well into the tens of thousands—the concern seems misplaced. And imposing distributor liability on mid-sized or small web firms would not force them to hire armies of staff to review allegations of libel or similar unlawfulness: Rather, as with data breach obligations and other cybersecurity duties, reasonable behavior for dealing with notices could be scaled to firm size and resources. Under current law, the myriad internet data breach obligations found in statutes such as HIPAA[66] and title V of the Gramm-Leach-Bliley Act have premised and scaled liability for unlawful behavior on the capacities of small firms to follow best practices.[67] While this is not the forum

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65 *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

66 *Fero v. Excellus Health Plan, Inc.*, 236 F. Supp. 3d 735, 763 (W.D.N.Y. 2017), *on reconsideration*, 304 F. Supp. 3d 333 (W.D.N.Y. 2018), *order clarified*, 502 F. Supp. 3d 724 (W.D.N.Y. 2020) (in lawsuit for data breach for HIPAA-regulated entity, "both the breach of contract claim and implied covenant claim arise out of the Excellus Defendants' failure to protect the confidentiality of Plaintiffs' personal information and to comply with policies, industry standards, and best practices for data security").

67 Title V of the GLBA states that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 U.S.C. § 6801(a); *see also* Board of Governors of the Federal Reserve System, *Interagency Guidelines Establishing Information*

to spell out the details, small firms could be exempted or best practices could be developed for what constitutes "knowledge" for distributor liability.[68] Such a burden is hardly crushing—after all, both small and large websites already have takedown obligations under the Digital Millennium Copyright Act.[69]

There is another problem: Websites will have to determine whether something is, in fact, libelous. Or, more realistically, they will have the obligation to assess the risk of libel associated with certain statements and gauge whether to accept such risk. This problem was addressed in distributor liability for telegraph liability. Courts solved this problem by only assigning liability if the libel was "apparent on the face" of the message."[70] Under this rule, only the most egregious types of speech would incur liability, as well as speech previously adjudged libelous or unlawful, which some courts have ruled section 230(c)(1) protects.[71] And, again, the accuracy of judgment to which a platform is to be held could scale to its resources, and best practices or safe harbors could be created

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Security Standards [Small-Entity Compliance Guide] (Aug. 2, 2013), https://tinyurl.com/5d43nb3z ("To achieve these objectives, an information security program must suit the size and complexity of a financial institution's operations and the nature and scope of its activities.").

[68] This idea resonates with Kyle Langvardt's *Can The First Amendment Scale?*, 1 J. FREE SPEECH L. 273 (2021), which suggests that traditional publisher and distributor categories may need to soften in the face of changing technology.

[69] 17 U.S.C.A. § 512(c).

[70] *See* sources cited in note 26.

[71] *Hassell v. Bird*, 5 Cal. 5th 522, 532 (2018).

either by courts or the Federal Communications Commission.

V. Interpreting Section 230(C)(2)

Title 47 U.S.C. § 230(c)(2) states:

> No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

The provision's scope turns on how the final "otherwise objectionable" should be interpreted. There are two choices: (i) an *ejusdem generis* reading in which the term refers to those objectionable things that are similar to the rest of the list and (ii) a non-*ejusdem-generis* reading in which "otherwise objectionable" is read "in the abstract" referring to literally any other objectionable thing. (Under the canon of *ejusdem generis*, "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[72])

Courts have had difficulty in determining what is the "similar nature" that unites the section 230(c)(2) list. Interpreting 47 U.S.C. § 230(c)(2)[73] shows that all

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[72] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001).

[73] Candeub & Volokh, *supra* note 6.

these terms referred in the 1990s to areas of then-permitted, or commonly believed to be permitted, types of telecommunications regulation. "Obscene, lewd, lascivious, and filthy" speech had been regulated on cable television and in telephone calls—and of course in broadcasting.[74] "Harassing" telephone calls had also long been seen by Congress as regulable, and continue to be regulated to this day.[75] "Excessively violent" speech was considered regulable content, like indecent content, in the context of regulating over-the-air broadcasting.[76]

An *ejusdem generis* reading would constrain the legal immunities in section 230(c)(2). If section 230's content moderation protections are found only in section 230(c)(2), not section 230(c)(1), then platforms receive such immunity only when moderating the types of speech section 230(c)(2) enumerates.

Of course, courts may ignore statutory canons even if there is a convincing argument for their application—and the canons sometimes can point in opposite directions.[77] Without *ejusdem generis*, "otherwise objectionable" would be interpreted in the abstract—and not refer to the list at all but rather to any possible objectionable content. This reading would provide immunity for virtually any content-moderation decision that a platform deems appropriate.

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[74] *Id.* at 180-83.

[75] 47 U.S.C. § 223.

[76] Candeub & Volokh, *supra* note 6, at 182.

[77] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521-35 (1960).

The *ejusdem* and non-*ejusdem* readings are subject to different constitutional analyses. The former is content-based. The latter is likely not. The following section examines the constitutionality of section 230 (c)(2) under each interpretation.

VI. The Constitutionality of Section 230(C)(2)

The *ejusdem generis* reading of section 230(c)(2) seems less likely to survive First Amendment scrutiny than the non-*ejusdem-generis* reading, though the matter is not certain.

A. Non-Ejusdem Generis Reading

Under a non-*ejusdem* interpretation, section 230 (c)(2)'s "otherwise objectionable" catchall term assumes an "in abstract" meaning, referring to any content objectionable in the platform's view. The statute's use of the phrase "material that the provider or user considers" to be objectionable bolsters this interpretation. The word "considers" suggests a subjective, or at least, individualized judgment.

Yet, even a non-*ejusdem-generis*, "in abstract" reading of "otherwise objectionable" has ambiguity. It could be read in a subjective way which would allow <u>any</u> objectionable material—or in an objective way which would refer to the category of speech people would likely find objectionable. The following examines the provision's constitutionality (1) under an objective reading and (2) under a subjective reading. An objective reading is likely content-based while a subjective reading could be content-neutral.

1. "Otherwise Objectionable": Objective Reading

The "objective" interpretation has several arguments for it. First, "objectionable" has a meaning that describes and categorizes speech independent of individual's particular judgments. For instance, "otherwise religious" in the phrase "Christian, Hindi, Jewish, or otherwise religious" has a distinct content—and if section 230(c)(2) were to be so read, it would be clearly content-based.

Second, Congress intended "otherwise objectionable" to refer to a distinct set of speech. The statute's clear purpose was to combat certain speech in media, such as indecency and profanity. In other words, Congress likely intended to catch other types of speech it thought to be regulable in telecommunications media in 1996. There is no evidence from the legislative history that Congress intended a purely subjective understanding of "objectionable." The evidence suggests that Congress intended to impose some sort of community standards even if imposed via individual internet platforms.

Third, when Congress wants individual subjective judgments about particular content be controlling, it does so explicitly. For instance, the statute banning "pandering advertisements in the mails" "provides a procedure whereby any householder may insulate himself from advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative.'"[78] Under Post Office procedure, which the Supreme Court has

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[78] *Rowan v. U.S. Post Office. Dep't*, 397 U.S. 728, 729-30 (1970).

upheld, the Post Office must accept any advertisement as qualifying under the statute that a mail householder judges arousing or provocative. If Congress had wanted a subjective reading, it would have used language similar to that found in this statute, *i.e.*, used words like "sole discretion." The use of the word "consider" does not convey subjectivity in such a definitive way.

An "objective" reading of "otherwise objectionable" would be subject to a constitutionality analysis similar to that of an *ejusdem generis* reading,[79] as both are content-based and refer to a similar set of things.

2. "Otherwise objectionable": subjective reading

On the other hand, a purely subjective reading is also reasonable and probably the better of the two readings (assuming one rejects the *ejusdem generis* approach, which I think is the best reading of all). As mentioned above, the text references what the platform "considers" to be objectionable, suggesting a subjective approach. Also, even if what everyone considers to be objectionable could be defined in some theoretical way as a distinct set of speech, this category is fuzzy and amorphous—suggesting that in practice the statute refers to whatever a platform subjectively deems objectionable.

A purely subjective reading of section 230 does not at first blush appear to be a regulation of speech at all. A platform can choose to moderate content according to the factors in section 230(c)(2) or not. Section 230 does not mandate or compel any particular type

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79 *See* Part VI.B.1.

of speech, nor does it punish any particular type of speech. The statute does not define objectionable but leaves the definition and application to individuals.

Yet it could still be a regulation of speech, even if a content-neutral one. Section 230 favors the expression of a certain type of speech—those that interactive computer services would likely find objectionable. "Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional."[80] Certainly, Congress intended restrictions on the flow of speech.

Further, by encouraging private censorship, Congress successfully made certain types of information more difficult to obtain. "'[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others.'"[81]

In order to justify a content-neutral regulation, the government must demonstrate, among other things, that "it furthers an important or substantial governmental interest [and that] the governmental interest is unrelated to the suppression of free expression."[82] Courts typically do not require a "least restrictive means" test, requiring instead that the means be

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80 *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011).

81 *City of Ladue v. Gilleo*, 512 U.S. 43, 55 n.13 (1994) (quoting Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 57 (1987)).

82 *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

narrowly tailored and leave ample alternative outlets.[83] But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[84] We must identify the content-neutral governmental goal of section 230 and see whether section 230 is narrowly tailored to that goal.

Identifying neutral interests supporting section 230 is not an easy inquiry. Most of its stated policy goals are quite content-based. Congress sought to empower parents' power to limit children's access to "objectionable and inappropriate"[85] speech and further "vigorous enforcement of obscenity and harassment."[86] Similarly, as discussed below, the legislative history as it exists suggests that the justifications for Congress passing the statute were content-based.

On the other hand, the stated justifications include some neutral justifications, such as to "promote the continued development of the Internet and other interactive computer services," "preserve the vibrant and competitive free market," and "encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools."[87]

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[83] *See Ward v. Rock Against Racism*, 491 U.S. 781, 797-99 (1989).

[84] *McCullen v. Coakley*, 573 U.S. 464, 486 (2014).

[85] 47 U.S.C. § 230(b)(4).

[86] 47 U.S.C. § 230(b)(5).

[87] 47 U.S.C. § 230(b)(1)-(3).

This ambiguity could lead to a finding of neutrality because the Court allows itself flexibility in determining statutory justification. For instance, in *Turner*,[88] the Court ruled on the constitutionality of the "must carry" obligations of the 1992 Cable Television Consumer Protection and Competition Act.[89] This law required cable systems to carry over-the-air television broadcasting. As some of the justices recognized, this appeared to be a content-based regulation.[90] Congressmen, ever solicitous to the local broadcaster who carries their political advertisements and whose news shows cover politicians' deeds, granted broadcasters favors by forcing cable systems to carry their content.[91]

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88 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

89 47 U.S.C. §§ 534(b)(1)(B), (h)(1)(A), 535(a).

90 512 U.S. at 677 (O'Connor, J., dissenting) ("Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications."); *id.* at 680 ("But when a content-based justification appears on the statute's face, we cannot ignore it because another, content-neutral justification is present.").

91 Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1767 (1995) ("What was the purpose of the must-carry rules? This is a complex matter. A skeptic, or perhaps a realist, might well say that the rules were simply a product of the political power of the broadcasting industry. Perhaps the broadcasting industry was trying to protect its economic interests at the expense of cable.").

The Court looked past this obvious purpose and found that the law's stated justification was to preserve free, over-the-air television. The Court ruled that the regulation, in simply specifying the source of programming to be carried, was not content-based.[92]

The Court could follow the *Turner* approach in interpreting section 230. The statute's stated purposes of "promot[ing] the continued development of the Internet and other interactive computer services" and "encourag[ing] the development of technologies which maximize user control over what information is received by individuals, families, and schools" might serve as content-neutral justifications.[93] One could say that limiting liability for content moderation furthers these goals by lowering the cost of blocking and moderation technologies. If you want to create markets in what is essentially private censorship, then lowering liabilities associated with creating tools for censorship is a good idea.

While this argument might very well win the day, there are a few caveats. First, *Turner* explicitly recognized the market power of the cable systems as justifying, in part, must-carry.[94] Given the market

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[92] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("[T]he importance of local broadcasting outlets 'can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.' The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene.").

[93] 47 U.S.C. § 230(b)(1)-(3).

[94] *Turner*, 512 U.S. at 632-33 ("In brief, Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable

power of cable, it had the power to silence others, and therefore access was required. In contrast, section 230 (c)(2) affects Twitter as well as your personal website—the big and the little. It is possible that the Court's willingness to find a content-neutral justification—which would be more likely to be upheld—stemmed from its overall greater willingness to accept regulation of dominant firms than smaller actors.

Second, the provision favors certain types of expression—namely forwarding a set of opinions and views through editing, amplifying, muting, shaping, and content-moderating posters' comments. It is perhaps odd to think of comment deletion as expression or speech. But, it can be, for reasons similar to those discussed in Part III in relation to section 230(f)(3). A comment thread subject to a strict content moderation policy certainly expresses something different than a comment thread that is not so subject—just as a bonsai tree, which is pruned to control its growth, is different from a tree than is allowed to develop freely.

By adopting content moderation policies, platforms can promote (or hide) ideas and control discussion. They become the anthologists of the internet, editing discussion to create versions of expression they prefer. Similarly, they become, in a sense, book publishers.[95]

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industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues.").

95 Daphne Keller speaks of "amplification," which she defines "to encompass various platform features, like recommended videos on YouTube or the ranked newsfeed on Facebook, that increase people's exposure to certain content beyond that created by the platform's basic hosting or transmission features." Daphne Keller, *Amplification and Its Discontents: Why Regulating the*

They promise to provide a free service—access to their platforms—in exchange for producing speech that they like. The exchange is analogous to an advance that a book publisher would give an author.

Third, even though stated in broad language, Congress's policies in section 230 cannot be plausibly read to support massive private censorship on any topics that the platforms please, which is what section 230 as interpreted by many courts today protects. To the degree section 230 allows the dominant internet firms to impose their own censorship rules—rules that can promote anything—section 230 minimizes "user control over what information is received." Congress never even considered section 230 as protecting giant internet platforms, which did not exist in 1996 and which, with the other "FAANG" companies, now enjoy close to 22% of the S&P's total market capitalization.[96]

Finally, it may be that a subjective section 230 in fact subverts the goals of "promoting the continued

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Reach of Online Content Is Hard, 1 J. FREE. SPEECH L. 227, 231 (2021). This seems to be a type of publication, in which the platform acts like an anthologist selecting messages to be repeated and shaping and directing discourse. It is not simply transmitting messages, and therefore falls outside section 230(c)(1). Ashutosh Bhagwat makes the argument that such editorializing is constitutionally protected. Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 111-23 (2021). If so, however, such editorializing is the *platform's speech* and thus not within section 230(c)(1).

96 Sergei Klebnikov, *Apple, Microsoft, Amazon, Google and Facebook Make up a Record Chunk of the S&P 500. Here's Why That Might Be Dangerous*, FORBES.COM (July 24, 2020), https://tinyurl.com/cy49pkr9.

development of the Internet and other interactive computer services" and "encourag[ing] the development of technologies which maximize user control over what information is received by individuals, families, and schools"—particularly given the ill-defined line between interactive computer services and internet content providers set forth in sections 230(c) and 230 (f)(3).

If one combines the subjective reading of "otherwise objectionable" with a highly restrictive view of section 230(f)(3), as some courts appear to have done, then platforms would be free to content-moderate in ways that could undermine users' willingness to express themselves online. Comments or arguments can be deleted, specially segregated, or, under some understandings of "content moderation," tagged with warnings. If these types of content moderation do not qualify as content provision under section 230(f)(3), then section 230(c)(2) would protect all such efforts. Exposing comments to such treatment does not further the goals of "user control" or the "growth of the internet."

B. Ejusdem Reading

The arguments for an *ejusdem generis* reading are discussed in Interpreting 47 U.S.C. § 230(c)(2). An *ejusdem* reading likely renders section 230 content-based, as the terms in § 230(c)(2) refer to a distinct type of content: speech Congress thought regulable because it was inappropriate for children and families. The next question is whether a content-based section 230 is constitutional. To survive strict scrutiny, a content-based regulation of speech must be narrowly

tailored to serve a compelling governmental interest, and that is a difficult test to pass.

On the other hand, classifying a provision as content-based does not necessarily doom it to strict scrutiny.[97] In particular, viewpoint-neutral (even though content-based) speech restrictions may not need to be subjected to strict scrutiny in certain contexts, particularly in designated public fora.

1. Section 230 as Content-Based Restriction on Protected Speech

Under the *ejusdem* reading, section 230(c)(2) covers matters Congress thought regulable in 1996. In particular, it explicitly disfavors a whole category of speech that now receives full or near full First Amendment protection under the Supreme Court's decision in *Brown v. Entertainment Merchants Association.*[98] In that case, the Court used strict scrutiny to strike

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97 In *Denver Area,* arguably the case closest on point, the Court refrained from specifying what level of scrutiny should be applied to decency regulation on cable television. *See Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741-42 (1996) (plurality opin.) ("But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard—they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, *see, e.g.*, Telecommunications Act of 1996 . . . , we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.")

98 564 U.S. 786 (2011).

down a restriction on the sale of violent video games to minors without parental permission.

And section 230 places a much higher burden on violent speech than does the California statute, which didn't restrict access to violent video games by adults or by minors who had adults who were willing to get the games for them. Section 230 limits the amount of violent content available to everyone, including adults.

While section 230's limit on speech is permissive and incentivizing—platforms do not have to block but are also not required to do so—the Court has found similar laws to be unconstitutional restrictions of speech. For instance, the Court ruled unconstitutional a statute giving permissive authority to cable systems to censor indecent material in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[99] More generally, the Court has rejected for First Amendment reasons laws that place special burdens, legal or financial, on certain types of speech or speakers.[100]

Denver Area is probably the case most on-point to the question of whether content-based pro-decency regulation on the internet is constitutional. Yet it is a fractured opinion that by design does not offer clear precedent, as the Justices could not agree on the applicable constitutional standard or even if there should be one. Each of the three challenged provisions received different votes—with the plurality opinion failing to win a majority for any provision. Arguably, however, the guidance that it does provide suggests

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[99] 518 U.S. 727 (1996).

[100] *Leathers v. Medlock*, 499 U.S. 439, 447 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

that section 230 is unconstitutional, though just barely.

The case involved three provisions of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), a statute that dealt with leased access of cable channels and public, educational, and government (PEGs) cable channels. Section 10(a) required cable systems to lease channels to local programmers as a way of providing competition to the large cable programming networks and encouraging the creation of local content; section 10(c) required cable systems to carry (for free) public, educational, and government channels, which give free access for community programming, school programs, government meetings, and the like; and section 10(b) required cable systems to segregate indecent material on specific cable channels.[101]

Section 10(a), which applies to "leased access channels," reversed prior law by permitting cable operators to allow or prohibit "programming" that they "reasonably believe[s] . . . depicts sexual . . . activities or organs in a patently offensive manner." Section 10(c) gives cable operators the same authority over PEGs. Under section 10(b), which applies only to leased access channels, operators must segregate "patently offensive" programming on a single channel, block that channel from viewer access, and unblock it (or later reblock it) upon subscriber's written request.[102]

Sections 10(a) and 10(c) permit cable systems to proscribe content depicting "sexual activities or organs

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101 47 U.S.C. §§ 532(h), 532(j), and note following § 531.

102 *Id.*

in a patently offensive manner." The plurality opinion—and the other opinions—understood this language as including unprotected obscenity as well as the indecent programming covered in *Pacifica.*[103]

There was disagreement about the theory of state action, the first step in any First Amendment analysis. Justice Breyer in his plurality recognized that the government mandates to carry certain cable channels were a type of state action. He did not go so far as Justice Kennedy to find a public forum, but found the channel set-aside to be sufficient government action for First Amendment purposes.

Given this type of government action, the plurality concluded, the First Amendment required a free speech balancing between speakers (PEG and leased access channels) against cable operators.[104] In contrast, Justice Kennedy, joined by Justice Ginsburg, went further and considered the public access cable channels to be designated public fora—in which the First

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103 *Denver Area*, 518 U.S. at 744 (plurality opin.) ("[T]he problem Congress addressed here is remarkably similar to the problem addressed by the FCC in *Pacifica*, and the balance Congress struck is commensurate with the balance we approved there. In *Pacifica* this Court considered a governmental ban of a radio broadcast of 'indecent' materials, defined in part, like the provisions before us, to include 'language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.'" (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978)).

104 *Id.* at 744-47.

Amendment would prohibit virtually any restriction on speakers' expression.[105]

In elaborating upon his balancing test, Justice Breyer pointed out that cable operators have monopoly power, allowing them to engage in private censorship if unchecked; they are extraordinarily involved with government regulation on a local level; and, as a realistic matter, their First Amendment interests as editors are weak.[106] Given these considerations, Breyer ruled that for section 10(a), the balance tipped in favor of the cable operators, permitting them to limit indecent speech. In addition, section 10(a) simply restores the rights that cable operators once had over leased access channels.[107]

On the other hand, with section 10(c), Justice Breyer found that the expressive rights of speakers predominated and therefore, the plurality found it unconstitutional. Unlike section 10(a), section 10(c) does not give back to cable operators the editorial rights that they once enjoyed. The countervailing cable operator's First Amendment interest is nonexistent, or at least much diminished, because these channels were meant for public access,[108] and cable operators did not historically exercise editorial control over them.[109] Last, local boards and commissions and other governmental or quasi-governmental groups typically

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105 *Id.* at 792 (Kennedy, J., dissenting).

106 *Id.* at 738, 760-61 (Breyer, J., plurality opin.).

107 *Id.* (citing 47 U.S.C. § 532(c)(2)).

108 *Id.* at 761.

109 *Id.*

oversee public access channels. These supervisory regimes presumably would control offensive content consistent with community standards

The peculiar facts of *Denver Area*—government-required cable channel set-asides—do not permit a clear application to section 230. But section 230 is closer to section 10(c) than 10(a), which suggests it may be unconstitutional.

First, the Cable Act targets indecent speech of approximately the sort *Pacifica* permitted to be regulated, and indeed likely just a subset of indecent speech, closer to obscenity.[110] The speech section 230 covers (even under the *ejusdem generis* reading) is much broader than that in *Pacifica*, because it includes fully First Amendment protected "excessively violent" speech. If it is unconstitutional for government even to permit a cable operator to censor regulable indecent speech, on its own volition on a quasi-governmental channel, then constitutional concerns seem present when the government disadvantages protected unregulable speech on the entire internet. This factor weighs against section 230's constitutionality.

Second, the interest in protecting children from indecent programming supported the Court's ruling that section 10(a) is constitutional. The government interest in protecting children from fully First Amendment-protected speech is less powerful than the interest in protecting them from unprotected speech, such as obscenity. Here, section 230 regulates fully protected speech, *i.e.*, speech that is excessively violent.

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110 *Id.* at 749, 755, 761-51.

This factor weighs against section 230's constitutionality.

Third, the plurality opinion balances the interests of the cable operators and the public, finding that the cable operators' interests predominated in section 10 (a), but making the opposite determination in section 10(c).[111] The interests the Court identified as determinative were cable operators' historical rights of control over leased access and section 10(a)'s viewpoint neutrality. Significantly, section 10(a) only returned cable operators the discretion they once had.

This factor probably cuts against section 230. Congress, in the CDA, was responding to *Stratton Oakmont*, a case that determined whether an internet bulletin board was more like a telephone company or bookstore, which had limited liability for third party content, or like a newspaper, which is generally liable for the content it prints. *Stratton Oakmont* said that platforms that edit are more like newspapers. In reversing *Stratton Oakmont*, if Congress had simply imposed carrier liability, *i.e.*, only passed section 230 (c)(1), not (c)(2), Congress could have been said to have "restore[d]" internet platforms to their rightful protec-

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111 *Id.* at 743-44 ("The First Amendment interests involved are therefore complex, and require a balance between those interests served by the access requirements themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them) and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the operator would have assigned the channels devoted to access)").

tion against liability. Instead, Congress created an entirely new, content-based regime that has no obvious precedent in United States communications law.

But these observations are speculative. The unusual facts of *Denver Area* and its hesitance to announce a level of scrutiny for regulations on cable television—let alone the internet—diminish its precedential force for section 230.

The strongest argument for section 230's unconstitutionality is probably its inclusion of the "excessively violent" term, which targets unregulatable, constitutional protected speech. Striking the phrase from the statute would help solve that problem, and the power of the federal judiciary to partially invalidate a statute in that fashion has been firmly established since *Marbury v. Madison*.[112]

When Congress includes an express severability clause in the relevant statute, courts generally follow it.[113] The Communications Act, which section 230 is part of, has an express severability clause.[114] Lower courts have relied upon this clause for statutes aimed at indecency in almost exactly the same situation presented in section 230. In *Carlin Commc'ns, Inc. v.*

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[112] *Barr v. Am. Ass'n of Political Consultants, Inc*, 140 S. Ct. 2335, 2350 (2020).

[113] *Id.* at 2349.

[114] 47 U.S.C. § 608 ("If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby."). The "chapter" referred to in the severability clause is Chapter 5 of Title 47, which includes sections 151 through 700 of Title 47, a group of provisions of which section 230 is part.

FCC,[115] the court had to interpret section 223(b) of the Federal Communications Commission Authorization Act of 1983, which prohibits "obscene and indecent" telephone communications. The court reasoned that, . . . "[w]ere the term 'indecent' to be given meaning other than *Miller* obscenity, we believe the statute would be unconstitutional. . . . [T]he words 'or indecent' are separable so as to permit them to be struck and the statute otherwise upheld.[116]

2. Viewpoint-Neutral But Content-Based Regulation and Section 230

Another way of analyzing the *ejusdem generis* reading of section 230(c)(2) is as a viewpoint-neutral but content-based regulation.

As an initial matter, it is not clear that section 230(c) is viewpoint-neutral, although it seems likely. Protecting platforms' ability to ban types of speech Congress thought regulable in telecommunications media in 1996, section 230 does not, for instance, target speakers advocating obscenity or advocating against it—it applies to all who distribute obscenity, whether they think obscenity sexually liberating, find it sexist and objectifying, or aren't trying to express any viewpoint at all. Like the FCC's regulation of "obscene, indecent, and profane" broadcast programming, or prohibitions on loud speakers in public parks, section 230 is viewpoint-neutral, as it prohibits speech regardless of one's view on these matters.

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115 837 F.2d 546 (2d Cir. 1988).

116 *Carlin Commc'ns, Inc. v. FCC*, 837 F.2d 546, 560-61 (2d Cir. 1988) (citing *Regan v. Time, Inc.*, 468 U.S. 641, 652-53 (1984)).

On the other hand, the line between viewpoint-neutral and viewpoint-based regulations is "is not a precise one."[117] The Court has held that a statute is viewpoint-based if it "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation."[118] In *Brunetti*, the Supreme Court found that the PTO's exclusion of "immoral or scandalous" trademarks from the trademark registration system did precisely that.

Following *Brunetti*, section 230 arguably forwards a "sense of propriety,"[119] and "distinguishes between two opposed sets of ideas": those types of speech considered so "objectionable" and so likely to 'provoke offense" in 1996 as to justify regulation in telecommunications media versus those types of ideas that were sufficiently acceptable that would not be considered regulable.

The strength of this argument rests on whether one thinks "regulable in 1996" speech is truly a discernible viewpoint in the same way that "immoral" or "scandalous" is. Given that very few people would even know what "regulable in 1996" encompasses, it likely refers to a "set of ideas" that is theoretical at best. This argument may simply point to the fuzziness of the viewpoint-based/viewpoint-neutral distinction rather than to a practical legal barrier.

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117 *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 831 (1995).

118 *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019).

119 *Id.* (internal quotation marks omitted).

CONCLUSION

Section 230 sets forth the immunity regime for internet content. Courts sometimes erroneously read section 230(c)(1), not section 230(c)(2), as immunizing content moderation decisions. And, similarly, courts ignore that section 230(f)(2) limits the immunity that the statute provides for content moderation. This misreading has expanded section 230 protections in ways that ignore the text and congressional intent.

Identifying section 230(c)(2) as the source of liability protection raises constitutional concerns, particularly under an *ejusdem generis* reading. However, it is not clear that these concerns render the provision unconstitutional; and to the degree constitutional concerns are present, severability may offer the best solution.

LETTER TO CHIEF JUSTICE CONTAINING NOTARIZED AFFIDAVIT FROM JASON M. FYK [DE 41] (DECEMBER 6, 2022)

From: Jason M. Fyk of *Fyk v. Facebook* and *Fyk v. USA*

To: Chief Judge Murguia, Judge McKeown, Judge Callahan, Judge VanDyke, Clerk Dwyer, and Circuit Executive Soong (9th Circuit Court Recipients)

RE: Six-Page Notarized Affidavit from Jason M. Fyk Re: Deprivation of Constitutional Rights and Recipients' Necessary Declaration & Redress, *Etc.* regarding *Fyk v. Facebook*, No. 4:18-cv-05159-JSW (N.D. Cal.); No. 19-16232 (9th Cir. Ct.); No. 20-632 (SCOTUS); No. 21-16997 (9th Cir. Ct.) and *Fyk v. USA*, No. 1:22-cv-01144-RC

Dear Recipient:

Please be advised that on December 5, 2022, the original of this six-page notarized affidavit was sent (*via* FedEx overnight trackable delivery) to Clerk Molly Dwyer at her 95 Seventh Street, San Francisco, CA, 94103 address, along with other methods of transmission of a copy of this affidavit to Ms. Dwyer (such as email and U.S. Mail to an alternative P.O. Box address in San Francisco, CA). Please also be advised that copies of the six-page affidavit you are receiving were sent *(via* FedEx overnight trackable delivery, U.S. Mail, and/or e-mail), on December 5, 2022, to the following: Judge McKeown in San Francisco, CA and in chambers in San Diego, CA; Judge Callahan in San

Francisco, CA and in chambers in Sacramento, CA; Judge VanDyke in San Francisco, CA and in chambers in Reno, NV; Chief Judge Murguia in chambers M Phoenix, AZ; and Circuit Executive Susan Soong in San Francisco, CA. Finally, the only email address I could locate online was auestions@ca9.uscourts, so a copy of this six-page notarized affidavit was sent there as well. As for the rest of you, I took a reasoned guess as to email addresses, so a copy of this affidavit was also sent to the following email addresses:

mdwyer@ca9.uscourts.gov
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Finally, please be advised that similar affidavits have been sent to Congress, the President of the United States of America, the Supreme Court of the United States of America, the U.S Dist. Court of the District of Columbia, and the Attorney General/Department of Justice.

I thank you in advance for your anticipated careful consideration of this affidavit and your related subsequent prompt rectification/stoppage of the several years of deprivation of my constitutional rights and justice (largely, thus far, at the hands of California district and appellate courts) that I have suffered in relation to the *Fyk v. Facebook* matter.

Sincerely

/s/ Jason M. Fyk
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Cochranville, PA 19330
(610) 470-5099
jfyk@socialmediafreesom.org

AFFIDAVIT OF NOTICE OF AWARENESS IN ADMINISTRATIVE NON-JUDICIAL HEARINGS AND DEMAND FOR REMEDY BY NECESSITY FOR GOVERNMENT SERVANTS WHO USE AUTHORIZED AGENTS TO BLOCK PROTECTED RIGHTS [DE 41A]

(Notice to Agent is Notice to Principal and Notice to Principal is Notice to Agent)

To: The United States Congress
The President of the United States
The Supreme Court of the United States
The Ninth Circuit Court of Appeals
The United States District Court for the Northern District of California
The United States District Court for the District of Columbia
The Attorney General/Department of Justice

Affiant, Jason M. Fyk, one of the People of the 50 American States (Republic in form), *sui juris* in all respects, in this court of record, does present you with this Affidavit that you and your agents may provide due care, by necessity and demand of one of the People, based on the following claims:

Claim 1: Legislative Tribunals/Agency hearings are not the same as Judicial Tribunals, moving by the common law as seen in the Black's Law Dictionary (4th ed.), which explains qualifications of that type of Court. The People have assembled for their common good and are aware that the definitions in Black's Law Dictionary (5th ed.) have been diminished. I, therefore, put you on notice that We the People are no longer ignorant to a person, not sitting as a proper

Judge, making nullified or void unconstitutional or untenable orders;

Maxim:

> "A judge should keep his jurisdiction within the limits of his commission."

Claim 2: No judge has the power to neglect, ignore, or circumvent the constitutionally required free speech and/or due process rights of We the People both in general and in particularly in order to help adversarial agents have their will;

Maxim:

> "A judgment given by one who is not the proper judge is of no force and should not harm anyone."

Claim 3: Government servants/Trustees have used statutory programs, in order to create an unconstitutional pathway for corporate entities (*i.e.*, statutorily authorized government agents), to suppress lawful speech, restrict personal liberties, take property, and/or deny full use and accommodation from entities engaged in commerce in the states. Furthermore, Government workers deny People of their right to redress their grievances and to regulate their government through online information sharing, who have a guaranteed right to free speech and due process in the State and Federal Constitutions;

Claim 4: All public officers (including legislative, judiciary, executive, and/or any authorized agent) are the trustees and servants of the People and, at all material times, are amenable/obligated to the People;

E.g., Virginia Constitution Bill of Rights

(Section 2)
People the Source of Power

> "That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them."

Claim 5: The People have a guaranteed right to frequently bring their government to adhere to fundamental principles;

> *E.g.*, Arizona Constitution (Article 2 Section 1)
> Fundamental Principles; Recurrence to
>
> "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government".

Claim 6: Congress cannot immunize (*i.e.*, protect), through authorized agents, any action that defies constitutional right, as it would allow for an entity to abrogate rights guaranteed in the Constitutions;

> Maxim:
>
> "He who commands a thing to be done is held to have done it himself." (*e.g.*, Title 47, United States Code, Section 230(c) to "block or screen offensive material").
>
> Maxim:
>
> "What I cannot do myself, I cannot by another." (*e.g.*, Section 230(c)(2)(A) "any action . . . taken . . . to
> restrict . . . material . . . con-

> sider[ed] . . . objectionable (*i.e.*, lawful), whether or not such material is constitutionally protected").
>
> *Miranda v. Arizona*, 384 U.S. 436, 491 (1966):
>
> "Where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them."

Claim 7: Corporate entities regularly held open to the public, doing commerce across state lines, are not "private" (*see* Title 2 of Public Accommodation law) and are bound to provide full accommodation to the People in observance of the Constitutions and Statutes of any given State and all applicable federal law;

> 42 U.S.C. ch. 21 II § 2000a(a):
>
> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.
>
> 42 U.S.C. ch. 21 II § 2000a(b):
>
> Each of the following establishments is a place of public accommodation within this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: . . . (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; . . .

42 U.S.C. ch. 21 II § 2000a(c):

> . . . (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce, and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any state or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

42 U.S.C. ch. 21 II § 2000a(e):

> The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

Please Take Notice: "Private" entities are entities not engaged in commerce and/or are not regularly held open to the public. Social media companies *(e.g.*, Google, Facebook, Twitter) are both regularly held

open to the public and are engaged in interstate commerce (*i.e.*, places of "exhibitions" or "entertainment," "which move in commerce," engaged in "communication among several states"); thus, Social Media companies are public accommodations doing business by the permission of the People who must respect the rights of the People;

Please Take Notice: The Legislature's statutory "protection" to deny personal rights (*i.e.*, Section 230-authorization), the executive's manipulation of same (*i.e.*, collusion between corporate agent and government servant-manipulation), and the Courts'/judiciary's endorsement of same *(i.e.*, denial of personal Due Process rights-immunization) are testament to the failures of this government's adherence to the Constitution and the People's rights. Any law that abridges the People's power to protect the People's rights is a Trespass against the People;

Please Take Notice: The People have discussed and understand that corporations are public accommodations that operate by the authority and will of the People. When using our power and authority to create corporate entities, we require they follow the Constitutions and laws of the State, which derive from the People. Corporate agents, therefore, cannot be ordered, coerced, and/or influenced by government servants to abrogate the People's rights under statutory "immunity" granted by our servants, as there has never been (and can never be) a grant of that magnitude;

Please Take Notice: The ability to deal with evil is not at issue here. Government servants are utilizing statutorily authorized *(i.e.*, "protected") corporate agents (*i.e.*, entities engaged in public commerce across state lines; *e.g.*, Google, Facebook, Twitter) to abrogate the

rights of the People. Government servants are misleading the People to believe that corporations, acting under the will of the People, are purportedly acting in the private domain and are accordingly not bound to accommodate the People or their rights;

Please Take Notice: As one of the People, I recognize and understand that you, as a Trustee of the People, must have been granted the authority by the People to delegate and endorse such authority to corporate agents that are acting as public accommodations, by the will of the People, to block the rights of the People. If you, the Trustee of the People, have the Constitutional Authority to grant such authority, please respond with such evidence of such power and/or authority within 10 days, sworn under penalty of perjury, and by affidavit;

Maxim:

> "If a man grant that which is not his, the grant is void."

Please Take Notice: The People, in the Constitutions of the United States of America (State and Federal), never agreed to endure long and abusive denials of remedy (*e.g., Fyk v. Facebook*, N.D. Cal. and 9th Cir. Ct.) to have what you, as trustees, already swore to give and protect, as a condition for your election, appointment, and/or employment. If you have, or are aware of any grant, to bypass or abrogate the People's constitutional rights, it is my respectful wish, my demand, and my order to respond under penalty of perjury, by sworn affidavit within 10 days, with a point-by-point rebuttal of the maxims and common law stated in this notice. If you fail to respond to the aforementioned and in the fashion demanded, within

10 days, and/or you continue to deny the People's right (*e.g.*, my rights), you agree that you are willfully committing a Trespass on the People, with full knowledge, malice, intent, and in contravention to the Constitutional rights you have sworn to protect and that the claims and notice in this Affidavit shall stand as truth and that it shall be accepted as such by all courts. The People, as the creators of your seats and offices, are the real regulators of all governments and demand remedy without delay, price, and/or denial. If you cannot find a remedy for the People, it is my respectful wish, my demand, and my order that you create remedy to serve the People by necessity.

> *Mann v. Mann*, 172 P.2d 369, 375 (Cal. App. Ct. 1st Dist. Div. 2 1946):
>
> "Judicial notice is a form of evidence."

Please Take Notice: Government servants and/or agents, pursuing their own interests, have fallen into maladministration. Some examples of such maladministration (voluntarily taken by government actors and/or authorized agents) include, but are not limited to, the following: suppression of free speech and preventing the redress *(i.e.*, due process) of the People's grievances *(e.g., Fyk v. Facebook)*, inducing, but not limited to, extraordinary remedy, election interference, blocking evidence of malfeasance, and the manipulation of body politics. All the aforementioned illustrative aggressions violate Federal and /or State Constitutions and/or Trust Indentures and constitute a national emergency. Furthermore, as one of the People, with (and by way of) the right to make government servants (all branches and/or agents) duly aware of the wrongdoings being done upon the People and the

right to demand for the strict observance of the protections you swore to give the People, I hereby respectfully demand and order this body and/or all government agents listed above to immediately allow for special remedies by necessity, under the common law and customs and usage in law, based on the historical principles following the American Revolution.

Maxim:

> "Where the ordinary remedy fails, we must have recourse to that which is extraordinary."

As one of the People who has assembled to declare a national emergency by necessity, it is accordingly my respectful wish, my demand, and my order that all government servants and authorized agents of government openly declare that all government servants and/or authorized administrative agent(s) listed above, including this body, were never granted true authority over the rights of the People. Furthermore, the failure of any government servant or authorized agent to misconstrue or misapply their administrative authority, in light of the Constitution, does not change what is the highest law (the Constitution) and it does not change their oath to protect the rights of the People;

It is accordingly my respectful wish, my demand, and my order that all government servants and authorized agents of government, provide immediate remedy to the People, immediately cease and desist all programs and/or agreements between any government entity, agency, or instrumentalities, and any corporate entity who is engaged in public commerce, or holding any government "protection" for blocking a right (*e.g.*, Section 230), security, or authorization, and cease and

desist any actions taken to restrict the lawful free speech and/or due process rights of the People.

Maxim:

> "To take away all remedy for the enforcement of a right is to take away the right itself."

We the People, have the power to create, alter, reform, or abolish government by right. The People have assembled, understand, and are informing that you, as a Trustee, are acting by our power, permission, and at our will, and that you, as a public servant, have absolutely no power to withhold remedy from the People. Nor may you deny, charge for, and/or delay said remedy. It is now the will of the People that you hear the People, as a necessity for the People.

Maxim:

> "Remedies for the rights are ever favorably extended." (*i.e.*, Constitutional rights are never time-barred; *i.e.*, never untimely to exercise).

Therefore, pursuant to my Constitutional rights, I, Jason M. Fyk, do hereby respectfully demand that you, as a Trustee of the People, sworn to uphold the Constitution, forthwith respect my right to redress my grievances, and immediately hear my case for the illegal taking of my property and for the denial of my liberties *(e.g.*, deprivation of constitutionally protected due process and/or free speech rights) by an authorized (*i.e.*, Section 230-statutorily protected) agent of government (*i.e.*, Facebook).

Moreover, I hereby demand that, within the next 10 days, the Ninth Circuit Court of Appeals hereby, so as to stop the ongoing deprivation of my constitutional

rights, withdraw/recall its October 19, 2022, Memorandum Order [D.E. 36] in No. 21-16997 and/or its November 9, 2022, clerk text Order in No. 21-16997 and replace same with an Amended Order(s) granting my appeal (*see*, *e.g.*, my March 3, 2022, Opening Brief [D.E. 8]) and accordingly remand my case to the N.D. Cal. court (No. 4:18-cv-05159-JSW) with instruction to the District Court to allow my case to finally move forward towards trial on the merits.

Maxim:

> "[W]e hold the general rule to be that, where a federal court of Appeals sua sponte recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence."

VERIFICATION

I, Jason M. Fyk, hereby declare, certify, and state, pursuant to the penalties of perjury under the laws of the United States of America, and by the provisions of 28 USC § 1746, that all of the above and foregoing representations are true and correct to the best of my knowledge, information, and belief.

Executed in Lancaster, Pennsylvania on this 5th day of December in the Year of Our Lord Two Thousand and Twenty-Two.

/s/ Jason M. Fyk
Autograph of Affiant

NOTARY AS JURAT CERTIFICATE

PA State
Lancaster County

On this 5th day of December, 2022 (date) before me Ronald B. Smith, a Notary Public, personally appeared affiant, Jason M. Fyk, who proved to me on the basis of satisfactory evidence (driver's license) to be the man whose name is subscribed to within this instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his autograph(s) on the instrument the man executed, the instrument in my presence. I certify, under penalty of perjury and under the lawful laws of the State of Pennsylvania, that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary/Jurat:

/s/ Ronald B. Smith

Seal:

Commonwealth of Pennsylvania-Notary Seal
Ronald B. Smith, Notary Public
Lancaster County
My commission expires
January 31, 2026
Commission number 1412034
Member, Pennsylvania
Association of Notaries

/s/ Jason M. Fyk

Date: December 2, 2022

APPELLANT FYK REPLY BRIEF [DE 23]
(MAY 25, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal No. 21-16997

On Appeal from Denial of Motion for Relief Pursuant to Fed.R.Civ.P. 60(b) to Vacate and Set Aside Entry of Judgment of the United States District Court for the Northern District of California, 4:18-cv-05159 (Hon. Jeffrey S. White)

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[. . .]

I. Summary of Reply Brief

This case is not about Plaintiff-Appellant, Jason Fyk ("Fyk"), treating Defendant-Appellee, Facebook, Inc. ("Facebook"), as "the publisher" of Fyk's content. Fyk has maintained, at all times, that Fyk is "the publisher" of his own content. This case is entirely about Facebook's own unlawful anti-competitive conduct motivated by corporate financial gain, antithetical to the "Good Samaritan" intelligible principle/general directive/general provision of the Communications Decency Act – Title 47, United States Code, Section 230 ("230" or "CDA").[1]

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[1] The heart of Fyk's appeal is whether Facebook is a "passive" "interactive computer service" ("ICS") when it takes discretionary "action" to discriminatorily and/or selectively "enforce" the CDA (offensive content) against Fyk, while ignoring the identical purported "problematic" content (Fyk's content) when in the hands of Fyk's competitor who Facebook is commercially incentivized to develop. Facebook's selective application of the CDA as pretext to tortiously interfere with Fyk's business amounts to fraud, extortion, tortious interference, and unfair competition. Facebook is not "passively" displaying information

Distilled, this current appeal revolves primarily around one issue – did Congress intend for the "Good Samaritan" intelligible principle (*i.e.*, the general motivation) overarching all of 230 to apply to all of 230 or to only 230(c)(2)? This question is not only a matter of Congressional intent, but also a matter of plain statutory language and canons of statutory construction. Fyk maintains in this appeal that one must be acting as a "Good Samaritan" (*i.e.*, for the good of others) to be afforded any "Protection for 'Good Samaritan' blocking and screening of offensive material." Whereas Facebook's Answering Brief self-servingly asserts that "Fyk seeks simply to rewrite the Communications Decency Act and relitigate issues that he has

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provided by others online and uniformly enforcing the CDA as to all information content providers, it is "actively" developing (at least in part) the information of some users (Fyk's competitor) and tortiously interfering with the information of others (Fyk) based on financial compensation. Facebook destroyed Fyk's business for its own financial gain. Fyk contends that where (as here) Facebook's application of the CDA is purposeful commercial activity, Facebook enjoys no 230(c) immunity per express statutory language and per cases properly interpreting same; *i.e.*, there is zero possibility for Facebook to be both a "Good Samaritan" and an anti-competitor acting for its own financial gain – "Good Samaritan" and "anti-competitive actor" are *prima facie* oxymoronic. *See, e.g., Enigma Software Group USA, LLC v. Malwarebytes, Inc.* 946 F.3d 1040 (9th Cir. 2019); *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13, 208 L. Ed. 2d 197 (2020); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008); *see also Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021) (holding that a social media company is not entitled to CDA immunity where (as here) the complainant is not seeking to treat the company as "the publisher," but rather seeking to treat the company as the company for the company's own tortious conduct).

already argued and lost." [D.E. 16] at 3. Wrong and wrong.

First, Fyk does not seek to "rewrite" the CDA in the instant action; rather, Fyk seeks enforcement of the CDA as written. 230(c)(1) does not speak to "a publisher," as this Court and others have erroneously treated as synonymous with "the publisher" in some opinions; rather, 230(c)(1) speaks to the "the publisher," which is a critical distinction.[2]

Second, this Court's *Enigma* decision was rendered on December 31, 2019, and was not "finalized" until the Supreme Court denied certiorari on October 13, 2020, well after the Ninth Circuit's June 12, 2020, Order in this case. This Court's *Enigma* decision came a mere three days before the January 3, 2020, Reply that Fyk filed in the first appeal. Fyk was unaware of *Enigma* during the first wave of filings (opening brief, answering brief, reply) in the first appeal in this case. Thus, this appeal does not seek to re-litigate the first appeal because the *Enigma* decision(s) post-dated the parties' prior briefing.

In refuting arguments in Facebook's Answering Brief, [D.E. 16] (while at the same trying to not repeat Fyk's Opening Brief, [D.E. 8]), this Reply Brief focuses

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[2] This Court's June 12, 2020, decision in the first appeal erroneously held, in part, as follows: "Pursuant to § 230(c)(1) . . . immunity from liability exists for '(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker . . . ." [D.E. 40-1] at 2 (emphasis added). Wrong – the CDA does not say "a publisher" (in a secondary publishing capacity . . . development in part), the CDA says "the publisher" (in a primary publishing capacity).

most on the canons of statutory construction relevant to the current appeal.

As framed by Fyk's Opening Brief, this appeal asks the following: in denying Fyk's request for Federal Rule of Civil Procedure 60(b)(5) relief, did the District Court err in narrowing the 230(c) anti-competitive animus non-immunity holding of *Enigma*[3] to only a 230(c)(2) challenge, notwithstanding the facts that (1) the "Good Samaritan" intelligible principle (with the "intelligible principle" specifically expressed in quotes and with anti-competitive animus being the antithesis of "Good Samaritanism") is applicable to all of 230(c) (whether that be 230(c)(1) or 230(c)(2)), as reflected by the very title of 230(c) (*i.e.*, express statutory language); and/or (2) the express language of 230(c)(2)(B) draws from 230(c)(1), further demonstrating that "Good Samaritanism" is not a general directive that can be applied to just 230(c)(2) as the District Court and Facebook wrongly posit. Put differently, is an ICS (such as Facebook or Malwarebytes), entitled to <u>any</u> CDA immunity when the ICS' <u>actions</u> (*i.e.*, own conduct) are motivated by an anticompetitive animus (as was alleged by Enigma against Malwarebytes, and as was alleged by Fyk against Facebook)?[4]

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[3] *See Enigma Software Group USA, LLC v. Malwarebytes, Inc.* 946 F.3d 1040 (9th Cir. 2019) (conduct driven by an anti-competitive animus does not enjoy CDA immunity at the 230(c) Good Samaritan threshold), cert. denied *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13, 208 L. Ed. 2d 197 (2020).

[4] Here, Fyk alleged that Facebook took <u>action</u> against Fyk's Facebook businesses/pages, so that Facebook could make more money after steering Fyk's businesses/pages into the hands of a Fyk competitor that paid Facebook appreciably more money. The

II. Summary of Facebook's Answering Brief

In Facebook's Answering Brief [D.E. 16], Facebook collapses Rules 60(b)(5) and 60(b)(6) together to avoid Fyk's entitlement to Rule 60 relief by claiming that *Enigma* did not constitute a change in controlling law because the "Good Samaritan" holdings in *Enigma* somehow only apply to a 230(c)(2) setting and Fyk's case is of a 230(c)(1) ilk (according to Facebook's wayward rendition of Fyk's claims rather than the claims made by Fyk in his Verified Complaint). Fyk's Verified Complaint alleges that Facebook took restrictive actions against Fyk under the authority of the CDA in order to favor a Facebook user who was paying Facebook.[5] The "offending" material was, for example, Fyk's reference to the Disney movie *Pocahontas*. *See* n. 7, *infra*. Hence, Fyk's allegations against Facebook are of a 230(c)(2)(A) challenge ilk not of a 230(c)(1) ilk wherein Fyk would have had to have sought to treat Facebook as "the publisher" of his own content (again, not this case). As to Rule 60(b)(3), Facebook posits that the Rule 60 filings by Fyk at the District Court

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content remained the same, but Facebook did not take discretionary CDA action against the better paying commercial Facebook user. *See* [D.E. 1], ER 176-204. Justice Thomas posits, *see Malwarebytes*, 141 S.Ct. 13: The first logical point for 230(c) immunity analysis is the "Good Samaritan" general provision overarching all of 230(c). If an ICS' action is not that of a "Good Samaritan," then the immunity analysis stops at the 230(c) threshold.

[5] *See, e.g.*, ER 177 at ¶ 1; 177-178 at ¶ 5; 178 at ¶ 7; 179 at ¶ 14; 180-181 at ¶ 18; 181-182 at ¶ 19; 185 at ¶ 25 – 190 at ¶ 40; 191 at ¶ 42 – 193 at ¶ 46; 193 at ¶ 50 – 197 at ¶ 57; 197 at ¶ 59 – 199 at ¶ 66 (this entire count sounds in unfair competition).

level did not say enough about 60(b)(3); *i.e.*, only discussed 60(b)(3) "in passing."

As to Rule 60(b)(5) and 60(b)(6), *Enigma* was the first case (that we are aware of) wherein this Court properly started the 230(c) immunity analysis at the "Good Samaritan" motivation threshold (which is necessarily where the analysis must start because "Good Samaritan" is the Congressional intelligible principle overarching all of 230(c), including 230(c)(1)).[6] This Court's "Good Samaritan" *Enigma* holdings, as discussed in Fyk's Opening Brief here, were grounded in 230(c) as a whole (*i.e.*, as a whole statute/Act), consistent with the structure of the statute – "Good Samaritan" is at the very start of 230(c), not at the start of 230(c)(2); *i.e.*, 230(c)'s "Good Samaritan" intelligible principle envelops both 230(c) subsections, not just one subsection (230(c)(2)) as Facebook self-servingly argues.

As to Rule 60(b)(3), had Facebook truly had a problem with the manner in which Fyk's Motion for Reconsideration (ER 21-83, [D.E. 46]) discussed Rule 60(b)(3), Facebook's Response to the Motion for Reconsideration (ER 17-20, [D.E. 47]) should have taken issue with same. Here, Facebook is precluded from making an argument for the first time – that Fyk's

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[6] In this Court's June 12, 2020, decision in the first appeal, this Court erroneously held as follows: "Unlike 47 U.S.C. § 230(c)(2)(A), nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service." [D.E. 40-1] at 4 (emphasis added). This Court's *Enigma* decision rectified this erroneous holding by properly determining that the "Good Samaritan" general provision (*i.e.*, motivation) applies to all of 230(c) at the immunity threshold.

Motion for Reconsideration did not mention Rule 60 (b)(3) enough.

III. Legal Analysis

A. Sections VII.A and VII.B of Facebook's Answering Brief are Amiss – The District Court's Reconsideration Order Wrongly Determined That the "Good Samaritan" Intelligible Principle Only Applied to a 230(c)(2) Setting, Bootstrapped on the Mischaracterization That Fyk's Case Is Somehow of a 230(c)(1) Ilk

Facebook's argument against the Rule 60(b)(5) and 60(b)(6) relief sought by Fyk boils down to whether the *Enigma* anti-competition non-immunity "Good Samaritan" motivation holdings are limited to 230(c)(2) cases. *Enigma* does not say "Good Samaritan" general provision (*i.e.*, motivation) applies to all of 230(c) at the immunity threshold. that. The express language of 230 does not say that. The District Court did not say that – the District Court only noted that this case and the *Enigma* case were of a different CDA backdrop (*Enigma* being of a 230(c)(2) backdrop and this case being of a 230(c)(1) backdrop per Facebook's mischaracterization of Verified Complaint averments).[7]

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[7] "Mischaracterization" because the Verified Complaint, as actually pleaded by Fyk (not as rewritten by Facebook and rubberstamped by the District Court), is of a 230(c)(2)(A) ilk. *See, e.g.,* ER 182 at ¶ 20 – 185 at ¶ 24 (Paragraph 24 is perhaps the most glaring example of how this case is of a 230(c)(2)(A) ilk rather than of a 230(c)(1) ilk – Facebook destroyed one of Fyk's businesses/pages because he posted a screenshot of the Disney kids movie *Pocahontas* because Facebook felt that such content was somehow racist or otherwise violative of 230(c)(2)(A)).

The District Court did not say that the "Good Samaritan" threshold immunity analysis applies only to 230(c)(2) cases. It is only Facebook saying the "Good Samaritan" threshold immunity analysis only applies to 230(c)(2); *i.e.*, Facebook is trying to rewrite the CDA, as to a non-existent carve-out, to its own benefit.

As discussed in the 60(b)(3) section of Fyk's Opening Brief, the District Court misclassified Fyk's case as a 230(c)(1) case because of Facebook's mischaracterization of Verified Complaint's averments. Even if the *Enigma* "Good Samaritan" holdings somehow only applied to a 230(c)(2) scenario, the *Enigma* "Good Samaritan" holdings would still apply here because, again, at the dismissal stage, the allegations contained in Fyk's Verified Complaint were to be taken as true with all reasonable inferences drawn therefrom in favor of Fyk. And, again, if the allegations of Fyk's Verified Complaint were anything under the CDA, they would be labeled as of a 230(c)(2)(A) ilk, not a 230 (c)(1) ilk. That the nature of this case somehow falls under 230(c)(1) was a Facebook fabrication (involving Rule 60(b)(3), discussed in Fyk's Opening Brief); *i.e.*, complete mischaracterization/rewrite of Verified Complaint's allegations.

Second, Facebook's Answering Brief, in more than one place, says that Fyk contends *Enigma* announced a general directive. *See, e.g.*, Facebook Answering Brief, [D.E. 16] at 2 and 17. That is not what Fyk is saying about *Enigma* – it is not the place of a court to announce an intelligible principle in relation to enacted

law, it is the place of Congress at the time of enactment.[8] Fyk's Opening Brief says that the "Good Samaritan" intelligible principle has always been in place vis-à-vis the plain statutory language enacted by Congress over twenty-six years ago, and this Court's *Enigma* decision recognized the intelligible principle laid down by Congress (*i.e.*, the general motivation for rulemaking) for the very first time in relation to the anti-competitive animus at play in *Enigma* (which, again, is the exact same animus underlying Fyk's case).

Fyk's Opening Brief makes clear (*via* direct *Enigma* citations) that this Court's *Enigma* holdings sounded in the "Good Samaritan" intelligible principle overarching all of 230(c), not just 230(c)(2) simply because the *Enigma* case had a 230(c)(2) backdrop. Fyk's Opening Brief cites the Court's "Good Samaritan" related holdings in *Enigma* to demonstrate that these cases necessarily flow from the 230(c) motivation threshold, which naturally includes 230(c)(1) (*i.e.*, a change of law). As touched upon in Fyk's Opening Brief (and underlying Motion for Reconsideration), reading the "Good Samaritan" principle to somehow only apply to 230(c)(2) would cut against myriad canons of statutory construction (*e.g.*, Harmonious-Reading, Irreconcilability, Whole-Text, and Surplusage canons of statutory construction).

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[8] In 1996, Congress sought to protect an ICS provider from liability arising out of the ICS's engaging (as a "Good Samaritan") in voluntary restriction of offensive materials online in an effort to help protect our children from harmful web content and/or otherwise rid the Internet of filth; hence, the enactment of the CDA.

The Whole-Text canon of statutory construction stands for the proposition that "the text must be considered as a whole."[9] The Surplusage canon of statutory construction stands for the proposition that "[W]e are advised by the Supreme Court that we must give meaning to all statutory terms, avoiding redundancy or duplication wherever possible."[10] *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (citing *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 197 (1985)). The Harmonious-Reading Canon provides that the provisions of a law should be interpreted in a way that renders them compatible, not contradictory:[11] "our task is to fit, if possible, all parts into a harmonious whole." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (citing *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)); *see also, e.g., Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (courts should "accord more coherence" to disparate statutory provisions where possible). The Irreconcilability canon provides that "[i]f a [statute] contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect." Antonin Scalia & Bryan A.

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[9] Antonin Scalia & Bryan A. Garner, *Canons of Construction*, at 2 (2018).

[10] Surplusage canon – "If possible, every word and every provision is to be given effect . . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Canons of Construction* at 2.

[11] Harmonious-Reading Canon – "The provisions of a text should be interpreted in a way that renders them compatible, not contradictory." *Canons of Construction* at 2.

Garner, *Reading Law: The Interpretation of Legal Texts*, at 189 (2012).[12] If the text of a statute contains "truly irreconcilable provisions," an irreconcilable conflict is determined to exist and "the next inquiry is whether the provisions at issue are general or specific." *See, e.g., State v. Conyers*, 719 N.E.2d 535, 538 (Ohio 1999) (internal citation omitted).

Courts are often asked (as Facebook asks this Court) to consider immunity under isolated statutory subsections (*e.g.*, just 230(c)(2)), without considering 230 as a whole. Defendants typically cite questionable out-of-context precedent to "prove up" the defendants' straw man argument as if it were controlling authority. This is known as "proof-texting:"

> the practice of using [isolated, out-of-context] quotations from a document, either for the purpose of exegesis, or to establish a proposition in eisegesis . . . [*i.e.*, interpretation of a text by reading into it, one's own ideas]. Such quotes may not accurately reflect the original intent of the author [*e.g.,* Congress], and a document quoted in such a manner, when read as a whole, may not support the proposition for which it was cited.[13]

When read as a whole, many cases (including this case thus far) are not harmonious or reconcilable with the "Good Samaritan" general provision. Here, this Court

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[12] *See also Canons of Construction* at 2 for this description of the Irreconcilability Canon: "[i]f a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect."

[13] Wikipedia, *Prooftext*, https://en.wikipedia.org/wiki/Prooftext.

previously misinterpreted the CDA: "Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue can take advantage of subsection (c)(2)." [D.E. 40-1] at 5. Development in part (*i.e.*, information content provision) is still a publishing function (*i.e.*, still redundant if a provider or user cannot be treated as "a publisher"); thus, this Court's prior holding resolves nothing, leaving the CDA disharmonious (*i.e.*, still surplusage and- irreconcilable) with respect to 230(c)(1) and 230(c)(2) and the definition of an ICP under 230(f)(3).

The reason for the disharmony is simple – in not giving "every word of the text" (*e.g.*, the word "the" or the words "Good Samaritan") proper effect, courts (including this Court here) and defendants (including Facebook here) have rewritten the statute and obliterated the purpose of 230(c)(1) and the basic function of the entire statute. 230(c)(1) does not say the ICS cannot be treated as "a publisher" (a secondary publisher – Facebook), it says "the publisher" (the primary publisher – Fyk). 230(c) also says, in plain text, that civil liability protection only exists for "Good Samaritan" blocking and screening (which did not happen in Fyk's case). Courts (including this Court) have failed to apply the actual words of the CDA resulting (absurdly) in sovereign online immunity for all unlawful conduct, antithetical to acting under Congress' expressed general motivation for rule-making – "Good Samaritan."

230's "harmonious-reading" went astray as early as 1997. In *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997), the first appellate court to consider the statute erroneously held that, although the text of 230

(c)(1) grants immunity only from "publisher" or "speaker" liability, it eliminates distributor liability too; that is, 230 confers immunity even when a company distributes content that it knows is illegal (*i.e.*, information content provision). This determination (without considering 230 as a whole) eliminated all liability (*i.e.*, including information content provision and restriction), thus swallowing the purpose of the "very next subsection, which governs removal of content, § 230(c)(2)." *Malwarebytes*, 141 S.Ct. at 16.

The *Zeran* decision rendered 230(c)(2) mere "surplusage" (*i.e.*, redundant/superfluous) as early as 1997, and courts have spent more than two decades trying to reconcile this mistaken application of 230(c)(1) and/or otherwise trying to put forth a clear meaning and/or application of 230; largely to no avail.[14] Under the most harmonious, reconcilable reading of the statute, 230(c)(1) can only (*i.e.*, harmoniously) apply to passive (*i.e.*, inactive) distributor liability protection (*i.e.*, the omission of action) and 230(c)(2) applies to active distributor liability protection (*i.e.*, publisher liability protection when actively blocking and screening offensive material, so long as such blocking and screening is done in "good faith" and as a "Good Samaritan"). If the interpretation/application were to be kept as narrow/simple as the preceding sentence, the CDA could possibly work as is (*i.e.*, harmoniously as a whole text).

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[14] "Largely" because, as discussed in this appeal, the Ninth Circuit Court has started to come around at least with respect to the "Good Samaritan" threshold CDA immunity analysis within an anti-competitive animus setting. *See, e.g.*, *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019).

230 enables an ICS to "voluntarily" take action, at the prerogative of Congress, to restrict content it "considers" "objectionable," but it must follow the "Good Samaritan" blocking and screening of offensive material" moderation obligation, in "good faith," articulated in the statute, if it is to be afforded any liability protection. When an ICS "considers" information, it is acting in a traditional editorial role. 230(c)(2) limits (*i.e.*, applicable narrowed provision) that editorial role to the exclusion of material.[15] The presently broken CDA, however, allows an ICS the editorial ability to decide what content is made available (*i.e.*, provided – developed in part). Development, in whole or in part, is the role of an Information Content Provider ("ICP") by definition under 230(f)(3);[16] thus, the ICS' role as an information content restrictor also allows the ICS to act as an ICP who can

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[15] 230(c)(2)(A) provides an ICS with immunity if the ICS restricts another ICP's content in "good faith." 230(c)(2)(B) provides an ICS with immunity if the ICS does not directly take action upon another ICP's content, but instead provides another with the tools/services needed to appropriately act upon yet another's materials; *e.g.*, where an ICS provides ICP #1 (*e.g.*, a parent) with the tools/services needed to act upon (restrict) offensive materials posted by ICP #2 so as to protect a child from harm, the ICS (Facebook, for example) enjoys a "no action" (upon content) immunity akin to that of 230(c)(1), which is why the express language of 230(c)(2)(B) relates back to 230(c)(1).

[16] Again, this Court created an imaginary level of development with its June 12, 2020, decision ratifying the *Kimzey* holding: "A website may lose immunity under the CDA by making a material contribution to the creation or development of content." Imaginary because the actual language of the CDA says no such thing as to "material contribution." [D.E. 40-1] at 3.

"knowingly distribute" unlawful information under civil liability protection.

This is at odds with the "Good Samaritan" general directive of the statute and creates an irreconcilable conflict between 230(c)(2) and 230(c)(1) and the 230(f)(3) definition of an ICP. Information "consideration" (*i.e.*, restriction and development in part) gave rise to the mistaken *Zeran* decision and the confusion surrounding 230's proper application. Any information that is "considered" (*i.e.*, active editorializing) and "allowed" (*i.e.*, not restricted – knowingly chosen, advanced, or developed) by an ICS (even in part) must be subject to civil liability (especially if not done as a "Good Samaritan") or, as a result, all distribution/publishing/content provision/content restriction liability is eliminated, including unlawful distribution/publishing (*i.e.*, knowingly causing harm). The statute cannot be reconciled in a way that distinguishes between "development by proxy" (as a result of content restriction consideration) and "development in part" (as a result of information content provision). *See* n. 15, *supra*.

Restricting users' materials online, under the supposed protection of 230, is not a voluntary choice to act privately (*i.e.*, without obligation or consideration); instead, it is the voluntary choice to act under the directive of Congress (*i.e.*, state directed action) to restrict statutorily specified (*i.e.*, 230(c)(2)(A)) offensive materials. A common definition of "voluntary" is as follows: "done by design or intention; acting or done of one's own free will without valuable consideration or

legal obligation."[17] Put differently, a provider or user cannot take any voluntary action whatsoever in a private capacity and still somehow enjoy CDA immunity; rather, a provider or user is authorized by (*i.e.*, delegated by) the state to engage in certain Internet content policing activity as a state actor *via* "Good Samaritan" general provision and in a "good faith" fashion. Put yet another way, a *private* actor cannot seek 230 civil liability protection for any and all private/commercialized activity because, if a provider or user seeks "protection" (*i.e.*, the consideration), it must have taken its action under the legal obligation (*i.e.*, as a state actor at the prerogative of Congress) to block and screen offensive material. The term "voluntarily" (a private function) is irreconcilable with 230's own obligatory/induced governmental function – 230 is an irreconcilable "voluntary mandate" (*i.e.*, governmentally induced private function), as the phrase "voluntary mandate" is a *prima facie* oxymoron.

If this Court were to somehow embrace Facebook's contention that the "Good Samaritan" intelligible principle somehow only applies to 230(c)(2), such embracement would disable a whole text and harmonious read of the CDA, would render 230(c)(2)(A) mere surplusage of 230(c)(1), would render 230(c)(1) and 230(c)(2) irreconcilable, and would create an absurd result in contravention of the Absurdity doctrine. This Court should not endorse a Facebook position that would contravene several canons of statutory construction – there is simply no other way to read 230 other than to read the "Good Samaritan" principle,

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[17] Merriam-Webster Dictionary, *Voluntary*, https://www.merriam-webster.com/dictionary/voluntarily (emphasis added).

found at the very start of 230(c) as applicable to all of 230(c), including 230(c)(1).[18]

Whether viewed through the lens of express CDA wording or the lens of canons of statutory construction, *Enigma* was the first case (that we are aware of) that properly employed a "Good Samaritan" immunity analysis at the threshold. In order for this Court's *Enigma* holdings to square with the express language of the CDA (namely, the "General Samaritan" principle being situated by Congress at the very start of 230(c), not embedded within a subsection such as 230(c)(2)) and/or not run afoul of the aforementioned canons of statutory construction, the "Good Samaritan" immunity analysis should have unfolded at the threshold of the immunity analysis in this case. Had that properly occurred (at any point during the approximate four-year lifespan of this case), Fyk would have enjoyed the same result as Enigma; *i.e.*, would not have been dismissed because Fyk's Verified Complaint very plainly argues anti-competition (heck, the Verified Complaint dedicates an entire count to California's unfair competition statute), which such anti-competitive animus was found by this Court in *Enigma* to cut against the "Good Samaritan" threshold motivation.

It would make zero sense for the Court to now somehow say that the *Enigma* anti-competition/"Good Samaritan" analysis is only applicable to cases of a 230(c)(2) backdrop. More pointedly, that interpretation

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[18] 230 is irreconcilably unconstitutional. We invite this Court to review Fyk's constitutional challenge complaint recently filed in the District of Columbia District Court for more detail. *See Fyk v. U.S.A.*, No. 22-cv-01144 (DDC Apr. 26, 2022).

would be wholly inconsistent with the express provisions of the statute.

B. Section VII.C of Answering Brief – Facebook's "Fyk Said Too Little About Rule 60(b)(3)" Argument Is Too Late

Facebook's Answering Brief [D.E. 16] contends, for the first time, that Fyk's Motion for Reconsideration said too little about Rule 60(b)(3) relief, as if a shorter discussion rendered it appropriate for the District Court and Facebook to entirely overlook same. Facebook, however, did not make this argument in its Response to the Motion for Reconsideration (where the argument was first available to Facebook to make), thereby precluding Facebook from making such an argument for the first time in this appeal; *i.e.*, Facebook's failure to address Rule 60(b)(3) relief in its District Court Response constitutes a waiver and/or estoppel in relation to Facebook rebutting Rule 60(b)(3) relief for the first time in its Answering Brief on this appeal. Facebook's Response to the Motion for Reconsideration (a mere few pages) does not even mention Rule 60(b)(3).

> Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so. One 'exceptional circumstance' is when the issue is one of law and either does not depend on the factual record, or the record has been fully developed.

In re America West Airlines, Inc. v. America West Airlines, Inc., 217 F.3d 1161, 1165 (9th Cir. 2000) (internal citations omitted); *see also, e.g., Casey v. Colvin*, 637 Fed.Appx. 389, 390 (9th Cir. 2016) ("These

arguments were raised for the first time on appeal and are therefore waived").

Here, the Rule 60(b)(3) relief that Fyk sought in the District Court entirely depended on the factual record (a record that has by no means been "fully developed" because this matter has yet to make it past the pleading stage); *e.g.*, (1) Facebook's misrepresentation to the District Court concerning the subject matter of one of the Fyk businesses/pages that Facebook destroyed (that subject matter being of public urination per Facebook falsehood); (2) Facebook's misrepresentation to the District Court that Fyk's case was/is of a 230(c)(1) ilk rather than of a 230(c)(2)(A) ilk as actually pleaded in Fyk's Verified Complaint.

Here, there is no "exceptional circumstance" under which this Court should entertain the Rule 60 (b)(3) argument that Facebook's Answering Brief raised for the first time in this appeal. Facebook could have made the same Rule 60(b)(3) argument in its Response to the Motion for Reconsideration but it did not even mention Rule 60(b)(3). Facebook is precluded from making its Rule 60(b)(3) argument for the first time in this appeal; *i.e.*, Facebook waived any right to make an argument against Rule 60(b)(3) relief.

Because Fyk's request for Rule 60(b)(3) relief remains unrebutted for all legal intents and purposes, this Court should reverse and remand on this basis alone. Although, as discussed above, *Enigma* absolutely marked a change in controlling law applicable to this case; and, thus, as discussed above, Rule 60(b)(5) and 60(b)(6) relief is (and should be made) available.

C. Conclusion

Fyk simply asks this Court to interpret and apply 230 as the CDA is actually (narrowly) written. The Court's overly broad interpretation of 230(c) has gone beyond anything that plausibly could have been intended by Congress.

This Court's *Enigma* "Good Samaritan" threshold holdings were in relation to the entirety of 230(c), which necessarily captured (but was not limited to) the 230(c)(2) setting of *Enigma*. Under the Whole-Text, Harmonious Reading, Irreconcilability, and Surplusage canons of statutory construction, there is just no other way to apply the "Good Samaritan" intelligible principle.

For all of the foregoing reasons, whether considered separately or together, Fyk respectfully requests this Court's reversal of the November 1, 2021, Order Denying Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) (ER 3-4, [D.E. 51], and remand to the District Court for resolution on the merits, consistent with the analysis of *Enigma* (controlling authority of the Ninth Circuit).

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32 (a)(7)(B)(ii) because the type-volume limitation does not exceed 6,500 words (exclusive of this certificate, cover pages, signature block, and certificate of service). This Reply Brief includes 6,377 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Jeffrey L. Greyber

APPELLANT FYK MOTION FOR RECONSIDERATION OF [DE 36-1] (NOVEMBER 2, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal No. 21-16997

On Appeal from Denial of Motion for Relief Pursuant to Fed.R.Civ.P. 60(b) to Vacate and Set Aside Entry of Judgment of the United States District Court for the Northern District of California, 4:18-cv-05159 (Hon. Jeffrey S. White)

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[. . .]

I. Introduction – Statement of Counsel (Purposes for Reconsideration)

Pursuant to this Court's October 19, 2022, *Information Regarding Judgment and Post-Judgment Proceedings* instructions [D.E. 36-2], undersigned counsel states that this Court's October 19, 2022, Memorandum [D.E. 36-1] ("Memorandum") dismissing the appeal of Plaintiff/Appellant, Jason Fyk ("Fyk"), on *sua sponte* "untimeliness" grounds appears to be based on this Court's misstatement of Fyk's procedural history, omitting, for example, any consideration of the time in which Fyk's petition for writ of certiorari was pending, which was filed with the Supreme Court of the United States ("SCOTUS") on November 2, 2020, assigned Case No. 20-632 and placed on the SCOTUS docket on November 10, 2020, and not accepted for consideration by SCOTUS (petition for writ of certiorari denied without discussion) on January 11, 2021. Accordingly, this Motion for Reconsideration

is filed by Fyk on the following grounds, and discussed in greater detail below:[1]

(a) This Court wrongly overlooked (or misconstrued) material points of fact. More specifically and discussed further below, this Court's Memorandum "recitation" of *Enigma*-usage[2] chronology leading up to Fyk's Rule 60(b) District Court proceedings and underlying this Court's *sua sponte* "time-barred" Memorandum adjudication (*i.e.,* this Court's view of purported Fyk "delay" in introducing the controlling authority of *Enigma* in District Court reconsideration proceedings) is factually incorrect.

(b) Changes in law occurred after initiation of the subject appeal that were not addressed by this Court.[3] More specifically and discussed further below,

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[1] "It is the duty of a good judge to enlarge or extend justice." 1 *Burr.* 304, https://thelawdictionary.org/boni-judicis-est-ampliare-justitiam/ "A good judge should do nothing of his own arbitrary will, nor on the dictate of his personal inclination, but should decide according to law and justice." 7 *Sir Edward Coke's English King's Bench Reports* 27A. "The main object[ive] of [the judiciary] is the protection and preservation of personal rights, private property, and public liberties, and upholding the law of God." *American Maxim* 51p. The Memorandum's "disposition" of the subject appeal contravenes all such maxims.

[2] *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019), cert. denied *via Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13 (2020).

[3] *See* [D.E. 29] (calling this Court's attention to *Rumble, Inc. v. Google, LLC,* No. 21-cv-00229-HSG (N.D. Cal. July 29, 2022), in and of itself warranting this Court's overturning the District Court's November 1, 2021, Order [D.E. 51] (denying Fyk deserved Rule 60(b) relief) in this matter and remanding this case on anticompetitive animus grounds argued by Fyk within the ER such that this case finally proceeds on the merits over

the supplemental cases submitted by Fyk post-appeal warranted, irrespective of *Enigma*, this Court's remand of this case back to the District Court to finally proceed on the merits (in a long overdue Due Process vein),[4] over four years after Fyk's August 2018 commencement of litigation against Defendant/Appellee, Facebook, Inc. ("Facebook") based on Facebook's anti-

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four years in); *see also* [D.E. 26] (calling this Court's attention to *Jarkesy v. SEC*, No. 20-61007 (5th Cir. May 18, 2022), in and of itself warranting this Court's overturning the District Court's November 1, 2021, Order [D.E. 51 (denying Fyk deserved Rule 60(b) relief) in this matter and remanding this case on intelligible principle grounds argued by Fyk within the ER such that this case finally proceeds on the merits over four years in); *see also* [D.E. 15] (calling this Court's attention to yet another Justice Clarence Thomas statement in *Doe v. Facebook, Inc.*, 595 U.S. ___, 2022 WL 660628 (Mar. 7, 2022), mirroring Justice Thomas October 13, 2020, *Enigma* statement and in and of itself warranting this Court's overturning the District Court's November 1, 2021, Order [D.E. 51] (denying Fyk deserved Rule 60(b) relief) in this matter and remanding this case on the true/accurate view of Section 230 immunity within an anti-competitive animus setting, just like *Enigma*, argued by Fyk within the ER such that this case finally proceeds on the merits over four years in). And we did not burden this Court with the filing of additional, supplemental case law post-dating initiation of this appeal because we were cognizant of the judiciary's general preference to not be peppered by supplemental case law.

[4] "It is axiomatic that one has standing to litigate his or her own due process rights." *Campbell v. Louisiana*, 523 U.S. 392, 400 (1998). Indeed, "[i]t has long been received a rule, that no one is to be condemned . . . or deprived of his property in any judicial proceeding, unless he has had an opportunity of being heard . . . ," Broom, Herbert, LL.D., *A Selection of Legal Maxims*, 112 (7th Am. Ed., T. & J.W. & Co., 1874) (internal citations omitted), contrary to the California courts never truly hearing Fyk (yet condemning him, in *Enigma* repugnant fashion, to boot) for four-plus-years.

competitive conduct (among other illegal conduct) committed in 2016 and perpetrated by Facebook ever since against Fyk (and millions of others Americans, for that matter) largely (if not entirely) because of the California district courts' dissonant treatment of Title 47, United States Code, Section 230, Communications Decency Act ("CDA" or "Section 230") "immunity" . . . until *Enigma*.[5]

(c) The substantive result of this Court's October 19, 2022, *sua sponte* "discretionary" "timing" (*i.e.*, non-substantive) decision inflicted upon Fyk conflicts with another Court decision – this Court knew of *Enigma*

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[5] *See Fyk v. United States of America*, No. 22-cv-01144-RC (D.D.C. Apr. 2022), a copy of which is attached hereto as Exhibit 1 (inclusive of Exhibits A-C, but sans Exhibits D-JJ due to size) for the Court's ease of reference. Fyk has never stopped fighting for justice/equity/constitutional rights to prevail. *See, e.g.*, Ex. 1 (simultaneously pursued by Fyk alongside District Court reconsideration efforts and this appeal because Fyk has never even been given an opportunity to amend his complaint after a summary dismissal at the pleading stage, before or after *Enigma* became the controlling authority in the Ninth Circuit. This Court's Memorandum perpetuates the deprivation of Fyk's Due Process right by failing to provide any recourse to Appellant to petition the District Court to apply Ninth Circuit law that was finally determinative after Malwarebytes' SCOTUS petition was denied, and *Enigma* became controlling authority. We request that this Court review the procedural history and return this matter to the District Court to finally afford Fyk his Due Process rights (progression on the merits). The District Court's reason for its November 1, 2021, Order (denying Fyk deserved Rule 60(b) relief) leading to this appeal did not mention the "timing" of *Enigma* usage in Fyk's reconsideration endeavor. And Facebook's 60(b) briefing arguments leading to the District Court's November 1, 2021, Order did not include the "timing" of *Enigma* (nor mention any prejudice suffered from the "timing" of *Enigma*) usage in Fyk's reconsideration endeavor.

well before Fyk (as more thoroughly discussed/demonstrated below) and yet inexplicably did not afford Fyk the benefit of *Enigma* (and/or the aforementioned supplemental case law filed during the pendency of this appeal, *see* n. 3, *supra*, which this Court cannot legitimately question the "timing" of) by remanding this case to the District Court to finally proceed on the merits in a constitutionally guaranteed Due Process fashion. And, although not specifically noted in the "Purpose" section of *Information Regarding Judgment and Post-Judgment Proceedings* [D.E. 36-2] directives, we would be remiss if this Motion for Reconsideration of [D.E. 36-1] did not note the perpetuation (*via* the Memorandum) of four-plus-years of constitutional right deprivation, injustice, and inequity suffered by Fyk in California, as promotion of justice/equity and preservation of constitutional rights should always be foremost "purposes" of all Judges.

II. This Court's Memorandum Misstates The Chronology Of Appellant's Case History In The Context Of The Parallel *Enigma* Appeal

The Memorandum revolves around this misnomer: "Fyk offers no excuse for th[e] significant delay [of *Enigma* usage] and we see no reason why he could not have either raised his *Enigma* argument in his first appeal or made his Rule 60(b) motion much earlier." [D.E. 36-1] at 3. Moreover, the "untimeliness" finding within the Memorandum was *sua sponte* – the District Court's November 1, 2021, Order (18-cv-05159-JSW, [D.E. 51]) denying Fyk's Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment [D.E. 46] had nothing to do with the timing of Fyk's Rule 60(b) efforts, and Facebook's Rule 60(b) briefing [D.E. 47] did not advance any arguments as

to the timing of Fyk's Rule 60(b) efforts or as to any supposed prejudice (because there was none) suffered by Facebook as a result of the "timing" of Fyk's Rule 60(b) proceedings.

Had this Court accurately stated the true chronology leading up to Fyk's Rule 60(b) efforts in the District Court that led to this appeal (or stuck to what was actually at issue in the District Court, which was not "timing"),[6] this Court should not have summarily dismissed Fyk's appeal by purporting to "affirm" the District Court's November 1, 2021, Order.[7] This Court

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[6] "It is improper to give judgement or pass sentence without looking at the whole case," 8 *Sir Edward Coke's English King's Bench Reports* 117b, as this Court's aberrant chronological recitation did.

[7] "Purporting to 'affirm'" because, again, this Court's Memorandum was no affirmation at all, it was a *sua sponte* dismissal of the merits of the subject appeal – the merits being that *Enigma* stands for what Fyk's appellate briefing and supplemental filings (and District Court briefing leading to this appeal, for that matter) say *Enigma* stands for in the CDA "immunity" vein (lest the "Good Samaritan" intelligible principle overarching all of Section 230(c) was/is Congressional fluff, which it was/is most certainly not, *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); *see also, e.g.,* 6 *Sir Edward Coke's English King's Bench Reports* 65 ("A general rule is to be understood generally"); *see also, e.g., Jarkesy* [D.E. 26]), not for District Court's November 1, 2021, Order's narrowed/strained view that *Enigma* somehow stands for the proposition that the "Good Samaritan" general provision/intelligible principle does not apply generally to Section 230(c) but rather somehow only applies to part of Section 230(c)(2). This Court knows that *Fyk* is correct as to the proper

should now do the right thing – remand Fyk's case to the District Court to finally proceed on the merits.

Fyk has pursued Section 230 immunity-oriented justice for well over four years, starting in the Northern District of California, 18-cv-05159-JSW in August 2018. Facebook's actions are the *sin qua non* of the anti-competitive animus alleged in Fyk's Verified Complaint that this Court's *Enigma* decision (initially entered by this Court on September 12, 2019, amended by this Court on December 31, 2019, made a "take effect" "mandate" by this Court on January 8, 2020, and not fully solidified until the SCOTUS' October 13, 2020, denial of Malwarebytes' petition for writ of certiorari)[8] clarified well after Fyk's case was dismissed on June 18, 2019, by the District Court, and his subsequent appeals underscore the deprivation of constitutionally protected rights of David (Fyk) in this David versus Goliath (Facebook) tragedy.

Contrary to the Memorandum's *sua sponte*/off-brief "timing"-oriented make-believe, Fyk did not "wait" any (appreciable) amount of time before bringing the *Enigma* decision to the District Court's attention and/or there was certainly no "significant delay" in Fyk's making use of *Enigma* immediately upon learning of same. Fyk was entirely unaware of the *Enigma* case

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application of the Court's *Enigma* holding(s), but for some unknown reason refuses to so declare for Fyk in the Facebook matter as it declared for Enigma in the Malwarebytes matter.

[8] Of note, these dates do not correlate with publicly viewable /readily findable dates (like Westlaw publication dates, for example), which such dates postdated these dates.

until October 14, 2020;[9] *i.e.* Fyk learned of this Court's *Enigma* decision only one day after the SCOTUS denied Malwarebytes' petition (October 13, 2020), which such SCOTUS petition denial solidified this Court's January 8, 2020, "take effect" "mandate" of its December 31, 2019, amended *Enigma* decision; *i.e.*, only one day after the "Good Samaritan" general provision/intelligible principle (CDA immunity threshold consideration overarching all of Section 230(c)) became settled law vis-à-vis SCOTUS' denial of Malwarebytes' petition.[10]

Simply put, Fyk did not "wait" to include the *Enigma* decision in his SCOTUS petition for writ of

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[9] *See* November 2, 2022, Fyk Declaration attached hereto as **Exhibit 2** and incorporated fully herein by reference. Undersigned counsel hereby certifies, as an officer of twenty-plus courts across the nation in good standing in all spanning a fifteen-plus-year career, that undersigned counsel's (un)awareness of *Enigma* tracked Fyk's (un)awareness of same, as neither Fyk nor undersigned counsel possess crystal balls revealing what is transpiring in every case in every court across the nation by the minute, day, or even month.

[10] Fyk's arguments against Facebook's CDA "immunity" are grounded in the CDA's conferral of immunity, if and only if Facebook acted as a "Good Samaritan" but not if Facebook's actions were motivated by commercial purposes; *i.e.,* Fyk's arguments say the same thing that this Court's *Enigma* decision said months before this Court's *Enigma* decision and years before the SCOTUS October 13, 2020, denial of Malwarebytes' petition for writ of certiorari, thereby making the Ninth Circuit's *Enigma* decision controlling authority; *e.g.*, the "Good Samaritan" intelligible principle overarches all of Section 230(c) at the threshold, not just one subsection or another (Subsection 230(c)(1) or 230(c)(2) or whatever) as the District Court's November 1, 2021, Order [D.E. 51] that is the subject of this appeal wrongly decided in wayward interpretation/application of *Enigma.*

certiorari, which was filed a mere nineteen days after he learned of the *Enigma* case (*i.e.,* Fyk timely employed *Enigma* in the proceedings that were then before him – petition for writ of certiorari to SCOTUS). Indeed, Fyk's SCOTUS petition was ready to be filed in mid-October 2020 following this Court's decision on Fyk's first appeal and this Court's rejection of Fyk's request for *en banc* consideration following this Court's first appeal decision; but, when Fyk learned of *Enigma* (again, October 14, 2020, *see* Ex. 2), his SCOTUS petition was revised to apply *Enigma* therein; *i.e.*, specifically because of *Enigma*, Fyk's SCOTUS petition was filed in early-November 2020 rather than mid-October 2020.

Fyk also did not "wait" to make the argument to the District Court in his timely Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment [D.E. 46] (the subject of this appeal), as that Motion was timely filed a mere two-and-a-half months after the SCOTUS decided to not take up Fyk's petition, which was only a mere five months after *Enigma* actually became settled law *via* the SCOTUS' October 13, 2020, denial of Malwarebytes' petition for writ of certiorari. Prior to the SCOTUS' solidification of this Court's *Enigma* decision, the precedential worth of this Court's *Enigma* decision was in question amidst Malwarebytes' appeal to SCOTUS. In other words, Fyk acted entirely in good faith and timely under the circumstances. It is also why Facebook's District Court Rule 60(b) response [D.E. 47] did not challenge the timeliness of Fyk's Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment [D.E. 46] nor argue some sort of timing-based prejudice and why the District

Court's November 1, 2021, Order [D.E. 51] that is the subject of this appeal did not quarrel with the timing of Fyk's *Enigma* usage. Again, only this Court's *sua sponte* Memorandum "affirmation" positing of a "timing" issue resulted in the continuing deprivation of Fyk's Due Process rights.[11]

Fyk acted entirely in good faith and as timely as possible (having addressed "Good Samaritanism" independent of *Enigma* knowledge and again immediately upon learning of *Enigma*), but to further expand on Fyk's good faith actions and timeliness, here is the actual sequence of events (*i.e.,* chronological parallel tracks between the *Fyk* case and the *Enigma* case supporting Fyk's Motion for Reconsideration in the District Court):[12]

- **10-07-2016 – Enigma files complaint against Malwarebytes in the N.D. Cal. Court.**
- **11-07-2017 – N.D. Cal. Court dismisses Enigma's complaint.**
- **11-21-2017 – Enigma appeals dismissal to the Ninth Circuit Court.**

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[11] Fyk's briefing in this Court did not address timing because District Court filings were already exhibits (ER) to filings in this Court, which is part of the record before this Court.

[12] *Enigma* filings/occurrences are in bold, whereas *Fyk* filings are not. And as to the following dates, *see* n. 8, *supra*. And, again, for what it is worth to this Court as to real world Fyk *Enigma* knowledge (we submit it should be worth something), *see* Ex. 2 and n. 9, *supra*.

- 08-22-2018 – Fyk files complaint against Facebook in the N.D. Cal. Court.
- **04-02-2019 - Enigma files opening brief in the Ninth Circuit Court. 06-18-2019 – N.D. Cal Court dismisses Fyk's complaint.**
- 06-19-2019 – Fyk notices appeal in the Ninth Circuit Court.
- **09-12-2019 – Ninth Circuit overturns the N.D. Cal. Court's dismissal of the *Enigma* case.**
- **09-13-2019 – Malwarebytes files motion to enlarge *en banc* petition deadline.**
- 09-18-2019 – Fyk files opening brief in the Ninth Circuit Court.
- **10-28-2019 – Malwarebytes files *en banc* petition in Ninth Circuit Court.**
- **12-31-2019 – Ninth Circuit Court issues amended *Enigma* decision denying Malwarebytes *en banc* petition.**
- 12-31-2019 – Fyk files his reply brief in Ninth Circuit Court.
- 01-03-2020 – Fyk files (corrected) reply brief in Ninth Circuit Court.
- **03-06-2020 – Malwarebytes files application to enlarge SCOTUS Cert to 05-11-20 (granted), placing this Court's *Enigma* decision in flux.**
- **05-11-2020 – Malwarebytes files Petition for Writ of Certiorari with SCOTUS.**

***Enigma* went to the SCOTUS after Fyk's Ninth Circuit briefing had been completed.**

- **05-13-2020 – *Enigma* SCOTUS docketed.**
- 06-12-2020 – Ninth Circuit Court denies Fyk's appeal; *i.e.*, affirms the N.D. Cal. Court's dismissal of Fyk's Verified Complaint without leave to amend.
- 06-26-2020 – Fyk timely files *en banc* petition with the Ninth Circuit Court.
- 07-21-2020 – Fyk *en banc* petition docketed.
- 07-30-2020 – Ninth Circuit Court denies Fyk's *en banc* petition.
- **10-13-2020 – SCOTUS denied Malwarebytes' petition for writ of certiorari, accompanied by a ten-page Statement from Justice Clarence Thomas expounding on what exactly CDA immunity is supposed to be; with SCOTUS' denial of Malwarebytes' petition, this Court's *Enigma* decision became settled law.**
- 10-14-2020 – In reality (whether or not this Court lends any credence to this truth), Fyk and undersigned counsel learn of *Enigma* for the first time. *See* Ex. 2.
- 11-02-2020 – Fyk files Petition for Writ of Certiorari in SCOTUS, incorporating the new *Enigma* affirmation (and Justice Thomas Statement) into such Petition.
- 11-10-2020 – Fyk's SCOTUS Petition docketed.

- 01-11-2021 – SCOTUS decides to not consider Fyk's Petition (SCOTUS denial entered 01-13-2021).
- 03-22-2021 – Fyk files 60(b) motion in N.D. Cal. Court, citing the now newly settled Ninth Circuit *Enigma* case law.
- 11-01-2021 – N.D. Cal Court, seven months later, denies Fyk's 3-22-2021 60(b) Motion.
- 12-01-2021 – Fyk timely notices appeal with Ninth Circuit Court.
- 12-21-2021 – Notice of appeal docketed.
- 03-03-2022 – Fyk timely files opening brief in this second Ninth Circuit appeal, and in following weeks Fyk timely files supplemental case law, *see* n. 3, *supra*.
- 04-26-2022 – Fyk files CC in the D.D.C. Court. *See* Ex. 1.
- 10-19-2022 – Over seven months after the filing of Fyk's opening brief, Ninth Circuit Court denies Fyk's appeal predicated on a three page, non-substantive *sua* sponte "timing" "basis."

The accurate chronology above reflects the parallel procedural tracks between the Malwarebytes' appeal and Fyk's appeal demonstrating that Fyk timely moved for reconsideration before the District Court, and before this Court. Fyk has never been given the opportunity to amend his pleadings or be heard in oral argument. Fyk was entitled to apply the controlling authority (*Enigma*) to his case, once it became settled law in October 2020. And contrary to the "untimely"

sua sponte Memorandum conclusion, Fyk promptly put *Enigma* to use in the District Court reconsideration proceedings following the SCOTUS' January 2021 denial of his petition for writ of certiorari, and the subject appeal is centered on the District Court's improperly narrow interpretation/application of *Enigma*.

III. Changes in Law Post-Appeal Were Overlooked By This Court – Assuming *Arguendo* Fyk's Use of *Enigma* Was Somehow "Tardy," the Supplemental Case Law Submitted By Fyk Post-Appeal Was Timely

Even if this Court, after reviewing the above full/in-context/accurate chronology of *Fyk* and *Enigma* proceedings, still somehow believes Fyk delayed seeking 60(b) reconsideration relief in the District Court by way of *Enigma* (notwithstanding Fyk's pursuing the equivalent of same *via* petition for writ of certiorari to the SCOTUS a mere couple weeks after SCOTUS' October 13, 2020, solidification of this Court's *Enigma* decision and Justice Thomas' insightful associated Statement), one only need review all of Fyk's supplemental filings (*see* n. 3, *supra*), which attempted time and again to highlight the requisite determination of "Good Samaritan" to entitle Facebook to CDA immunity, and which warranted in and of themselves this Court's overturning the District Court's November 1, 2021, Order and remanding for merits-based progression grounded in preservation of justice, equity, and constitutionally guaranteed rights. This Court does not address, nor could it, that Fyk's supplemental filings were timely. This Court's October 19, 2022, "Affirmation" not even mentioning Fyk's myriad supplemental filings strongly suggests that this Court completely ignored same (along with the rest of the actual

substance of briefing filed in this appeal and contained within the incorporated ER). The supplemental filings noted in footnote 3 above where not rebutted by Facebook, nor did this Court ever quarrel with same. The supplemental filings were fair game, and must be considered by this Court within the confines of this Motion for Reconsideration unlike the Court's failure to consider same in rendering its incorrect October 19, 2022, *Enigma* "timing" decision. Again, those decisions alone (irrespective of this Court's decision to discriminate against Fyk by not affording Fyk the same CDA non-immunity justice it afforded Enigma despite this Court's knowing of *Enigma* well before Fyk because *Enigma* was this Court's decision) warrant this Court's overturning its October 19, 2022, "Affirmation" and remanding this matter to the District Court for progression on the merits nearly fifty-one months after Fyk sued Facebook for the Social Media Giant's blatant anti-competitive illegal conduct (among other illegal conduct), which by its nature could not be entitled to Section 230 immunity.

IV. This Court's Memorandum "Affirmation" Conflicts With Another Court Decision – This Court Knew of *Enigma* Well Before Fyk and Yet Still Decided Fyk's Case Differently Than Enigma's Case (The Outcome of the *Fyk* Case Conflicts With the Outcome of the *Enigma* Case, in a *Prima Facie* Judicial Elevation of "Form" Over Function in Contravention of Justice, Equity, and Constitutional Rights)

On substance, the Court's October 19, 2022, "Affirmation" has resulted in two cases involving the same issue (the breadth, or lack of breadth, of CDA immunity for Big Tech abusers like Facebook) "ending"

entirely differently/irreconcilably – Fyk being deprived of justice, equity, and constitutional rights compared to Enigma enjoying same . . . all at the hands of this Court and the District Court.[13] That cannot rightly be, especially predicated on the selective/truncated/out-of-context/uninformed/non-substantive "timing" "reason" around which this Court's October 19, 2022, "Affirmation" (rather, October 19, 2022, *sua sponte* manufacturing) revolves. This Motion for Reconsideration should be granted; *i.e.*, this Court should reverse its October 19, 2022, non-substantive "Affirmation;" *i.e.*, this Court should reverse the District Court's November 1, 2021, Order by saying that *Enigma* means the same thing for Fyk that it meant for Enigma. In so doing, this Court will no longer be promoting the deprivation of constitutional rights, justice, and equity.[14]

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[13] "Nothing in law is more intolerable than that the same case or matter [being subjected to] different views of law [within the same Court]." 4 *Sir Edward Coke's English King's Bench Reports* 93. Rather, the same reason, warrants the same law. *See Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837). Put yet another way, "[o]f [respecting] like things, [in like cases,] the judgment is to be the same." 7 *Sir Edward Coke's English King's Bench Reports* 18. Put yet another way, "[t]he law rejects . . . contradictory, and incongruous things." *Jenkins' Eight Centuries of Reports*, English Exchequer at 133.

[14] Lady Justice was blind, but for a reason. This Court's vision, however, should be 20/20, especially within the hindsight opportunity for this Court that is this Motion for Reconsideration. "Where the ordinary remedy fails, we must have recourse to what is extraordinary." *See, inter alia*, *Black's Law Dictionary* at 1002 (2d ed., 1910) The ordinary remedy would have been the Court's doing the right thing *via* the Memorandum, whereas the extraordinary remedy that must now occur is this Court's reversing

WHEREFORE, Plaintiff/Appellant, Jason Fyk, requests entry of an Order reversing this Court's October 19, 2022, "Affirmation," overturning the District Court's November 1, 2021, Order denying Fyk deserved 60(b) relief, remanding this case to the District Court to finally proceed on the merits, and affording any other relief to Fyk that this Court deems equitable, just, and/or proper.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Motion for Reconsideration complies with the Court's *Information Regarding Judgment and Post-Judgment Proceedings* instructions. *See* [D.E. 36-2] (Oct. 19, 2022) (*e.g.*, this Motion was filed within fourteen days of the Court's October 19, 2022 "Affirmation," this Motion does not exceed 15-pages, and this Motion otherwise complies with other Federal Rules of Appellate Procedure dictates such as font size and formatting).

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its Memorandum and contemporaneously remanding this case to the District Court to finally progress on the merits.

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Dated: November 2, 2022

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Submitted By:

/s/ Jeffrey L. Greyber
Jeffrey L. Greyber, Esq.

COMPLAINT FOR DECLARATORY JUDGMENT REGARDING TITLE 47, UNITED STATES CODE, SECTION 230 (THE COMMUNICATIONS DECENCY ACT) (AUGUST 22, 2018)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JASON FYK,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 1:22-cv-01144

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[. . .]

Complaint for Declaratory Judgment Regarding Title 47, United States Code, Section 230 (the Communications Decency Act)

In this constitutional challenge to Title 47, United States Codes, Section 230 (the Communications Decency Act, "CDA" or "Section 230"), *pro se* Plaintiff, Jason Fyk ("Fyk"), sues Defendant, the United States of America ("USA"), as follows:

Nature of the Action, Parties, Jurisdiction, and Venue

1. Pursuant to Federal Rule of Civil Procedure 5.1 and Title 28, United States Code, Section 2201 (Federal Rule of Civil Procedure 57), this is a constitutional challenge of the CDA seeking this Court's declaratory judgment that the CDA is unconstitutional and accordingly inoperative.[1,2]

2. Fyk seeks a declaration that the CDA (primarily, Section 230(c)) is unconstitutional because it deprives American citizens (through private commercial entities acting with federal government delegated authority) of their (a) liberties and property without due process,

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[1] The full text of the CDA, entitled *Protection for private blocking and screening of offensive material,* is attached hereto as **Exhibit A** for the Court's ease of reference, and Exhibit A is incorporated fully herein by reference.

[2] Alternative relief to a finding from this Court as to the CDA's unconstitutionality is discussed mainly in ¶¶ 4 and 329 and n. 107, *infra,* but intermittingly throughout this filing.

in violation of the Fifth Amendment;[3] and (b) free speech rights, in violation of the First Amendment.[4]

3. Section 230, on its face and/or as applied,[5] violates the Non-Delegation/Major Questions, Void-for-Vagueness, and Substantial Overbreadth Doctrines. Section 230 also violates the Harmonious-Reading, Irreconcilability, Whole-Text, Surplusage, and Absurdity Canons of statutory construction.

4. This Court has the ability 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

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[3] The Fifth Amendment reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

[4] The First Amendment reads, in pertinent part, as follows: "Congress shall make no law . . . abridging freedom of speech, or of the press . . . and to petition the government for a redress of grievances." *Id.*

[5] Constitutional challenges are typically classified as "as applied" challenges or "facial" challenges. This constitutional challenge is both.

department to say what the law is"). And this is precisely the declaratory judgment Fyk respectfully requests from this Court here — striking aspects of the CDA as unconstitutional. Alternatively, the Court has the ability to rein in Section 230 by narrowly conforming the application of Section 230 consistent with the legislative intent, constitutional tenets/mandates, and/or the CDA's actual language. In this case, Fyk challenges the inconsistent judicial construction of the limits of online providers' Section 230(c) immunity.[6] Fyk seeks a declaration that the CDA's immunity should be struck consistent with the Constitution or, alternatively, if judicial interpretation by the Court can cure the deficiencies of CDA immunity, the alternative declaration that Fyk seeks is this Court's clarification of the proper scope of Section 230(c) immunity.[7] *See, e.g.*, ¶ 329(a)-(d) and n. 107, *infra.*

5. The CDA enables a private actor (Interactive Computer Service, "ICS," as defined by Section 230(f); *e.g.,* Facebook, Google, Twitter, PayPal, Snapchat, and *et cetera,* which can also be rightly categorized as "online providers," "Big Tech," "Social Media Giants," or the like) to "police," "regulate," "enforce," and/or

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[6] The breadth of Section 230 immunity has been unchecked and expanded by courts (mainly courts within the Ninth Circuit, including the Ninth Circuit Court, where many social media companies have their principal place of business) over the last twenty-six years.

[7] At present, there is no limit to Big Tech's CDA immunization; and, worse, the judicial construction of immunity limits varies tremendously from one jurisdiction to another, making the CDA's application and effect extremely inconsistent and arbitrary despite the Internet not recognizing geographic bounds.

"penalize" offensive speech under supposed CDA authority and protection so long as the ICS acts as a "Good Samaritan." In a separate, independent action (discussed further below), the CDA was applied (at least so far; this separate, independent action is presently up on a second appeal to the Ninth Circuit Court) to immunize the commercial activities of a private actor (Facebook, Inc., "Facebook") against a commercial competitor (Fyk) without a showing that the private actor (Facebook) was acting as a "Good Samaritan" or in "good faith" or legally. *See Fyk v. Facebook, Inc.,* No. 4:18-cv-05159-JSW (N.D. Cal.)/ *Fyk v. Facebook, Inc.,* No. 19-16232 (9th Cir.)/*Fyk v. Facebook, Inc.,* No. 21-16997 (9th Cir.) (the "Facebook Lawsuit").[8] More specifically, the overly "broad construction" of the unconstitutional CDA that has "confer[red] sweeping immunity on some of the largest companies in the world"[9]

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[8] In the Facebook Lawsuit, Fyk was denied due process rights after Facebook stripped him of his liberties and property (property rights demonstrably valued in excess of $100,000,000.00) by way of powers delegated by the federal government to Facebook (a self-interested commercial private entity acting under the aegis of government authority) by the authority of the CDA vested in private actors and sanctioned by various courts' implementation of a sweeping application of Section 230 immunity protection to the anti-competitive actions of Facebook, which would otherwise be unlawful. *See Fyk v. Facebook, Inc.,* No. 20-632 (2020), Fyk Nov. 2, 2020, Petition for a Writ of Certiorari; *see also* Request for Judicial Notice ("RJN") Facebook Lawsuit Background, attached hereto as Exhibit B and incorporated fully herein by reference.

[9] *See Malwarebytes, Inc. v. Enigma Software Group USA, LLC,* No. 19-1284, 141 S.Ct. 13 (2020) (wherein Justice Thomas issued a detailed Statement, which has since been cited authoritatively in several cases, concerning the CDA and several things wrong with same, namely the judicial interpretation/application abuse of Section 230(c) that has transpired over the CDA's twenty-six-

(*i.e.*, Big Tech) substantially harmed Fyk by stripping him of his constitutionally protected Fifth Amendment due process rights in relation to the Facebook Lawsuit, and, also, his constitutionally protected First Amendment free speech rights.

6. When challenging a law as unconstitutional, the Non-Delegation/Major Questions Doctrine, Void-for-Vagueness Doctrine, Substantial Overbreadth Doctrine, Harmonious-Reading Canon, Irreconcilability Canon, Whole-Text Canon, Surplusage Canon, and the Absurdity Canon all apply to Fyk as well as all citizens. Although one does not need "standing" per *se* to challenge the (un)constitutionality of Section 230, Fyk has "standing" (predicated on direct harm suffered as a result of Section 230) to constitutionally challenge the CDA based on the violation of his specific liberties and the taking of his specific property without due process guaranteed by the Fifth Amendment and/or for violation of his free speech guaranteed by the First Amendment — the Facebook Lawsuit and related Section 230 immunity misapplication.

7. The *pro se* Plaintiff is Jason Fyk. At all material times, Fyk was a citizen and resident of Cochranville, Pennsylvania and *sui juris* in all respects. Fyk established the 501c3 organization named "Social

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year existence); *see also Doe v. Facebook Inc.,* 595 U.S. 2022 WL 660628 (Mar. 7, 2022). We submit that *Malwarebytes* is a must read (not to mention that this constitutional challenge cites to same myriad times); thus, *Malwarebytes* is attached hereto as composite Exhibit C and incorporated fully herein by reference. Also attached as part of composite Exhibit C, because it aligns with his *Malwarebytes* Statement, is Justice Thomas' recent *Doe* Statement.

Media Freedom Foundation" (https://socialmediafreedom.org/) aimed at restoring freedom online, which such freedom Fyk has devoted his life to for years.

8. The Defendant is the United States of America. At all material times, the highest legislative bodies of the federal government and the highest court of the federal judiciary were/are headquartered in the District of Columbia and responsible for the laws of the land (here, Title 47, United States Code, Section 230).

9. This Court possesses original jurisdiction pursuant to Title 28, United States Code, Section 1331, as the action "aris[es] under the Constitution, laws, or treatises of the United States." *Id.*

10. Venue is proper in the District of Columbia pursuant to Title 28, United States Code, Sections 1391(b)(1), 1391(b)(2), 1391(e)(1)(A), and 1391(e)(1)(B) since, for examples, (a) a substantial part of the events or omissions giving rise to this action against the USA (*e.g.*, the passage and enactment of and/or maintenance of Section 230) occurred in this judicial district, and (b) the situs of the highest legislative governing bodies and the highest judicial court of the USA is the District of Columbia.

11. All conditions precedent to the institution of this action have occurred, been performed, were futile, and/or were not mandatory.

Common Allegations

A. Brief Introduction

12. In 1996, in enacting the CDA, a well-intentioned Congress sought to protect an ICS/online provider from liability arising out of the ICS' voluntary

choice to engage in the government's CDA directive — restriction of offensive online materials (as a "Good Samaritan" and in "good faith") in an effort to help protect children from harmful web content and/or otherwise rid the Internet of filth. Congress attempted to resolve this Internet indecency issue twenty-six years ago (before many ICSs, *e.g.,* Facebook, Twitter, Instagram, existed) by delegating regulatory "agency" authority (under the CDA's civil liability protection) directly to private entities (ICS).

13. Among the several challenges to the constitutionality of the CDA advanced in this action is Fyk's challenge of the CDA's delegation of authority that permits the discretionary actions of a commercial ICS/online provider to "enforce" the CDA regulatory authority. In the Facebook Lawsuit, it was Facebook "enforcing" CDA regulatory authority against one user (Fyk) while, at the same time, electing not to carry out CDA regulation against another user (Fyk's competitor) with the exact same content, but with whom Facebook had a pecuniary interest. This discretionary enforcement resulted in the advancement of anti-competitive animus, an animus that cannot, by definition, meet the qualification of "Good Samaritanism" to enjoy entitlement to complete immunity for any and all liability for any malfeasance or illegal conduct.

14. Regulation, penalization, or deprivation in any form, carried out by an authorized government agent (*i.e.*, whether private or public) "to fill up the details" (*i.e.*, fill in the quasi-legislative rules) at the directive of Congress, must afford due process and free speech of the entity or person being policed/regulated. Fyk challenges the constitutionality of Section 230,

with the law (currently being wielded by large technology companies, cloaked as delegated state actors; *i.e.,* proxy agents), to deprive constitutionally protected rights, such as due process and free speech, *via* illegal conduct being glaringly violative of the multitude of constitutional doctrines and/or canons of statutory construction discussed throughout this filing.

15. The time has come for this Court to scrutinize whether Section 230 is constitutional/lawful and, if it is not, realign the law/United States Code (the scope of Section 230) consistent with the realities of the modern Internet. Section 230 is a congressional delegation of authority, granted to private entities, to regulate/monitor some area of human activity while immunized from civil liability even when commercial motives for the ICS' censuring of citizens are alleged. Section 230 operates to deprive citizens, including Fyk, of the freedoms ensured by the First and Fifth Amendments of the United States Constitution. This Court is obliged to assess whether Section 230 may exist extant with the Constitution. Fyk contends that Section 230's improper delegation of legislative authority to private commercial enterprises has resulted in a pernicious degradation and unconstitutional abridgment of citizens' First and Fifth Amendment rights, which cannot withstand judicial scrutiny.

B. Preliminary Statement[10]

16. The CDA is an administrative law that provides civil liability protection, in part, when a private

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[10] The idea of this "Preliminary Statement" is to give the Court a good enough feel for this constitutional challenge before having to deep dive into this matter by way of reading the vast detail that follows this "Preliminary Statement." Although what

entity (ICS) voluntarily undertakes "any action . . . in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2)(A) (emphasis added).

17. An administrative agency (here, an ICS like Facebook, Twitter, or Google, for examples) is "[a] government body authorized to implement legislative directives [*e.g.*, block or screen offensive materials] by developing more precise and technical rules [*i.e.,* "fill up the details," *see, e.g., Wayman v. Southard,* 23 U.S. 1, 43 (1825)] than possible in a legislative setting. Many administrative agencies also have [ ] enforcement responsibilities."[11] Agencies are created through their own organic statutes (*e.g.*, Section 230), and they establish new "laws" (*e.g.*, Facebook's Community Standards). In so doing, the agencies interpret, administer, and enforce those new "laws." Generally, administrative agencies are created to protect a public interest (*e.g.*, protect children from harm, such as Internet pornography pursuant to the legislative intent behind the CDA), not to vindicate private rights.

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follows the "Preliminary Statement" section of this filing is admittedly lengthy, it was/is necessary to not short-shrift since the proper scope of CDA immunity is extraordinarily important and generally misunderstood.

[11] Cornell Law School, *Administrative Agency,* https://www.law.comell.edu/wex/administrative_agency This publication (along with all other Cornell publications cited in this filing) is attached hereto as composite Exhibit D for the Court's ease of reference and is incorporated fully herein by reference.

18. In *Malwarebytes,* Justice Thomas aptly stated (all of Justice Thomas' *Malwarebytes* statements were/are apt), in part:

> courts have extended the immunity in §230 far beyond anything that plausibly could have been intended by Congress . . . Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content [*i.e.,* creation and development in part by proxy] . . . . Courts have long emphasized non-textual arguments when interpreting §230 [*i.e.*, proof-texting], leaving questionable precedent in their wake."

Ex. C, *Malwarebytes,* 141 S.Ct. at 13-15 (emphasis added, internal citations omitted). It needs to be considered "whether the text of this increasingly important statute [the CDA] aligns with the current state of immunity enjoyed by Internet platforms." *Id.* at 14.

19. Justice Thomas is not alone in his Section 230 views advanced in *Malwarebytes*. The Department of Justice ("DOJ") came to a very similar conclusion:

> At the same time, courts have interpreted the scope of Section 230 immunity very broadly, diverging from its original purpose. This expansive statutory interpretation, combined with technological developments, has reduced the incentives of online platforms to address illicit activity on their services and, at the same time, left them free to moderate lawful content without transparency or accountability. The time has therefore come to realign the scope of Section

> 230 with the realities of the modern Internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services.

DOJ, Department of Justice's Review of Section 230 of the Communications Decency Act of 1996, Sept. 23, 2020.[12, 13]

20. Most, if not all, cases seeking to expand/surpass Section 230 immunity have relied on (un)twisting the "non-textual," "questionable" interpretation of the statute. Most Section 230 cases wind up in the same California court system, since nearly all major technology companies reside in Silicon Valley and almost always have forum selection provisions included within their user terms of service ("TOS").

21. California courts (including in the Facebook Lawsuit; again, so far, at least) have consistently failed to address and/or embrace the most natural reading of the CDA's text by giving Internet companies immunity for their own content and/or conduct, which would otherwise be unlawful. Although Justice Thomas welcomed an "appropriate case," *see* Ex. C, *Malwarebytes,* 141 S.Ct. at 14 ("in an appropriate case, we

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[12] A copy of this DOJ publication is attached hereto as Exhibit E and incorporated fully herein by reference.

[13] On May 28, 2020, President Trump entered Executive Order 13925 ("EO") challenging social media companies' ability to shield their misconduct behind 230 immunity, which such EO gave way to DOJ's subsequent review of (and publications concerning) the CDA. A copy of this EO is attached hereto as Exhibit F and incorporated fully herein by reference.

should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms") and Ex. C, *Doe,* 2022 WL 660628 at *2 ("Assuming Congress does not step in to clarify § 230's scope, we should do so in an appropriate case"), the Supreme Court of the United States ("SCOTUS") denied Fyk's Petition for Writ of Certiorari in the Facebook Lawsuit, which addressed (to some degree or another) some of the constitutional doctrines and/or canons of statutory construction at play here.[14]

22. A statute must be read as a whole.[15] "[W]e are advised by the Supreme Court that we must give meaning to all statutory terms, avoiding redundancy or duplication wherever possible." *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC,* 521 F.3d 1157, 1168 (9th Cir. 2008) (citing *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 197 (1985)).[16]

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[14] Congress has not reformed Section 230 in the twenty-six-year existence of the law because, we submit, there is no realistic and comprehensive way to fix Section 230 shy of a complete overhaul; hence, this constitutional challenge is appropriate and necessary.

[15] Whole-Text Canon — "The text must be considered as a whole." Antonin Scalia & Bryan A. Garner, *Canons of Construction,* at 2, https://www. law. uh. edu/faculty/adjunct/dstevenson/2018Spring/CANONS%20OF%20CONSTRUCTION.pdf

This *Canons of Construction* publication is attached hereto as Exhibit G for this Court's ease of reference and is incorporated fully herein by reference.

[16] Surplusage Canon — "If possible, every word and every provision is to be given effect . . . . None should be ignored. None should needlessly be given an interpretation that causes it to

23. The Harmonious-Reading Canon provides that the provisions of a law should be interpreted in a way that renders them compatible, not contradictory:[17] "our task is to fit, if possible, all parts into a harmonious whole." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (citing *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959)); *see also, e.g., Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (courts should "accord more coherence" to disparate statutory provisions where possible). The Irreconcilability Canon provides that "[i]f a [statute] contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 189 (2012).[18] If the text of a statute contains "truly irreconcilable provisions," an irreconcilable conflict is determined to exist and "the next inquiry is whether the provisions at issue are general or specific." *See, e.g., State v. Conyers*, 719 N.E.2d 535, 538 (Ohio 1999) (internal citation omitted).

24. Courts are often asked to consider immunity under isolated statutory subsections (*e.g.*, Section 230 (c)(1) or Section 230(c)(2)), without considering

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duplicate another provision or to have no consequence." Ex. G at 2.17

[17] Harmonious-Reading Canon — "The provisions of a text should be interpreted in a way that renders them compatible, not contradictory." Ex. G at 2.

[18] *See also* Ex. G at 2 for this description of the Irreconcilability Canon: "[i]f a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect."

Section 230 as a whole. Defendants typically cite questionable out-of-context precedent to introduce the defendants' understandable bias (because they are defending themselves) into the determination. This is known as "proof-texting:"

> the practice of using [isolated, out-of-context] quotations from a document, either for the purpose of exegesis, or to establish a proposition in eisegesis . . . [*i.e.*, interpretation of a text by reading into it, one's own ideas]. Such quotes may not accurately reflect the original intent of the author [*e.g.*, Congress], and a document quoted in such a manner, when read as a whole, may not support the proposition for which it was cited.[19]

When read as a whole, many cases are not harmonious or reconcilable with the "Good Samaritan" intelligible principle/general directive/general provision of Section 230.

25. Section 230's "harmonious-reading" went astray as early as 1997. In *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997), the first appellate court to consider the statute erroneously held that, although the text of Section 230(c)(1) grants immunity

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[19] Wikipedia, *Prooftext*, https://en.wikipedia.org/wiki/Prooftext This Wikipedia article, along with all other Wikipedia articles cited herein, is attached hereto as compose Exhibit H and incorporated fully herein by reference. Wikipedia is, of course, not an authoritative citation source; but, Wikipedia often does a nice job of distillation and/or simplification. And, so, utilize Wikipedia a bit throughout this filing, mainly as to subjects/concepts that are not too complicated and/or that only require generalized understanding in relation to the reason(s) for citation in this filing.

only from "publisher" or "speaker" liability, it eliminates distributor liability too; that is, Section 230 confers immunity even when a company distributes content that it knows is illegal. This determination (without considering Section 230 as a whole) eliminated all liability (*i.e.*, both active publishing and passive distribution), thus swallowing the purpose of the "very next subsection, which governs removal of content, §230(c)(2)." Ex. C, *Malwarebytes*, 141 S.Ct. at 16. The *Zeran* decision rendered 230(c)(2) mere "surplusage" (*i.e.*, redundant/superfluous)[20] as early as 1997, and courts have spent more than two decades trying to reconcile this mistaken application of Section 230(c)(1) and/or otherwise trying to put forth a clear meaning and/or application of Section 230; largely to no avail.[21] Under the most harmonious, reconcilable reading of the statute, Section 230(c)(1) applies to passive distributor liability protection (*i.e.*, a platform/host — omission of action) and Section 230(c)(2) applies to active distributor liability protection (*i.e.*, publisher liability protection when blocking and screening offensive material, so long as such blocking and screening is done in "good faith" and as a "Good

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[20] *See* n. 16, *supra.*

[21] "Largely" because, as discussed below, the Ninth Circuit Court has started to come around at least with respect to the "Good Samaritan" threshold CDA immunity analysis within an anti-competitive animus setting. *See, e.g., Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040 (9th Cir. 2019). For a discussion as to the appropriate interpretation/application of the Ninth Circuit Court's *Enigma* decision, this Court is invited to review Fyk's March 3, 2022, filing in *Fyk v. Facebook, Inc.,* No. 21-16997 (9th Cir.) of the Facebook Lawsuit.

Samaritan"). If the interpretation/application were to be kept as narrow/simple as the preceding sentence, the CDA could possibly work as is (although, we submit that, even still, Section 230 would be constitutionally infected); hence, the alternative relief Fyk seeks in this CDA challenge (*see*, *e.g.*, ¶ 4, *supra*, ¶ 329, *infra*, and n. 107, *infra*).

26. Section 230 enables (under civil liability protection/immunity) an ICS to "voluntarily" act at the prerogative of Congress to block and screen information that it "considers" "objectionable," but it must follow (in "good faith" and as a "Good Samaritan") the obligation (*i.e.*, the intelligible principle/general directive/general provision laid down by Congress) articulated in the statute if it is to be afforded liability protection. When an ICS "considers" information, it is acting in a traditional editorial role. Section 230(c)(2) limits (*i.e.*, applicable narrowed provision) that editorial role to the exclusion of material.[22] The presently broken CDA,

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[22] Section 230(c)(2)(A) provides an ICS with immunity if the ICS acts upon another's (an Information Content Provider's) impermissible content in "good faith." Section 230(c)(2)(B) provides an ICS with immunity if the ICS does not directly take action upon another's (an Information Content Provider's) content but instead provides another Information Content Provider with the tools/services needed to appropriately act upon yet another Information Content Provider' materials; *e.g.,* where an ICS provides Information Content Provider #1/user #1 (*e.g.*, a parent) with the tools/services needed by that parent to act upon (restrict) offensive materials posted by Information Content Provider #2/user #2 so as to protect Information Content Provider #1's child from harm, for example, the ICS (a Facebook, for example) enjoys a "no action" immunity akin to that of Section 230(c)

however, allows an ICS the editorial ability to decide what content is made available (*i.e.*, advanced — developed in part/provided). Development, in whole or in part, is the role of an Information Content Provider ("ICP") by definition under Section 230(0(3); thus, the ICS' role as an information content *restrictor* also allows the ICS to act as an ICP who can "knowingly distribute" unlawful information under civil liability protection. This is at odds with the "Good Samaritan" general provision (*i.e.*, intelligible principle/general directive/general provision) of the statute and creates an irreconcilable conflict between Sections 230(c)(2) and 230(c)(1) and the Section 230(0(3) definition of an ICP. Information "consideration" (*i.e.*, restriction and development in part) gave rise to the mistaken *Zeran* decision. Any information that is "considered" (*i.e.*, active editorializing) and "allowed" (*i.e.*, not restricted — knowingly chosen, advanced, or developed) by an ICS (even in part) must be subject to civil liability (if not done as a "Good Samaritan") or, as a result, all distribution/publishing liability is eliminated, including unlawful distribution/publishing (*i.e.*, knowingly causing harm). The statute cannot be reconciled in a way that distinguishes between "development by proxy" (as a result of content restriction consideration) and "development in part" (as a result of information content provision).

27. Contrary to popular belief, restricting users' materials online, under the supposed protection of Section 230, is not a *voluntary choice* to act privately (*i.e.*, without obligation or consideration); instead, it is

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(1), which is why the express language of Section 230(c)(2)(B) relates back to Section 230(c)(1).

the voluntary choice to act under the directive of Congress (*i.e.*, state directed action) to restrict statutorily specified (*i.e.*, 230(c)(2)(A)) offensive materials. Webster's dictionary defines the word "voluntary" as follows: "done by design or intention; acting or done of one's own free will without valuable consideration or legal obligation."[23] Put differently, a provider or user cannot take any voluntary action whatsoever in a private capacity and still somehow enjoy CDA immunity; rather, a provider or user is authorized by (*i.e.*, delegated by) the state to engage in Internet content policing as a state actor *via* "Good Samaritan" intelligible principle/general directive/general provision and in a "good faith" fashion. Put yet another way, a private actor cannot seek Section 230 civil liability protection for any and all private/commercialized activity because, if a provider or user seeks "protection" (*i.e.*, the consideration), it must have taken its action under the legal obligation (*i.e.*, as a state actor at the prerogative of Congress) to block and screen offensive material. The term "voluntarily" (a private function) is irreconcilable with Section 230's own obligatory/induced governmental function — Section 230 is an irreconcilable "voluntary mandate" (*i.e.*, governmentally induced private function), as the phrase "voluntary mandate" is *a prima facie* oxymoron.

28. The Non-Delegation Doctrine:

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[23] Merriam-Webster Dictionary, *Voluntary*, https://www.merriam-webster.com/dictionary/voluntarily For this Court's ease of reference, a copy of all Webster's Dictionary definitions utilized throughout this filing is attached hereto as composite Exhibit I and incorporated fully herein by reference. Exhibit I provides definitions in the order in which this filing utilizes such definitions.

> . . . is 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].
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> 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.
>
> In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court held that 'Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.'[24]
>
> The Supreme Court has recognized that Congress could not delegate powers that were 'strictly and exclusively legislative.' 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, it must provide a 'general provision' by which 'those who

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[24] Cornell Law School, *Nondelegation Doctrine*, https://www.law.cornell.edu/wex/nondelegation_doctrine For this Court's ease of reference, a copy of this publication is found in composite Exhibit D.

act' can 'fill up the details.' Therefore, Congress cannot give an outside agency 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. This became known as providing an 'intelligible principle' to which the agency is instructed to conform. The 'intelligible principle' could be anything in the 'public interest, convenience, or necessity' or considered 'just and reasonable.' Being put in such subjective terms gives agencies vast discretion when enacting new rules.[25]

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.[26]

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[25] US Legal, *Intelligible Principle Law and Legal Definition,* https://definitions.uslegal.com/i/intellligible-principle/ For this Court's ease of reference, a copy of this publication (along with other US Legal definitional publication) is attached hereto as composite **Exhibit J** and is incorporated fully herein by reference.

[26] Constitution Annotated, *The Nature and Scope of Permissible Delegations*, https://constitution.congress.gov/browse/essay/artI-S1-1%202/ALDE_000000/10/%5b'declaration',%20'of,%20'independence'%5d A copy of this publication is attached hereto as **Exhibit K** and incorporated fully herein by reference.

29. In *Mistretta v. United States*, 109 S.Ct. 647 (1989), Justice Scalia warned that "the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation [*i.e.*, Section 230]. The major one, it seems to me, is that the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power." *Id.* at 678 (emphasis added).

30. Section 230 grants administrative agencies (here, private entities/ICSs), under the "Good Samaritan" intelligible principle/general directive/general provision, the authority to create any rule/"law" the ICS deems to be "in the public interest," solely relying on the agency's (here a private entity's) own views and policy agenda rather than requiring Congress to set forth objective guidelines. This kind of unchecked power vested in private entities (with ulterior motives) cloaked with the imprimatur of "Good Samaritan" immunity is exploitable, reckless and dangerous.

31. Dovetailing with the Non-Delegation Doctrine is the Major Questions Doctrine, which was recently addressed by the SCOTUS in *National Federation of Independent Business, et al. v. Department of Labor, Occupational Safety and Health Administration, et al.*, No. 21A244 and *Ohio, et al. v. Department of Labor, Occupational Safety and Health Administration, et al.*, No. 21A247, 595 U.S. (Jan. 13, 2022).

32. Justice Gorsuch's concurring opinion (joined in concurrence by Justice Thomas and Justice Alito) in the aforementioned January 13, 2022, COVID-19 mandatory vaccination SCOTUS cases did a nice job

in fundamentally recognizing what needs to be fundamentally recognized here — we need to bring independent agencies (like the Occupational Safety and Health Administration, "OSHA") back under the control of Congress so that they do not become a fourth branch of government. Precisely our point as it relates to the private entity government agencies (which "private entity government agency" should be an oxymoron in and of itself) that are large technological companies in relation to the "enforcement" of the CDA.

33. In the aforementioned cases, it was appropriate for the SCOTUS to rein in the likes of the OSHA with respect to its attempt to *carte blanche* mandate COVID-19 vaccination in certain settings. Similarly, here, private social media commercial enterprises function as quasi-governmental agencies (like OSHA) that have to be controlled/reined in (or stripped of *carte blanche* Section 230 immunization/civil liability protection).

34. Justice Gorsuch's concurring opinion in the aforementioned recent SCOTUS cases included discussion of the Major Questions Doctrine tied to the aforementioned (and also below discussed) Non-Delegation Doctrine.

35. The Major Questions Doctrine is conceptually as follows: "We expect Congress to speak clearly if it wishes to assign to an executive agency decisions of vast economic and political significance." *Id.* at 2 (internal citation omitted).[27]

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[27] The concurring opinion cited herein has its own set of page numbers starting at page one.

36. Justice Gorsuch's discussion of the "Major Questions Doctrine" specifically relates same to the "Non-Delegation Doctrine:"

> In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. . . . Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

Id. at 4 (internal citation omitted). The new "laws" created by large technology companies "govern[ ] the lives of [millions of] Americans [and must be] subject to the robust democratic processes the Constitution demand," like due process and free speech. Anybody sane recognizes that the "laws" created by large tech companies do anything but ensure constitutional freedoms.

37. Applied here, and put more simply, CDA immunity implicates major questions concerning due process, freedom of speech, *et cetera*.[28]

38. Justice Gorsuch aptly continued:

> The major questions doctrine serves a similar function [to the non-delegation doctrine] by guarding against unintentional, oblique, or

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[28] Any law (*i.e.,* Section 230) that results in the deprivation of life, liberty, and/ or property sans due process (*e.g.*, the deprivation experienced thus far by Fyk within the Facebook Lawsuit) is legally untenable straightaway.

> otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. . . . Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress 's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually 'hide elephants in mouseholes.'

Id. at 5 (internal citations omitted) (emphasis added).

39. First, the CDA is broadly worded and we have a related doctrine called "Substantial Overbreadth" directly at play here, discussed below. Second, the well-being of the worldwide web and protecting (*i.e.*, immunizing) those who legitimately engage in trying to preserve a healthy Internet (in "good faith" and as a "Good Samaritan") is very "important policy," especially in the ever-burgeoning dot.com era. Third, private actors (like Facebook, Google, Twitter, *et cetera*) indeed have tried to exploit (and have largely succeeded in exploiting, thus far, as illustrated by cases like the Facebook Lawsuit) gaps and/or ambiguities in the vague CDA. So, just as the below Substantial Overbreadth Doctrine section ties in, so too does the Void-for-Vagueness Doctrine (also discussed below). Fourth, in the same vein of exploitation, large technology companies have taken the CDA "far beyond" what Congress originally could have plausibly intended.

40. The SCOTUS concurring opinion in the aforementioned COVID-19 vaccination decision(s) continued:

> Whichever the doctrine, the point is the same. Both serve to prevent 'government by bureaucracy supplanting government by the people.' . . . And both hold their lessons for today's case. On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really did endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority. Under OSHA's reading, the law would afford it almost unlimited discretion — and certainly impose no 'specific restrictions' that 'meaningfully constrai[n]' the agency. . . . OSHA would become little more than a 'roving commission to inquire into evils and upon discovery correct them.' *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 551 (1935) (Cardozo, J., concurring). Either way, the point is the same one Chief Justice Marshall made in 1825: There are some 'important subjects, which must be entirely regulated by the legislature itself,' and others 'of less interest, in which a general provision may be made, and power given to [others] to fill up the details.' *Wayman v. Southard*, 10 Wheat. l, 43 (1825). And on no one's account does this mandate qualify as some 'detail.' The

> question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA. In saying this much, we do not impugn the intentions behind the agency's mandate. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the lives of 84 million Americans. Respecting those demands may be trying in times of stress. But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little.

Id. at 6-7 (some internal citations omitted) (emphasis added). Spot on, we could just swap out "OSHA" with "ICS," "Facebook," "Twitter," or "Google," for examples, and come to an identical SCOTUS holding in relation to the CDA.

41. The Internet is an indispensable aspect of life for most people in this day and age and is much more than just some "detail." This Court must make clear in this constitutional challenge that the power to control/govern the daily lives (because, again, for most, the Internet is an indispensable part of everyday life; *i.e.*, inextricably woven into the fabric of everyday life) of hundreds of millions of people in

America and billions of people worldwide is not limitless.[29]

42. The design of the CDA is Internet regulation by way of "blocking and screening of offensive material." The CDA contemplates protecting the "Good Samaritan" (whether that be the user/ICP or the online provider/ICS) who engages in the regulation that is "blocking and screening of offensive materials."

43. Despite the CDA's "Good Samaritan" requirement, however, courts are deferring to Big Tech without requiring a threshold showing of the private actor's entitlement to "Good Samaritan" status even where (*e.g.*, the Facebook Lawsuit) the allegation against the private actor is that it acted with anti-competitive motives.[30]

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[29] This "Major Questions Doctrine" dovetails into different forms of deference; *e.g.*, Chevron deference, Skidmore deference, Mead deference, and Auer deference.

[30] Fyk's pending second Ninth Circuit Court appeal relates to, in large part, such an anti-competitive animus setting, questioning the Ninth Circuit Court as to how, under identical circumstances (at least with respect to the anticompetitive animus facet), did the Ninth Circuit Court provide justice to Enigma, but not Fyk? Put differently, how did the Ninth Circuit Court deem Malwarebytes' anti-competitive animus laden conduct to be not eligible for CDA immunity under the Section 230(c) threshold "Good Samaritan" intelligible principle/general directive/general provision analysis, but determined that Facebook's anti-competitive animus laden conduct as to Fyk was immune? *Cf Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040 (9th Cir. 2019) with the Facebook Lawsuit. As invited in footnote 21, *supra,* for a discussion as to the appropriate interpretation/application of the Ninth Circuit Court's *Enigma* decision, this Court is invited to review Fyk's March 3,

44. Under the Major Questions Doctrine recently highlighted by the SCOTUS, one must be a congressionally appointed agency tasked with overseeing a regulatory act/law before a federal court even begins to consider yielding to one's interpretation of that statute or regulation.

45. Big Tech is not an explicitly congressionally appointed "agency" in relation to the CDA. In enacting the CDA, Congress did not explicitly appoint an overseeing agency (like, for examples, the Federal Communications Commission, "FCC," is to the Communications Act of 1934, or like OSHA is to the Occupational Safety and Health Act), and Congress has not maintained oversight or regulation of the CDA on its own. But in function/in reality/in practice, somehow Big Tech has absolutely morphed into Congress' CDA policing agency.

46. In the absence of congressional oversight as to the application of the CDA, courts are almost uniformly giving judicial deference to the private parties (*e.g.*, Facebook, Google, Twitter) to enforce the CDA.

47. The "Good Samaritan" blocking and screening decision-making, which is Section 230(c) (*i.e.*, all of 230(c), including 230(c)(1) and 230(c)(2)(A) and 230(c)(2)(B)), cannot rightly be classified as anything less than decision-making of "vast economic and political significance."

48. Under the Major Questions Doctrine, Congress had to "speak clearly if it wishe[d] to assign [ ]

2020, filing in *Fyk v. Facebook, Inc.,* No. 21-16997 (9th Cir.) of the Facebook Lawsuit.

executive agency decision[-making] of vast economic and political significance" to Big Tech. Congress did not; Big Tech "cannot trace its [purported unlimited and unchecked Internet policing] authority . . . to any clear congressional mandate."

49. So, the Major Questions Doctrine and/or the Non-Delegation Doctrine should be applied (just like the Substantial Overbreadth Doctrine Discussed below and the Void-for-Vagueness discussed below, for examples) to ensure preservation of constitutionally protected liberties.

50. The Void-for-Vagueness Doctrine is:

1) A constitutional rule that requires laws to state explicitly and definitely what conduct is (in)actionable. Laws that violate this requirement are said to be void for vagueness. The Void for Vagueness doctrine rests on the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution. By requiring fair notice of what is actionable and what is not, the Void for Vagueness Doctrine also helps prevent arbitrary enforcement of the laws.

2) Under the Void for Vagueness Doctrine, a statute is also void for vagueness if a legislature's delegation of authority to judges and/or administrators is so extensive that it

> would lead to arbitrary enforcement of the law.[31]

51. The Substantial Overbreadth Doctrine ("Overbreadth" being the shorthand for this Doctrine):

> . . . provides that a regulation/law can sweep too broadly and prohibit protected rights. A regulation of speech, for example, is unconstitutionally overbroad if it regulates a substantial amount of constitutionally protected expression. Overbreadth is closely related to its constitutional cousin, vagueness. For example, a regulation of speech is unconstitutionally vague if a reasonable person cannot distinguish between permissible and impermissible speech because of the difficulty encountered in assigning meaning to language.[32]
>
> Overbreadth doctrine is a principle of judicial review that a law is invalid if it punishes constitutionally protected speech or conduct

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[31] Cornell Law School, *Vagueness doctrine,* https://www.law.cornell.edu/wex/vagueness_doctrine For this Court's ease of reference, a copy of this publication is found in composite Exhibit D.

[32] Middle Tennessee State University Law School, *Overbreadth*, https://www.mtsu.edu/firstamendment/article/1005/overbreadth (internal citations omitted). For this Court's ease of reference, a copy of this publication is attached hereto as Exhibit L and incorporated fully herein by reference. *See also* Cornell Law School, *Overbreadth*, https://www.law.comell.edu/wex/overbreadth For this Court's ease of reference, a copy of this publication is found in composite Exhibit D.

> along with speech or conduct that the government [*i.e.*, delegated authority to a private entity] may limit to further a compelling government interest [*e.g.*, block and screen offensive material]. A statute that is broadly written [*e.g.*, Section 230(c)(2)(A): "any action voluntarily taken . . . to restrict access to or availability of material that the provider or user considers . . . whether or not such material is constitutionally protected"] which deters free expression can be struck down on its face because of its chilling effect even if it also prohibits acts that may legitimately be forbidden [*i.e.*, actually offensive]. If a statute is overbroad, the court may be able to save the statute by striking only the section that is overbroad. If the court cannot sever the statute and save the constitutional provisions, it may invalidate the entire statute.[33]

52. Section 230's broad delegation of authority, combined with the courts' broad interpretation, enables an ICS to restrict any speech it "considers" "objectionable" (*i.e.*, allowing development, in part, by proxy), even when the information is "constitutionally protected"/"permissible" speech. Section 230 is so overbroad that companies like Google, Facebook, and Twitter, for examples, have effectuated a "chilling effect" (*i.e.*, deterrence) on almost all online free expression. Being in Google, Facebook, or Twitter

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[33] US Legal, *Overbreadth Doctrine Law and Legal Definition*, https://definitions.uslegal.com/o/overbreadth-doctrine/ (emphasis added). For this Court's ease of reference, a copy of this publication is found in composite Exhibit J.

"prison" (*i.e.*, denied of one's liberty or property, like Fyk in relation to that which is at issue in the Facebook Lawsuit) for purportedly violating some "vague" Community Standard (*i.e.*, being arbitrarily penalized for some quasi-legislative "law") at the sole discretion of a self-interested ICS (without congressional oversight, uniform enforcement, or judicial review) under the "sovereignly immune" protection of government (*i.e.*, Congress' civil liability protection that is Section 230(c)) is repugnant to the Non-Delegation Doctrine, Major Questions Doctrine, Void-for-Vagueness Doctrine, and Overbreadth Doctrine (as well as myriad other doctrines and/or canons discussed through this filing). Regardless of the doctrinal problems of the immunities conferred upon the ICS, the net end result is the same: deprivation of one's constitutional rights (*e.g.*, free speech and/or due process).

53. Section 230's overly broad misinterpretation/misapplication is an abomination that has afforded private corporations the unlimited authority to, for examples, eliminate their competition, dispose of critical thinking, and grant self-interested individuals/companies the ability to conduct (*i.e.*, under "color" of law) the largest modern-day book burning in the history of mankind. Section 230's vague, overly broad "sovereign" immunization of Big Tech's unlawful conduct results in a deep chilling effect on all lawful/permissible speech online and is an all-out assault on citizens' due process rights.[34]

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[34] More real-world examples of the havoc Section 230 is wreaking with its *carte blanche* "sovereign" immunity are provided throughout this challenge, in particularly in the below

54. The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law"[35] . . . the Internet should not continue to be the exception. Fyk was personally denied due process by the California courts (again, at least so far), and the SCOTUS to a lesser degree, when a government authorized and purportedly fully immunized "proxy agent" (Facebook), voluntarily taking action under the aegis of government (Section 230), deprived Fyk (which amounts to a government taking) of his liberty and property without so much as a single hearing on the matter. Again, this being at issue in the Facebook Lawsuit.

55. Pursuant to Title 5, United States Code, Section 706, when an agency takes an agency action (here, the "agency" being a private person/entity),

> [t]he reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; . . . .

5 U.S.C. § 706 — Scope of review.

"Overbreadth" section where real-world harms caused by the broken application of the CDA have to be shown.

[35] Cornell Law School, *Due Process,* https://www.law.cornell.edu/wex/due_process For this Court's ease of reference, a copy of this publication is found in composite Exhibit D.

56. "Immunity" from suit, means there is no reviewing court when an agency (*i.e.*, a private entity) takes an "agency action." Simply put, there is no review of any ICS rule, action, or enforced violations (paramount to "laws" created *via* government delegation). Section 230 also lacks any "official agency" qualifications. *Cf e.g.*, 47 U.S.C. § 154 —FCC. This lacking of review and qualifications prevent virtually all judicial scope of review when a commercial private actor takes "any action voluntarily," actions that arbitrarily restrict U.S. citizens' liberty or property under government authority.

57. In other words, just as Justice Scalia warned in *Mistretta*, Section 230 grants a private entity (*i.e.*, self-motivated agent) the authority to create any rule/ "law" (at least "Internet law," as if such a thing even exists, which it should not and really does not under the true law but does in reality, as illustrated by the livelihood crushing applied by Facebook to Fyk at issue in the Facebook Lawsuit) it deems to be "in the public interest." And Section 230 "sovereignly" immunizes (*i.e.*, denies due process to folks like Fyk, for example, which such folks doubtless total in the millions this far into Big Tech's two-plus-decades of abuses of the CDA) any/all actions "voluntarily" taken when arbitrarily restricting the liberty and/or property of others that it considers "objectionable," "whether or not such material is constitutionally protected" (*i.e.*, contrary to constitutional doctrines and rights), solely relying on the agency's own views and policy agenda rather than requiring Congress to set forth objective guidelines, which may partly explain (if not fully explain) why even Mark Zuckerberg has advocated (or

at least suggested) at congressional hearings for Section 230 regulatory oversight vis-à-vis a congressionally appointed regulatory body/agency.

58. Section 230, in its current unchecked state, confers *carte blanche* immunity to all online providers, even from unlawful or tortious conduct.[36] According to the restrictive theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts of a state, but not with respect to private acts.'"[37] In other words, a state should enjoy immunity from suits arising out of the exercise of their governmental functions (*i.e.*, to block and screen offensive material), but not from suits arising out of the types of activities in which private parties engage (*i.e.*, entirely "voluntary" private acts, devoid of obligation or consideration). In contradiction to the restrictive theory (*i.e.*, "which excludes immunity for private acts such as commercial activities"), Section 230 allows both private function and governmental function, simultaneously. In *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), the Ninth Circuit Court determined that, "any activity that can be boiled down to deciding whether to exclude

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[36] Absurdity Doctrine/Canon — "A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve." For the Court's ease of reference, see Ex. G at 3.

[37] The Free Library, *Foreign sovereign immunity and comparative institutional competence*, https://www.thefreelibrary.com/Foreign+sovereign+immunity+and+comparative+institutional+competence-a0401777155 (internal citations omitted). For the Court's ease of reference, a copy of this publication is attached hereto as Exhibit M and is incorporated fully herein by reference.

material that third parties seek to post online is perforce immune under section 230." *Id.* at 1102 (internal citation omitted). If the Ninth Circuit Court was correct (it was not correct in *Barnes*), that would also include unlawful behavior such as antitrust and/or anti-competitive action, which has been the aberrant conclusion (thus far) in the Facebook Lawsuit. All agency actions (especially private acts) cannot logically or legally be immune from suit. While the Ninth Circuit Court has been right on occasion (*e.g., Fair Housing,* and *Enigma*, and *Lemmon v. Snap, Inc.*, 440 F. Supp. 3d 1103 (C.D. Cal. 2020)), the Ninth Circuit Court has also missed the mark on other occasions (*e.g., Barnes, Sikhs for Justice, Inc. v. Facebook Inc.,* 697 Fed.Appx. 526 (9th Cir. 2017), the Facebook Lawsuit), leaving the CDA in a case law gray zone/no man's land in addition to the CDA's constitutionally broken condition.

59. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), Justice Sutherland aptly wrote:

> The power conferred upon the majority [ICS] is, in effect, the power to regulate the affairs of an unwilling [User]. This is legislative delegation in its most obnoxious form; for it is not even delegation [Section 230 does not confer power] to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business [the Facebook Lawsuit]. . . . The difference between producing coal [operating an interactive computer and advertising service] and regulating [restricting] its

> production [materials] is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be [e]ntrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.

Id. at 311 (citing, *inter alia*, *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 537 (1935)).

60. Fyk challenges the constitutionality of the CDA's delegation of regulatory authority that permits the discretionary restrictive actions of a commercial private entity. This discretionary enforcement resulted in the advancement of anti-competitive animus against Fyk (and many other improperly discriminated users), an animus that cannot, by definition, meet the qualification (intelligible principle/general directive/general provision) of "Good Samaritanism" to enjoy the entitlement of complete immunity for any and all liability for any malfeasance or tortious conduct. Regulation, penalization, or deprivation in any form, carried out by an authorized government agent (*i.e.*, whether private or public) "to fill up the details" (*i.e.*, fill in the quasi-legislative rules) at the directive of Congress must afford/not deprive (not even approach

infringing upon) the due process and free speech rights of the entity or person being regulated. Fyk lodges this facial and/or as applied constitutional challenge of Section 230, with the law being glaringly violative of the constitutional doctrines and/or canons of statutory construction discussed herein (above and below), resulting in deprivation of freedoms ensured by the First and Fifth Amendments.

61. We risk losing the freedoms of this nation or heavy abridgement of freedoms already experienced by way of the CDA over the last twenty-six years, if this Court does not act in conjunction with this constitutional challenge to enjoin and put an end to Section 230's unconstitutional delegation of regulatory authority and to put a stop to unchecked large commercial tech entities' control over online free speech and the free market.[38]

C. Constitutional Doctrines Violated By The CDA

62. The CDA's constitutional/statutory flaws, as discussed in detail greater below (doctrines in Section C and canons in Section D), result in the deprivation of constitutionally guaranteed rights (due process under the Fifth Amendment almost always, and free speech under the First Amendment quite often). As discussed above, the CDA's numerous constitutional/statutory flaws deprived Fyk of his Fifth Amendment and First Amendment rights, resulting in the economic/livelihood destruction of Fyk, all as illustrated by the Facebook Lawsuit. Moreover, because CDA-

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[38] *See* n. 14, *supra*.

oriented actions are taking place without any transparency, and are being performed by commercial actors, the CDA has a pernicious effect of allowing private factions to "police" and censor public participation, expression, and speech without any check on online providers' plenary power. For these reasons, this Court should scrutinize the constitutionality of the CDA.

1. Non-Delegation Doctrine/Major Questions Doctrine

63. America's growth (technological or otherwise) was inconceivable when the Constitution was written. The growth of the Internet was also inconceivable when Section 230 was made law in 1996. All this considered, America's vastness calls for regulation that far exceeds the capabilities of Congress.

64. Section 230(c) is an (in)direct congressional grant of authority to private commercial enterprises (*e.g.*, ICS, such as Facebook in relation to the Facebook Lawsuit, wherein, again, Facebook was a commercial actor in direct competition with Fyk) to self-regulate content under the aegis of "communications decency" statute, typically left to the aegis of an administrative agency, such as the FCC or OSHA in other contexts.

65. When Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the regulatory authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power [presumably granted to an official body]." *J.W. Hampton*, 276 U.S. at 409. If a statute contains an articulated "intelligible principle"/general directive/general provision, we know

it is delegated agency authority under which the body (here, a private entity) is directed (*i.e.*, obligated) to conform in order to receive protection (*i.e.*, consideration, which is civil liability protection/immunity in the CDA context).

66. Here, Section 230 contains the "Good Samaritan" intelligible principle/general directive/general provision. The intelligible principle is located in Section 230(c) and is emphasized by the quotes surrounding the provision. Since the "Good Samaritan" intelligible principle exists within the statute, we must conclude that Section 230 is, in fact, an authority delegated by Congress for an ICS to voluntarily act on behalf of Congress (*i.e.*, a state directive).

67. Where, as here, Congress abdicates its regulation of law (whether that be the enforcement of such law and/or the development of such law by way of things like rule creation; *e.g.*, Facebook Community Standards) to private actors who are not bound by administrative agency oversight and who are nevertheless somehow enjoying *carte blanche* "sovereign" immunity in regards to their regulation of law, such congressional abdication runs afoul of the Non-Delegation Doctrine. U.S. Const. Art. 1, Art. I, § l; Art. I, § 8, par. 18. *See, e.g., A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 485, 537 (1935) (congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade and industry); *National Federation of Independent Business, et al. v. Department of Labor, Occupational Safety and Health Administration, et al.*, No. 21A244 and *Ohio, et al. v. Department of Labor, Occupational Safety and Health Administration,*

et al., No. 2lA247, 595 U.S. ___ (Jan. 13, 2022), concurring opinion at 4 ("the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. . . . Both are designed to . . . ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands," internal citation omitted).

68. The new "laws" (*e.g.*, Facebook Community Standards) created by Big Tech "govern[ ] the lives of Americans [and must be] subject to the robust democratic processes the Constitution demand;" again, like due process and free speech. Again, anybody sane recognizes that the "laws" created by Big Tech to "fill up the details" do anything but ensure constitutional freedoms.

69. The Non-Delegation Doctrine is a principle in administrative law that Congress cannot delegate its legislative powers to other entities in unbridled fashion.[39]

70. The Constitution makes clear that legislative function should generally remain within Congress. *See* Art. 1, U.S. Constitution Sec. 1. Our system of government has long held that "the integrity and maintenance of the system of government ordained by the Constitution" mandates that Congress generally cannot delegate its legislative power to another branch (and especially not to a private entity, in creation of a fourth branch). *See, e.g., Field v. Clark*, 143 U.S. 649, 692 (1892). It

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[39] *See, e.g.*, Cornell Law School, *Nondelegation Doctrine*, https://www.law.comell.edu/wex/nondelegation_doctrine and Cornell Law School, *Administrative Law,* https://www.law.cornell.edu/wex/administrative_Law. Both of these publications are found in composite Exhibit D.

was also recognized, however, that the separation-of-powers principle and the Non-Delegation Doctrine do not entirely preclude Congress from obtaining assistance in regulating law.

71. Chief Justice Taft explained the approach to such a cooperative venture: "In determining what [Congress] may do in seeking assistance from another branch [here, private corporations], the extent and character of that assistance must be fixed according to common sense [not absurdity] and the inherent necessities of the government co-ordination." I W. *Hampton*, 276 U.S. at 406.

72. Succinctly put, the history of the Non-Delegation Doctrine goes like this:

> The SCOTUS has sometimes declared categorically that 'the legislative power of Congress cannot be delegated,' and on other occasions has recognized more forthrightly, as Chief Justice Marshall did in 1825, that, although Congress may not delegate powers that 'are strictly and exclusively legislative,' it may delegate 'powers which [it] may rightfully exercise itself.' The categorical statement has never been literally true, the Court having upheld the delegation at issue in the very case in which the statement was made. The Court has long recognized that administration of the law requires exercise of discretion, and that, 'in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives [*i.e.*, under intelligible principle(s)].' The real issue is

> where to draw the line. Chief Justice Marshall recognized 'that there is some difficulty in discerning the exact limits,' and that 'the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.' Accordingly, the Court's solution has been to reject delegation challenges in all but the most extreme cases, and to accept delegations of vast powers to the President or to administrative agencies.[40]

73. The CDA is the extreme case in which unconstitutional authority has been delegated, not to the President or even to an official administrative agency, but rather to self-interested private parties like Mark Zuckerberg, Jack Dorsey, Sundar Pichai, or to anyone else who provides an online service.

74. In delivering the opinion of the SCOTUS in *Carter*, Justice Sutherland stated, in part, as follows:

> [t]he power conferred upon the [ICS] is, in effect, the power to regulate the affairs of an unwilling [participant]. This is legislative delegation in its most obnoxious form [*i.e.*, an extreme case]; [Section 230 does not confer

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[40] Cornell Law School, *The History of the Doctrine of Nondelegability*, https://www.law.comell.edu/constitution-conan/article-1/section-1/the-history-of-the-doctrine-of-nondelegability (emphasis added) (citing, in this order *US. v. Shreveport Grain & Elevator Co.,* 287 U.S. 77, 85 (1932), *Field, Wayman, J.W. Hampton, Mistretta,* and *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 398 (1940). This publication is found in composite Exhibit D.

> power] to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.

Carter, 298 U.S. at 311 (emphasis added). This is precisely what happened in the above-described Facebook Lawsuit, and what has happened to millions of others over the last twenty-six years.

75. Applying the principles in *Carter* to the Facebook Lawsuit, private corporations have been delegated (unconstitutionally) overly broad (*i.e.*, unlimited) nonsensical authority to regulate the life, liberty, and/or property of other U.S. citizens under the color of law. Anyone who seeks to challenge Big Tech's "legislative" actions, even when their actions are *prima facie* unlawful (as was the case in the Facebook Lawsuit), are dismissed pre-merits (*i.e.*, immune from all civil liability). That is simply absurd and unconstitutional.

76. The action of one that affects the life, liberty, and/or property of another, for example, is the epitome of a "major question." Again, as Justice Gorsuch recently emphasized, the Non-Delegation Doctrine and Major Questions Doctrine are often (if not always) intertwined. Putting this situation into a Major Questions Doctrine perspective is one instance in this filing where elaborating beyond that which is said in the above "Preliminary Statement" section of this filing is not necessary; *i.e.*, as it pertains to the application of the Major Questions Doctrine, the above Paragraphs 31-49 say all that needs to be said and are accordingly incorporated fully into this Section C by reference. That said, a re-write of a particular passage from Justice Gorsuch's (and Justice Thomas' and Justice

Alito's) concurring opinion in the aforementioned OSHA COVID-19 vaccination case(s) is worthwhile in this Section C.

77. Regardless of the doctrine (whether it be the Non-Delegation Doctrine or the Major Questions Doctrine):

> the point is the same. Both serve to prevent 'government by bureaucracy supplanting government by the people.' . . . And both hold their lessons for today's case. On the one hand, [Big Tech] claims the power to issue . . . nationwide mandate[s] on . . . major question[s] but cannot trace [their] authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection [Section 230] [that Big Tech] cites really did endow [Big Tech] with the power [they] assert[ ], that law would likely constitute an unconstitutional delegation of legislative authority. Under [Big Tech's] reading, [the CDA] would afford [them] almost unlimited discretion — and certainly impose no 'specific restrictions' that 'meaningfully constrai[n]' the agency. . . . [Big Tech] would become little more than a 'roving commission to inquire into evils and upon discovery correct them.' *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 551 (1935) (Cardozo, J., concurring). Either way, the point is the same one Chief Justice Marshall made in 1825: There are some 'important subjects, which must be entirely regulated by the legislature itself,' and others 'of less interest, in which a general provision may be made,

> and power given to [others] to fill up the details.' *Wayman v. Southard*, 10 Wheat. 1, 43 (1825). And on no one's account does [regulation of the entire Internet] qualify as some 'detail.' The question before us is not how to respond to [Internet policing], but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not [Big Tech]. In saying this much, we do not impugn the intentions behind [Big Tech's Internet] mandate[s]. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the lives of . . . million[s] [of] Americans. Respecting those demands may be trying in times of stress. But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little.

Id. at 6-7 (some internal citations omitted).

78. Here, although the real-world application of the CDA has somehow resulted in online providers having become the Internet policing authority without any apparent exposure to civil liability, *carte blanche* immunity finds no Congressional authority. On the other hand, if the CDA could somehow be read to provide online providers with *carte blanche* "sovereign" immunity, such would be an unconstitutional delegation of power. Whether viewed through a Non-Delegation Doctrine lens or a Major Questions Doctrine lens, such doctrines are in place to prevent government by

bureaucracy supplanting government by the people. Here, the use of the CDA's enforcement mechanism has been contorted into government by a private bureaucracy as to all things Internet. The resulting effect of Section 230 (in application, at the very least) is that the CDA is unconstitutional under the Non-Delegation Doctrine and/or Major Questions Doctrine.

79. Section 230 requires agency action, if a private entity seeks protection. A private entity must have voluntarily chosen to act as the regulatory agency, under the intelligible principle/general directive/general provision of the statute (*i.e.*, chosen to act as an agent of Congress in "Good Samaritan" and "good faith" fashion). But the power to determine whether a private entity is entitled to "Good Samaritan" status cannot be abdicated and Congress cannot delegate the power to restrict speech (or deprive due process) upon any agent (whether official or private) because it is not a "power[ ]which [it] may rightfully exercise itself."[41]

80. Private actors who seek protection/immunization after voluntarily engaging in blocking and screening pursuant to Section's 230 mandate are acting as congressional agents, at least in part. Agencies are created through their own organic statutes (*e.g.*, Section 230), which establish new laws, and doing so, creates the respective agencies to interpret, administer, and enforce those new laws. Generally,

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[41] Cornell Law School, *The History of the Doctrine of Nondelegability,* https://www.law.cornell.edu/constitution-conan/article-1/section-l/the-history-of-the-doctrine-of-nondelegability (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41 (1825). A copy of this publishing is found in composite Exhibit D.

administrative agencies are created to protect a public interest rather than to vindicate private rights.[42]

81. Section 230 "creates the respective agencies" who "establish new laws" (*e.g.*, Community Standards) amidst zero boundaries concerning such new "laws." And, then, self-interested corporations are left free to "interpret, administer, and enforce" those new "laws" however they see fit without any congressional or judicial oversight, which, as noted above, may well explain why Big Tech heads (like Mark Zuckerberg) have actually advocated (or at least suggested) at congressional hearings for Section 230 regulatory oversight . . . whether or not that was just for show from Mr. Zuckerberg does not take away from the fact that such was/is a valid point/suggestion. Section 230 is repugnant to the Non-Delegation Doctrine and/or Major Questions Doctrine. The CDA is the extreme case that must be addressed by this Court, just like the extreme OSHA mandatory COVID-19 vaccination case(s) recently addressed by the SCOTUS.

82. In *Carter*, Justice Sutherland went on to note the difference between private activity and governmental function:

> The difference between [providing an interactive computer service] and regulating [material] is, of course, fundamental. <u>The former is a private activity; the latter is necessarily a governmental function</u>, since, in the very nature of things, one person may not be [e]ntrusted with the power to regulate

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[42] Cornell Law School, *Administrative Law,* https://www.law.cornell.edu/wex/administrative_Law (emphasis added). A copy of this publication is found in composite Exhibit D.

> the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.

Carter, 298 U.S. at 311 (emphasis added) (citing, *inter alia*, *A.L.A. Schechter*).

83. Traditional editorial activity is voluntary private activity; but, when a private entity acts at the prerogative of Congress under protection, it is not acting privately (*i.e.*, voluntarily), it is acting as an agent of government under required/obligatory activity.

84. Congressional delegation of the authority to an ICS (a commercial enterprise) that operates without transparency or the safeguards of agency oversight, undertook an intolerable and unconstitutional interference with Fyk's personal liberty and private property. Fyk lost hundreds of millions of dollars without due process when Facebook, Fyk's competitor, acting under the color of "congressional CDA authority," stripped Fyk of his livelihood. *See* the Facebook Lawsuit.

85. This kind of delegation by Congress to commercial actors is "clearly arbitrary," resulting in a deprivation of Fyk's due process rights (and free speech rights, for that matter) from which he has thus far been unable to brook relief in California's federal

court system (both the Northern District of California Court and the Ninth Circuit Court).

86. Section 230 does not confer power to "a government body" required to adhere to procedural safeguards; but, instead, to private entities who are not required to adhere to the same procedural safeguards as the government body would be. This is the fundamental reason why a private entity cannot be delegated regulatory agency authority because no safeguards exist and because a company's decision to deny one's life, liberty, and/or property cannot be challenged in court (*i.e.*, lacks due process) even when the entity, acting under government authority, regulates to its own benefit or pursuant to its own motivation.

87. In *Mistretta*, Justice Scalia warned that where (as here with the CDA):

> the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation. The major one, it seems to me, is that the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.

Mistretta, 488 U.S. at 416-417. Section 230 enables Big Tech to create "law" (*e.g.*, Facebook's Community Standards).

88. The CDA "has effectively allowed Congress to grant administrative agencies the authority to create any rules they deem to be in the public interest, solely relying on the agency's own views and policy

agenda rather than requiring Congress to set forth objective guidelines."[43]

89. Section 230's authority is largely (if not entirely) uncontrollable and it grants the functional equivalency of administrative agency to online providers (*e.g.*, Facebook, Google, Twitter, *et cetera*) with the authority to create *any rules* they deem to be in the "public interest," solely relying on the quasi-agency's own views and policy agenda (which rarely, if ever, comport with public interest) rather than requiring Congress to set forth objective guidelines.

90. Where (as here) delegation has gone to private individuals/entities rather than a public official, such is acceptable if Congress has sufficiently marked the field within which an administrator may act so it may be known whether the private individual/entity has kept within the so-marked boundaries in compliance with the legislative will. That is not the case with the CDA because there are no checks and/or balances on whether the online providers' conduct and activities (which can be completely hidden and proprietary, such as algorithms only accessible from the private provider's exclusive purview) are operating within the parameters of legislative will. Most legal cases challenging the legitimacy of the online providers' actions are summarily dismissed based on CDA immunity

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[43] Dunigan, M., St. John's University School of Law, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival In Today's Administrative State*, https://scholarship.law.stjohns.edu/lawreview/vol91/iss1/7/ For the Court's ease of reference, a copy of this publication is attached hereto as Exhibit N and incorporated fully herein by reference.

before the merits are even heard or subjected to discovery.

91. Thus, the "Good Samaritan" intelligible principle/general directive/general provision laid down by Congress, and Section 230 lacks any material safeguards that ensure the "enforcers" act within the legislative standards or general directives of Congress. Without safeguards, a self-interested company is more inclined to exploit even the most basic directives (*e.g.*, to act as a "Good Samaritan" in "good faith") for its own self-benefit.

92. "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Wayman*, 23 U.S. at 20. While Chief Justice Taft's distinction may have been lost over time, the theory of the power "to fill up the details" remains current, most recently discussed in the Justice Gorsuch (and Justice Thomas and Justice Alito) concurring opinion in the above-mentioned OSHA COVID-19 vaccination case(s) through the Major Questions Doctrine lens.

93. Per government publication:

> The second principle underlying delegation law is a due process conception that undergirds delegations to administrative agencies. 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.[44]

94. The CDA provides no established procedures to review online providers' compliance with the safeguards of, and entitlement to the "Good Samaritan" immunity; rather, under the CDA, private entities can do whatever they want (contrasted with a FCC, SEC, IRS who are required to follow procedures, explain their actions, and enable a court to review their actions to assure their actions complied with the limits of the agency's legislative mandate).

95. This lack of "required safeguards" led to the decisions in *A.L.A. Schechter* and *Carter*, for examples. Both cases centered around delegated authority (to regulate the affairs of others) being granted to private entities who inevitably regulated based on their own interests, rather than under the requirements set forth by the legislative mandate (*i.e.*, intelligible principle/general directive/general provision). These public agency requirements are specifically in place to safeguard every citizen's constitutionally ensured rights when the authorized agency takes any action to the contrary (*e.g.*, an action to deprive someone of their life, liberty, and/or property).

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[44] Constitution Annotated, *The Nature and Scope of Permissible Delegations,* https://constitution.congress.gov/browse/essay/artI-51-1-2/ALDE_00000010/%5b'declaration',%20'of',%20'independence'%5d (citing *Carter v. Carter Coal Co., 298* U.S. 238, 310-312 (1936); *Yakus v. US.,* 321 U.S. 414, 424-425 (1944)). This publication is attached hereto as Exhibit K and incorporated fully herein by reference.

Section 230 (in its present state, or in the present interpretation/application of same) does not afford someone any safeguards, as illustrated by the Facebook Lawsuit. A private entity cannot be delegated this authority to handle major questions amidst no scope of review, among other things.

96. The FCC, for example, is an "official body" and has strict regulations to which it must adhere. Title 47, United States Codes, Section 154 (Federal Communications Commission of the US Telecommunications Act of 1996) pertains to procedural guidelines of the FCC (the same Telecommunications Act containing Section 230).

97. When the FCC takes action against another, it is subject to a scope of review. Under Title 5, United States Code, Section 706 (Scope of review), when an agency takes an agency action (the Section 230 agency being a private entity):

> . . . the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
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> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

Id.

98. None of these procedural requirements or mechanisms of review exist in Section 230.

99. Moreover, online providers are not required to possess any qualifications for agents who regulate the affairs of U.S. citizens. Conversely, the FCC maintains specific qualifications to explicitly safeguard every U.S. citizen's constitutional rights.

100. The principal qualification of most (if not all) official regulatory commissions (*e.g.*, the FCC) is that all of its regulatory agents be U.S. citizens because only a U.S. citizen can make and enforce law

implicating life, liberty, and/or property of another U.S. citizen. The same goes for jury service, as another example — the primary qualification for jury service is that the candidate must be a U.S. citizen. A foreign actor cannot be tasked with depriving any U.S. citizens of their rights, and, yet, private entities (*e.g.*, Facebook, Twitter, Google, *et cetera*.) admittedly hire foreign agents to regulate U.S. citizens' information (*e.g.*, foreign content moderators/fact checkers). And regardless of whether the third-parties enlisted by Big Tech to regulate U.S. citizens' information control over U.S. elections, and/or *et cetera*, such third parties are rogue actors without any qualifications to protect our constitutional rights.

101. Furthermore, a private entity (who has received delegated authority from Congress) is not required to adhere to the Administrative Procedure Act ("APA"), a federal act that is codified as Title 5, United States Code, Sections 551-559 and governs the procedures of administrative law. Section 3 of the APA addresses the procedural formalities that agencies must employ when making decisions. There is a distinction made between (a) general regulations made through the process of rulemaking, and (b) case-by-case decisions made through the process of adjudication. Section 10 of the APA deals with judicial review of administrative agency decisions. Reviewing courts determine whether agency officials acted in compliance with relevant federal statutes and whether the agency's actions were "arbitrary, capricious, or an abuse of discretion."

102. Section 230 has no measurable bounds, is not "enforced" uniformly, and is often "enforced" to the benefit of the online provider/ICS rather than "in the

interests of the public." In the Facebook Lawsuit, Fyk has thus far been denied all measure of redress (*i.e.*, denied due process, and denied free speech for that matter) when Facebook took agency action (illegitimately protected by government) against Fyk. This unlawful regulatory taking action (undertaken by an agent of government — Facebook) has thus far been afforded "who cares?" status by the courts presiding over the Facebook Lawsuit, amounting to a deprivation of Fyk's due process rights even though Fyk's Verified Complaint in the Northern District of California Court specifically alleges anti-competitive animus/motives for Facebook's actions.

103. Section 230 is an inescapably extreme example of why the Non-Delegation Doctrine and Major Questions Doctrine exist. Congressional authority, to assist in the legislative function, may be delegated to an "official body, presumptively disinterested;" but, regulatory authority delegated to private entities motivated by self-interest is "legislative delegation in its most obnoxious form." Section 230 is an unconstitutional delegation of regulatory authority, that is "so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment." Section 230's constitutional infirmities must be immediately addressed and remedied by this Court, lest continued irreparable permanent harm to the constitutional rights of all Americans (like Fyk) and to the Constitution of the United States of America continue.

2. Void-for-Vagueness Doctrine

104. The legal definition of the Void-for-Vagueness Doctrine is a doctrine requiring that a penal

statute (Section 230) "define a[n] . . . offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (internal citations omitted). Under the Void-for-Vagueness Doctrine, a vague law is a violation of due process because the law does not provide fair warning of a prohibition; *i. e.*, fails to provide "persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

105. Section 230(c) is entitled "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material." "[B]locking and screening" is a form of penalization (*i.e.*, a restriction of liberty and/or property). *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc., et al.*, 567 U.S. 239 (2012) (assessing the Void-for-Vagueness Doctrine in a civil setting, rather than criminal).

106. In the Facebook Lawsuit, Facebook deemed Fyk's materials "offensive" when in Fyk's hands; but, when Fyk's materials (*i.e.*, identical in content) were in the hands of Fyk's competitor, Fyk's materials were inexplicably no longer offensive to Facebook. Not-so-coincidentally, Fyk's competitor paid Facebook substantially more advertising money than Fyk. Facebook's discriminatory determination that Fyk's identical materials were "offensive" was motivated by commercial monetary objectives and unfair competition — not Good Samaritan motives of policing "decency" — and this type of tortious conduct cannot be immune under the CDA; hence, this constitutional challenge. To be

clear, a commercial actor can make commercial decisions on its own platform but it cannot enjoy immunity from liability by an aggrieved party from the consequences that flow from conduct that are determined by a judge or jury to be tortious.

107. Section 230(c)(2)(A) attempts to better define what constitutes (*i.e.*, what is to be considered) "offensive" material. It reads, in pertinent part, as follows: "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is Constitutionally protected." *Id.*

108. Section 230 leaves the decision-making as to what is and is not offensive entirely in the hands of self-interested private corporations. Here, the vaguest measure of "blocking and screening" under Section 230(c)(2)(A) is "objectionable." "[O]therwise objectionable" could be anything unwanted, inconvenient, undesirable, embarrassing, troublesome, awkward, disadvantageous, conflicting, or even contrary discourse.

109. Section 230(c)(2)(A) analysis and decision-making is inherently (*i.e.*, on its face) arbitrary and/or discriminatory, and Section 230 does not sufficiently define (let alone in a way that ordinary people can understand) what conduct is prohibited; thus, the CDA is void for vagueness, as the CDA specifically encourages arbitrary and/or discriminatory enforcement (*i.e.*, any action taken to restrict whatever the provider of user considers objectionable). On its face and as applied, Section 230 even allows, for example,

a provider or user the ability to discriminate arbitrarily against protected classes, so long as the ICS considers them objectionable. Vagueness leads to that absurd result, with the related Absurdity Canon discussed further below.

110. The term "material" in the context of Section 230 defies objective determination. Webster's dictionary defines the term "material," in pertinent part, as: "relating to or made of matter; physical rather than spiritual or intellectual; having real importance."[45] The term "material" relates to physical matter, not to intellectual or spiritual things.

111. In the Facebook Lawsuit, Fyk's content (*i.e.*, Fyk's physical material) was restricted for Fyk, but then Fyk's identical materials were restored by Facebook for Fyk's competitor who paid substantially more money to Facebook. Because Facebook made more money from Fyk's competitor than from Fyk, the strong inference is that Facebook's discriminatory application of censorship of Fyk's materials were motivated by anti-competitive animus rather than a benign but non-uniform application of the CDA.

112. "Under [the] vagueness doctrine, a statute is also void for vagueness if a legislature's delegation of authority to judges and/or administrators is so extensive that it would lead to arbitrary prosecutions."[46]

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[45] Merriam-Webster Dictionary, *Material*, https://www.merriam-webster.com/dictionary/material A copy of this definition is found in composite Exhibit I.

[46] Cornell Law School, *Void for vagueness,* https://www.law.cornell.edu/wex/voidfor.yagueness (citing to *Skilling v. US.,* 130

113. Private corporations have been delegated broad administrative authority by Section 230 to create rules (*i.e.*, to "fill up the details") in the public interest. As applied, however, Section 230 grants these companies the authority to create any rules the company deems to be in the "public interest," solely relying on the agency's own views and policy agenda rather than requiring Congress to set forth objective guidelines.

114. Facebook recently admitted that "facts" are nothing more than (intellectual or spiritual) opinion. This is an extraordinary statement and reveals how the CDA is fostering the corruption of public discourse and suppression of public participation and speech. Section 230 is so vague, on its face and as applied, that private corporations now determine what is fact and what is fiction, dovetailing with the Substantial Over-breadth Doctrine (discussed below) and the Major Questions Doctrine (discussed above).

115. Not only have these companies become the arbiters of truth, but companies like Facebook have become the arbiters of opinion.

116. Even competition has become "objectionable," such as in the Facebook Lawsuit. Companies like Facebook are paid to develop information for their sponsors. Sponsored ads are shown in the newsfeed alongside (or, rather, in displacement of) other user's content or advertising. It is almost certainly in the

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S.Ct. 2896 (2010)). A copy of this Cornell publication is found in composite Exhibit D.

company's best interest to restrict its own competition.[47][47] Section 230, as applied, allows companies like Facebook (or any other private corporation, for that matter) to deem the user (*i.e.*, its own competition), the user's business, and/or the user's advertising objectionable in its own competitive self-interest and restrict them from the site.

117. In his concurring opinion in *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009), Judge Fisher warned that pernicious consequences could follow if future courts permitted online platforms to have unchecked authority to define what content is "otherwise objectionable." *See id.* at 1178-1180. Continuing with Judge Fisher's concurring opinion:

> Focusing for the moment on anticompetitive blocking, I am concerned that blocking software providers who flout users' choices

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[47] This note could have been placed in several different areas throughout this brief, but one thing we could not do is not put this note somewhere in this brief Let us be abundantly clear that in no way, shape, or form are we suggesting an ICS does not have the right to compete, not even close. But life is full of choices and full of consequences, and Big Tech companies are run by sophisticated adults. If an ICS of ordinary (or, really, heightened) corporate intelligence chooses to conduct itself in an anti-competitive fashion (devoid of "Good Samaritanism" and/or "good faith"), then the ICS should so choose, knowing full well that it (Facebook, Google, Twitter) no longer has a choice as to "invoking" CDA civil liability protection/immunity. The ICS cannot have its proverbial cake and eat it too. If an ICS chooses to behave in an anti-competitive way, then it subjects itself to civil liability in the ordinary course based on the merits (*i.e.*, just as it would outside the Internet ether; *i.e.*, just as it would in the legal real world) because without a true, legitimate "Good Samaritan" cloak at the threshold, the ICS can enjoy no CDA immunity, period.

> by blocking competitors' content could hide behind § 230(c)(2)[A] when the competitor seeks to recover damages. I doubt Congress intended § 230(c)(2)[A] to be so forgiving. . . . Unless § 230(c)(2)[A] imposes some good faith limitation on what a blocking software provider can consider 'otherwise objectionable,' or some requirement that blocking be consistent with user choice, immunity might stretch to cover conduct Congress very likely did not intend to immunize.

Id. at 1178-1179.

118. Judge Fisher's warning of pernicious consequences was not only correct, but an unimaginable understatement. A legislative statute enacted to protect children from harmful content has morphed into vague, arbitrary, and unfettered discretion to crush anyone economically, politically, ideologically, ethnically, racially, religiously, philosophically, and *et cetera.*

119. In his dissenting opinion in *Mistretta*, Justice Scalia posed the question: "What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?'" *Mistretta*, 488 U.S. at 416 (internal citations omitted). "This standard has effectively allowed Congress to grant administrative agencies the authority to create any rules they deem to be in the public interest, solely relying on the agency's own views and policy agenda rather

than requiring Congress to set forth objective guidelines."[48]

120. A law cannot be so vague as to allow a private entity motivated by self-interest rather than public interest to allow discretionary enforcement of same, which leads to arbitrary adjudication. Here, the CDA allows biased private entities to freely prosecute anyone for anything at any time in arbitrary fashion whether physically, intellectually, or spiritually. Section 230 violates the Void-for-Vagueness Doctrine both on its face and as applied, and must be struck.

3. Substantial Overbreadth Doctrine[49]

121. "Chris Cox['Cox'] and Ron Wyden Wydenl wrote Section 230 in 1996 to give up-and-coming tech

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[48] Dunigan, M., St. John's University School of Law, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival In Today's Administrative State*, https://scholarship.law.stjohns.edu/lawreview/vol91/iss1171 *See* Ex. J, incorporated fully herein by reference.

[49] The breadth of CDA immunity is a bipartisan issue. For example, when Googling "Biden/Trump communications decency act," here are some search results: (a) *Both Trump and Biden have criticized Big Tech's favorite law — here's what Section 230 says and why they want to change it*, CNBC (May 28, 2020); (b) *Section 230 under attack: Why Trump and Democrats want to rewrite it*, USA Today (Oct. 15, 2020). As another example of bipartisan scrutiny, Facebook, Twitter, and Google have testified in front of Congress regarding "serious consequences" flowing from unbridled CDA immunity; *e.g.*, silencing of voices (at fever pitch during an election cycle).

companies a sword and a shield, and to foster free speech and innovation online."[50]

122. As Wyden wrote in his June 2020 article (Ex. O):

> Essentially, 230 says that users, not the website that hosts their content, are the ones responsible for what they post, whether on Facebook or in the comments section of a news article. That's what I call the shield [*i.e.*, Section 230(c)(1)]. But it also gave companies a sword [*i.e.*, Section 230(c)(2)(A)] so that they can take down offensive content, lies and slime — the stuff that may be protected by the First Amendment but that most people do not want to experience online.

Id.

123. Wyden and Cox are the two authors of Section 230. In the title of his article (Ex. O), Wyden points out that Section 230 was written "to protect free speech." He goes on to say that the purpose of Section 230 was to give up-and-coming tech companies a "shield" (defensive protection, Section 230(c)(1)), a "sword" (offensive weapon, Section 230(c)(2)(A)), and a "shield" and a "sword" vis-à-vis the ability (*i.e.*, the "shield") to pass the "sword" (*i.e.*, the tools necessary to restrict materials) to another (defensive protection

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[50] Wyden, Ron, *I wrote this law to protect free speech. Now Trump wants to revoke it*, https://edition.cnn.com/2020/06/09/perspectives/ron-wyden-section-230/index.html A copy of this publication is attached hereto as Exhibit 0 and incorporated fully herein by reference.

when providing the offensive weapon to another, Section 230(c)(2)(B)).

124. In 1997, the Fourth Circuit Court in *Zeran* somehow transformed the Section 230(c)(1) "shield" into an offensive weapon (*i.e.*, another sword), and, as another example, somehow the California court system in the Facebook Lawsuit has thus far endorsed Facebook's offensive weaponization of the defensive Section 230(c)(l) realm in a case having nothing to do with Section 230(c)(l). It is logical to provide an ICS with a "shield" from liability for the content and conduct of another (defensively) vis-à-vis Section 230(c)(1), but it is not logical to provide a "shield" that allows protection for an ICS' own content (offensively) or conduct as to the content of another (offensively) because such was the intended purpose of the Section 230(c)(2) "sword." The "sword" can be used by the ICS within the context of Section 230(c)(2)(A) (pursuant, of course, to the "Good Samaritan" intelligible principle/general directive/general provision and otherwise pursuant to Section 230's "good faith" language) and, in the case of Section 230(c)(2)(B); whereas, pursuant to Section 230 (c)(2)(B), an ICS is "shielded" when the "sword" is passed by the ICS to another ICP 41 to use offensively against ICP 42 where appropriate (*e.g.*, the ability of ICP 41 to remove ICP #2's comments on ICP 41's post *via* tools/services made available to ICP #1 by the ICS).

125. Wyden attempts to paint Section 230's authority into a favorable light, insinuating that Section 230 only "gave companies a sword so that they can take down offensive content, lies and slime;" but, in application at the very least, Section 230 gives companies far more than just a "sword" to take down

"lies and slime." Wyden acknowledges that the "sword" is used to slash "the stuff [speech] that may be protected by the First Amendment." Restricting protected speech is at the core of an Overbreadth challenge.

126. "The [SCOTUS] has recognized that the First Amendment's protections extend to individual and collective speech 'in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.' Accordingly, speech is generally protected under the First Amendment unless it falls within one of the narrow categories of unprotected speech."[51]

127. The CRS continues:

> [T]he [SCOTUS] has recognized the narrow categories that the government may regulate because of their content, as long as it does so evenhandedly [*i.e.*, uniformly]. The Court generally identifies these categories as obscenity, defamation, fraud, incitement, fighting words, true threats, speech integral to criminal conduct, and child pornography."[52]

In the CDA context, the absurd practical effect (even if originally unintended by the government) is that the government has laundered policing of anything considered "objectionable" to private self-interested

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51 Congressional Research Service, *The First Amendment: Categories of Speech*, https://crsreports.congress.gov/product/pdf/IF/IF11072 (citing *Roberts v. US. Jaycees,* 468 U.S. 609, 622 (1984)). A copy of this publication is attached hereto as **Exhibit P** and incorporated fully herein by reference.

52 *See* Exhibit P (citing *See R.A.V. v. St. Paul,* 505 U.S. 377, 382-86 (1992)) (regular italics in original and bold italics added).

technology companies (remarkably, even if the "objectionable" material is permissible speech that is supposed to be protected under the First Amendment), whereas the government should only be "laundering" regulation of impermissible speech (*i.e.*, not constitutionally protected speech) under the government's/SCOTUS' very narrow view of what constitutes impermissible speech.

128. Section 230(c)(2)(A)'s categories of supposedly "unprotected" speech are not nearly as narrow as typical government agency standards. With the professed purpose of writing Section 230 being to protect speech, it is counterintuitive to provide private entities with a broader range of categories over which to restrict permissible speech. Section 230(c)(2)(A) identifies "impermissible" speech categories as anything the provider or user considers: "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Section 230(c)(2)(A) has a glaring flaw. A self-interested private corporation can "consider" anything obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable and, unlike the government's determinations of (and SCOTUS prescribed) impermissible speech categories, one cannot challenge an online provider's decisions.

129. Several of Section 230(c)(2)(A)'s categories, at least theoretically, track (in some respect) the government's and SCOTUS' categorical identifications, except for "otherwise objectionable." "Otherwise objectionable" is so broad that it swallows all of the other categories. "Obscene, lewd, lascivious, filthy, excessively violent, harassing" are all "otherwise objectionable" terms/phrases; so, the lowest (or broadest)

measure of offensive content is anything the ICS considers "objectionable." Section 230(c)(2)(A) could be written, in its broadest and most pertinent part, as " . . . to restrict access to or availability of material that the provider or user considers to be otherwise objectionable . . . " and it would have the same overbroad effect, having removed the terms/phrases "obscene, lewd, lascivious, filthy, excessively violent, harassing" from the statute. The breadth of the phrase "otherwise objectionable" far exceeds the policy and purpose of Section 230's protections; *i.e.*, "otherwise objectionable" is violative of the Overbreadth Doctrine, reaching well-beyond the very few, limited categories of truly impermissible speech.

130. Section 230(c)(2)(A)'s "otherwise objectionable" language/category is already overly broad in and of itself; but, the overbreadth of "otherwise objectionable" is compounded by the judiciary's mistakenly overbroad application of Section 230(c)(1) (to protect editorial function without a measure of "good faith") . . . the "limits" of civil liability protection became absolute publishing sovereignty as to all things online, which amounts to the lawless wild west of the Internet.

131. Per Justice Thomas:

> [B]y construing § 230(c)(1) to protect *any* decision to edit or remove content, *Barnes v. Yahoo!, Inc.*, 570 F. 3d 1096, 1105 (CA9 2009), courts have curtailed the limits Congress placed on decisions to remove content [*i.e.*, curtailed the limits to restrict speech — overbreadth], see *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, *3 (MD Fla., Feb. 8, 2017) (rejecting the interpretation

> that § 230(c)(1) protects removal decisions because it would swallo[w] the more specific immunity in (c)(2)'). With no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (9th Cir. 2017), aff'g 144 F. Supp. 3d 1088, 1094 (N.D. Cal. 2015) (concluding that '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(c)(1)).

Malwarebytes, 141 S.Ct. at 17 (emphasis in original).

132. The court's (mis)construing Section 230(c)(1) to protect editorial conduct (which it does not), curtailed the speech restriction limits (which were already overbroad) espoused in Section 230(c)(2)(A). Section 230's protection is (as applied) so broad that a company can, for example, racially discriminate (commit unlawful acts). Unlawful conduct (*e.g.*, discrimination, anti-competition) is *prima facie* vastly beyond the breadth of Congress' CDA intent. Lawful, legitimate, and permissible speech became fair game for removal without there being a showing of "good faith" vis-a-vis a "Good Samaritan," while allowing (*i.e.*, knowingly providing) otherwise unlawful/impermissible content has become commonplace online. Section 230 went from being overly broad on its face (*e.g.*, the authority to restrict anything considered "otherwise objectionable, whether or not such material is constitutionally protected" or whether such conduct is illegal) to absurd in its misapplication as absolute editorial sovereignty.

Violative of the Overbreadth Doctrine and Absurdity Canon.

133. Despite misguided proponents of Section 230 believing Section 230 is a protection for First Amendment rights, Section 230 is just the opposite. The ICS' First Amendment rights are ensured by the Constitution, Section 230 does not change or protect that fact. In the real world, Section 230 authorizes (under civil liability protection) the infringement of a third-party's First Amendment rights. Section 230 authorizes an ICS to create arbitrary rules, deem third-party speech impermissible, restrict that third-party speech, and then punish the third-party for their content and conduct all under the "protection" of government. Section 230 does not "protect" (in any capacity) First Amendment rights, it only serves to protect the ICS' ability to infringe on a third-party's First Amendment rights.

134. Third-party participants have no process by which to challenge (in a court of law) a corporation's unlawful, anti-competitive decisions because Section 230 has ridiculously morphed into absolute immunity from suit. In the Facebook Lawsuit, Facebook unlawfully restricted Fyk's permissible speech by way of the government's delegation of the major question that is free speech. Section 230 did not "protect" either the ICS' or Fyk's First Amendment rights; rather, by dismissing Fyk's claims, the courts protected Facebook from civil liability and infringed upon Fyk's rights to seek redress and speak freely. There is a distinct difference between the government's liability "protection" of the ICS and the government's authorization (*i.e.*, to a private agent) to infringe on a third-party's constitutionally protected rights. Simply put, the government

cannot fuel an ICS' deprivation of an ICP's free speech rights, which is precisely what the CDA fosters in a far too overbroad way.

135. "A statute is overly broad if, in proscribing unprotected speech, it also proscribes protected speech. Because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others."[53] Here, Section 230(c)(2)(A), for example, literally contains the following language: "whether or not such material is constitutionally protected." Here, Fyk challenges Section 230 on behalf of millions of Americans (*i.e.*, a substantial number) whose lawful, permissible speech has been unlawfully, unwillingly censored by private agents with ulterior motives (*e.g.*, monetarily driven competition) acting under the aegis of government, as a direct result of the overly broad draftsmanship of Section 230 and the overly broad application of Section 230 immunity.

136. "Overbreadth is closely related to vagueness; if a prohibition is expressed in a way that is too unclear for a person to reasonably know whether or not their conduct falls within the law, then to avoid the risk of legal consequences they often stay far away from anything that could possibly fit the uncertain

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[53] https://en.wikipedia.org/wiki/Overbreadth_doctrine (citing, *e.g.*, *Board of Trustees of State Univ. of N.Y v. Fox*, 492 U.S. 469, 483 (1989), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)). A copy of this Wikipedia article, along with all other Wikipedia articles cited throughout this filing, is attached hereto as composite Exhibit H and incorporated fully herein by reference.

wording of the law [*e.g.*, Fyk]."[54] The CDA's effects are much broader than Congress had intended or that the Constitution permits; hence, the CDA is violative of the Overbreadth Doctrine.

137. Indeed, the CDA's prohibitions (or allowances, conversely) are so unclear to Fyk (a reasonable person who has no idea what conduct does or does not fall within the CDA or Big Tech Community Standards that have spiraled out of the CDA) that Fyk, ever since Facebook destroyed his livelihood, has been risk adverse; *i.e.*, Fyk has stayed far away from anything that could result in such destruction again under the broken CDA. Put differently, the overbroad and vague CDA have had a chilling effect on Fyk's life (professionally and personally) in a much broader way than Congress could have ever intended or that the Constitution permits. Fyk's free speech has been chilled/deterred to such a degree that Fyk, for fear an ICS would destroy his life (professionally and personally) again by crushing his businesses and permissible free speech, has not reestablished his businesses on any other social media platforms. Fyk fears that he will once again waste his time and energy building his businesses (with permissible free speech being a foundational material for same, and the building of businesses being a pillar upon which this country was built in the vein of the American Dream) only to have it destroyed once again, by a governmentally authorized agent, without recourse. Accordingly, the CDA's absolute protection of online providers' unilateral ability to restrict permissible speech

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[54] https://en.wikipedia.org/wiki/Overbreadth_doctrine, Ex. H.

has had a substantial real-world chilling effect on protected free speech for Fyk and public discourse as a whole. After all, the Internet being the modern-day public square for anybody with a grip on reality.

138. Section 230 does far more to advance the commercial interests of private corporations than it does to protect children or the public from impermissible offensive speech. When considering how to resolve Section 230's overly broad protections, Justice Thomas noted (and this constitutional challenge asks this Court to so note and so engage in) the

> [p]aring back [of] the sweeping immunity courts have read into § 230[.] [Such paring] would not necessarily render defendants liable for online misconduct, [such paring] simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail.

Ex. C, *Malwarebytes*, 141 S.Ct. at 18. Fyk was not given the chance to raise his claims because of Section 230's "sweeping" (*i.e.*, overly broad) immunity.

139. This Court should also consider on this constitutional challenge that "laws are constitutional only if they directly advance a substantial government interest and are not broader than necessary to serve that interest."[55]

140. For a statute (Section 230) to be struck down because it is substantially overbroad, on its face and/or as applied, the amount of overbreadth must be

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55 *See* Ex. P.

substantial and real (*i.e.*, not hypothetical), when judged in relation to the statute's legitimate scope (*e.g.*, to block and screen offensive material). For a statute to be substantially overbroad, a substantial number of the applications of the statute must be impermissible under the First Amendment, both in terms of absolute numbers and in relation to a law's legitimate applications (the ratio of permissible to impermissible applications).

141. This lawsuit seeks a judicial determination that the phrase "otherwise objectionable" cannot stand because it is overly broad on its face, and worse, when "enforced" (as applied) by private actors, acting in their own self-interest (with governmental authority), there are no checks on the capricious and arbitrary actions of the "enforcer," much less on actions which are targeted and conscious efforts to engage in anti-competitive behavior, political suppression, ideological suppression, sociological suppression, religious suppression, as examples.

142. When a statute is challenged under the Substantial Overbreadth Doctrine, one must first consider the statute as a whole (*i.e.*, on its face) and one must then consider how the agents (private or public) have applied the statute's authority when restricting a citizen's speech. The question is whether or not the statute (as a whole) and/or whether the agent's application of the statute (as applied) is or is not substantial? Does Section 230 deter a substantial amount of permissible speech, causing a chilling effect on future lawful speech?

143. A substantial overbreadth challenge can be raised if a statute has both legitimate and illegitimate

applications. This action seeks a judicial determination that a significant number of possible applications of the statute are impermissible under the First Amendment and that the statute should accordingly be invalidated in its entirety (on its face). Separately, the government (the Defendant) may attempt to convince this Court that a small number of possible applications are impermissible and that those applications can be dealt with one at a time in as applied challenges. Such an attempt by the government under a First Amendment lens would still be untenable, however, because the statute cannot stand as repugnant to the Fifth Amendment's Due Process clause because Section 230 permits a *de facto* taking from a citizen before the citizen is given his Due Process rights.

144. We now turn our examination to the substantiality of the statute's overbreadth. To provide an adequate backdrop, against which to contrast what lawful, legitimate and permissible speech is restricted, we must first give examples of the illegitimate, impermissible, "objectionable," "offensive," and otherwise unlawful speech and/or conduct that has been authorized (*i.e.*, immunized) by Section 230.

145. In one case, for example:

> several victims of human trafficking alleged that an Internet company that allowed users to post classified ads for 'Escorts' deliberately structured its website to facilitate illegal human trafficking. Among other things, the company 'tailored its posting requirements to make sex trafficking easier,' accepted anonymous payments, failed to verify e-mails, and stripped metadata from photographs to make crimes harder to track. *Jane Doe No. 1*

> *v. Backpage.com, LLC*, 817 F. 3d 12, 16–21 (1st Cir. 2016). Bound by precedent creating a 'capacious conception of what it means to treat a website operator as the publisher or speaker,' the court held that § 230 protected these website design decisions and thus barred these claims. Id., at 19; see also *M A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1048 (ED Mo. 2011).

Ex. C, *Malwarebytes*, 141 S.Ct. at 17.

146. Had the CDA actually been correctly interpreted and applied (*i.e.*, applied to <u>not</u> immunize an ICS that knowingly fosters/allows illegal activity, *e.g.*, sex trafficking, to unfold on its platform), FOSTA-SESTA would not have had to have become law under President Trump's April 11, 2018, signature.[56] FOSTA-SESTA was a law enacted to offset/guard against Section 230's protecting an ICS' unscrupulous business practices (which such protection of an ICS' unscrupulousness has somehow become reality amidst the "as applied" CDA Twilight Zone that has evolved over the last twenty-six years), when the CDA was by no means designed to provide immunity to websites that facilitate sex trafficking.

147. <u>Does not the fact that a separate law has to be created to fix another law render that other law untenable? Yes — the CDA is untenable. Is not the fact that Section 230 has morphed into a facilitator of sex trafficking confirmation of the CDA 's overly broad immunization? Yes — the CDA is unconstitutionally</u>

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[56] "SESTA" is an acronym for "Stop Enabling Sex Traffickers Act," and "FOSTA" is an acronym for "Allow States and Victims to Fight Online Sex Trafficking Act.'

overbroad. Just based on the enactment of FOSTA-SESTA alone, which, again, necessarily confirms the legal/constitutional repugnancy of the CDA, the CDA must be struck.

148. Pursuant to FOSTA-SESTA, an ICS no longer has an option (*i.e.*, no longer has a voluntary decision to make) as to whether or not to remain inactive/sit idly by (in the CDA context, *see* Section 230(c)(l) as to an ICS' direct inactivity and *see* Section 230(c)(2)(B) as to an ICS' indirect inactivity) when the ICS *knows* about illegalities (*e.g.*, sex trafficking) unfolding on or being promoted within its backyard/platform. That is not to say that FOSTA-SESTA renders an ICS responsible for seeking out such illegalities (*i.e.*, not to say that proactivity is now required of an ICS in some sort of pre-harm crystal ball or detective fashion) and/or not to say that an ICS somehow needs to perform the arduous (if not impossible, actually) task of somehow acting upon unknown illegal content. Not the case.

149. Rather, FOSTA-SESTA can be distilled to this: "hey, Facebook/Twitter/Google/YouTube, if you know about bad things going down on your platform, it would behoove you to do the right thing . . . for example, if you know of sex trafficking transpiring on your site, you should strongly consider immediately blowing the whistle and blowing the whistle loudly because an opposite decision to remain inactive will constitute willful/known/negligent decision-making on your part, *i.e.*, a decision to remain inactive is an action, and you will not somehow enjoy immunity for your 'own' action(s). That is not to say that your decision to remain inactive, *i.e./e.g.*, not blow the whistle on sex trafficking unfolding on your site, will result in civil liability; but, it is to say that you do not enjoy a

threshold immunity under the aforementioned circumstances and your accuser/opponent will get his/her day in court on the merits."

150. FOSTA-SESTA supports our correct understanding of the CDA — CDA civil liability protection sweeps far too broadly in immunizing an ICS from its own conduct (even if that conduct is to knowingly not act), such as the facilitating sex trafficking on their sites or such as Facebook's anti-competitive animus conduct against Fyk as alleged in Fyk's Verified Complaint in the Facebook Lawsuit. And FOSTA-SESTA supports our request that the CDA be struck — again, a new law had to be passed (FOSTA-SESTA) in order to combat (*i.e.*, do the job of the CDA) the overly broad CDA immunization ("overly broad" in that CDA immunity sweeps so widely that an ICS is somehow protected from claims arising out of the ICS' allowing sex trafficking to unfold on the platform and/or even going so far as to promote, directly or indirectly, the trafficking). Just as lawmakers had to start over again with respect to a piece of the CDA vis-à-vis FOSTA-SESTA, so too should this Court with respect to all of Section 230(c). FOSTASESTA was a relatively easy "CDA partial fix," all things considered . . . FOSTA-SESTA was passed in the House with a vote of 388-25 and passed in the Senate with a vote of 97-2.[57]

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[57] The bi-partisan support for FOSTA-SESTA evidences another thing that we have been saying all along (even citing to Section 230 news articles featuring President Biden and Section 230 news articles featuring President Trump in our late-2020 Petition for a Writ of Certiorari to the SCOTUS) — irrespective of one's politics (left, right, center), if one has functioning dendrites and/or firing synapses, agreement is legion that the

151. Of note, had the *Doe* case (Ex. C) presented itself to the SCOTUS in a procedurally "final" way, the SCOTUS would be presently entertaining a CDA case involving the FOSTASESTA bit in the CDA context: "It is hard to see why the protection § 230(c)(l) grants publishers against being held strictly liable for third parties' content should protect Facebook from liability for its own 'acts and omissions.' Ex. C, *Doe*, 142 S.Ct. at 1088.

152. And then there is the absurdity (likely also overbreadth) of permitting terroristic content on a platform:

> Consider also a recent decision granting full immunity to a company for recommending content by terrorists. *Force v. Facebook, Inc.*, 934 F. 3d 53, 65 (2d Cir. 2019), cert. denied, 590 U.S. ___ (2020). The court first pressed the policy argument that, to pursue 'Congress's objectives, . . . the text of Section 230 (c)(1) should be construed broadly in favor of immunity [*i.e.*, overbreadth].' 934 F. 3d, at 64. It then granted immunity, reasoning that recommending content (*i.e.*, development in part) 'is an essential result of publishing.' *Id.*, at 66. Unconvinced, the dissent noted that, even if all publisher conduct is protected by § 230(c)(l), it 'strains the English language to say that in targeting and recommending these writings to users . . . Facebook is acting as 'the publisher of . . . information provided by another information content

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CDA is broken and needs fixed immediately . . . yesterday . . . years ago . . . decades ago.

> provider.' *Id.*, at 76–77 (Katzmann, C. J., concurring in part and dissenting in part) (quoting § 230(c)(1))." (Emphasis Added)

Ex. C, *Malwarebytes*, 141 S.Ct. at 18.

153. Moreover:

> Other examples abound. One court granted immunity on a design-defect claim concerning a dating application that allegedly lacked basic safety features to prevent harassment and impersonation. *Herrick v. Grindr LLC*, 765 Fed. Appx. 586, 591 (2d Cir. 2019), cert. denied, 589 U.S. ___ (2019). Another granted immunity on a claim that a social media company defectively designed its product by creating a feature that encouraged reckless driving. *Lemmon v. Snap, Inc.*, 440 F. Supp. 3d 1103, 1107, 1113 (C.D. Cal. 2020).

Ex. C, *Id.* at 17-18.

154. As yet another heinous example of Section 230's failures:

> Plaintiffs John Doe 1 and John Doe #2 allege that when they were thirteen years old, they were solicited and recruited for sex trafficking and manipulated into providing to a third-party sex trafficker pornographic video ('the Videos') of themselves through the social media platform Snapchat. A few years later, when Plaintiffs were still in high school, links to the Videos were posted on Twitter. Plaintiffs allege that when they learned of the posts, they informed law enforcement and urgently requested that Twitter remove

> them but Twitter initially refused to do so, allowing the posts to remain on Twitter, where they accrued more than 167,000 views and 2,223 retweets. According to Plaintiffs, it wasn't until the mother of one of the boys contacted an agent of the Department of Homeland Security, who initiated contact with Twitter and requested the removal of the material, that Twitter finally took down the posts, nine days later. . . . [I]f a provider remained passive and uninvolved in filtering third-party material from its network, the provider could not be held liable for any offensive content it carried from third parties. . . . Twitter was immune from claims based on theory that third-party content Twitter allowed to be posted on its platform led to plaintiff's injury because the claim sought to hold Twitter liable as a publisher.

Doe v. Twitter, Inc., No. 21-cv-00485-JCS, 2021 WL 3675207, at *1, *3-4 (N.D. Cal. Aug. 18, 2021).

155. In this circumstance, Twitter was not simply a "passive" host, it knowingly chose to "allow" (*i.e.*, knowingly continued to host unlawful content) the patently offensive, obscene, and illegal child pornography, thereby materially and negligently contributing to the development of the information in part (*i.e.*, the content amassed more than 167,000 views and 2,223 retweets after Twitter chose to "allow" the content to remain — *i.e.*, acted to not act), until such time as it required the Department of Homeland Security to get involved.

156. Twitter did absolutely nothing to achieve the compelling government interest of Section 230 and

acted contrary to ordinarily recognized contemporary community standards. Twitter did not act as a "Good Samaritan;" rather, it exploited the overbroad immunity protections it is afforded by the courts. In our opinion, Twitter's active material responsibility in contributing to the development of child pornography should have not only disqualified it from CDA immunity, but should have resulted in criminal charges against those directly involved in the decision to allow it to remain. It is one thing for the CDA to preclude civil liability (in protection of the behemoth ICS), whereas it is quite another thing for the CDA's immunity swath to sweep so broadly that such swath ends up protecting an ICS from child-related illegalities (some of which such illegalities would rightly be in the criminal realm).

157. Section 230's overbroad immunity authorizes (as applied) unlawful conduct such as discrimination, human trafficking, recommending terrorist content, building dangerous applications that lack basic safety features (*i.e.*, negligence), encouraging unlawful reckless driving and knowingly hosting (*i.e.*, allowing) child pornography, as just a few examples of Section 230's (as-applied) failures.

158. Justice Thomas noted a commonality between these circumstances (a commonality shared with the Facebook Lawsuit):

> A common thread through all these cases is that the plaintiffs were not necessarily trying to hold the defendants liable 'as the publisher or speaker' of third-party content. § 230(c)(l). Nor did their claims seek to hold defendants liable for removing content in good faith. § 230(c)(2). Their claims rested instead on alleged product design flaws —

> that is, the defendant's own misconduct. Cf. *Accusearch*, 570 F. 3d, at 1204 (Tymkovich, J., concurring) (stating that § 230 [immunity] should not apply when the plaintiff sues over a defendant's 'conduct rather than for the content of the information'). Yet courts, filtering their decisions through the policy argument that 'Section 230(c)(l) should be construed broadly,' [to protect all editorial function], *Force*, 934 F. 3d, at 64, give defendants immunity.

Ex. C, *Malwarebytes*, 141 S.Ct. at (Emphasis added). Judge Tymkovich's concurrence is correct.

159. "Section 230 had two purposes: the first was to encourage the unfettered and unregulated development of free speech on the Internet, as one judge put it; the other was to allow online services to implement their own standards for policing content and provide for child safety."[58]

160. The legislative intent of Section 230, however, has been turned upside down. Self-interested private corporations, given regulatory power and immunity protection, have (as applied) discouraged the development of third-party free speech without transparency or accountability (*i.e.*, private corporations have penalized a substantial amount of permissible speech, causing an alarming chilling effect) and at the same time "reduced the incentives of online

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[58] Electronic Frontier Foundation, *CDA 230 — The Most Important Law Protecting Internet Speech,* https://www.efforg/issues/cda230/legislative-history (internal citation omitted). A copy of this publication is attached hereto as **Exhibit Q** and incorporated fully herein by reference.

platforms to address illicit activity," *see* Ex. E (*e.g.*, to protect children).

161. By what measure does one determine what material is "offensive" (*i.e.*, impermissible, unlawful speech)? "The Miller Test" enlightens as to that question:

> According to the FCC and the Supreme Court, a broadcast [similar to publishing] is considered offensive and obscene if it meets criteria under three different statements. The broadcast is offensive if: '[a] An average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient (involving sexual desire) interest[;] [b] The material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law[;] [c] The material, taken as a whole, must lack serious literary, artistic, political or scientific value.[59]

162. The government agency's (FCC's) general standard for an "offensive" broadcast (*i.e.*, content publishing) is material that appeals to the prurient (sexual in nature) mind and lacks serious literary, artistic, political, or scientific value. Section 230's breadth (*i.e.*, authority) to restrict any speech considered "objectionable" goes well beyond sexual material

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[59] Laws, *Patently Offensive*, hftps://patent.laws.com/patently-offensive (citing to *Miller v. California*, 93 S.Ct. 2607 (1973)). A copy of this publication is attached hereto as **Exhibit R** and incorporated fully herein by reference.

that lacks serious literary, artistic, political, or scientific value.

163. Having provided an adequate backdrop against which to compare what unlawful, illegitimate, impermissible speech, and/or conduct that is encouraged ("allowed"/"developed" as-applied by online providers under Section 230 authority), we now turn our examination towards the substantiality of the lawful, legitimate, and permissible third-party speech that is discouraged (disallowed/restricted/penalized/punished), which does absolutely nothing to achieve Section 230's compelling government interests of developing permissible Internet free speech and/or protecting children by discouraging impermissible (*i.e.*, offensive, unlawful) speech.

164. Facebook has well over two billion users, making it one of the largest social media companies in the world. Facebook often chooses to act "voluntarily" to purportedly achieve Section 230's compelling government interest to restrict offensive/impermissible material. Facebook moderates (without transparency or accountability) a "substantial" amount of third-party (im)permissible speech. Facebook is accordingly a good model by which to determine the ratio of permissible to impermissible applications of Section 230's breadth (authority).

165. When Congress enacted Section 230, it had ordinary contemporary community standards (circa 1996) in mind. Private companies like Facebook, however, inevitably create and administer self-interested, self-benefiting Community Standards that are often misaligned with the ordinary contemporary community standards that Congress had in mind twenty-six years ago when Mark Zuckerberg was eleven years old. To

better understand how a company as large as Facebook misapplies its Community Standards to restrict a substantial amount of permissible speech, we must first understand how it creates and enforces its "rules." To better understand this, we turn to a source that worked directly for Facebook.

166. Brian Amerige, an engineering manager of Facebook products who had firsthand knowledge of Facebook's internal processes, explains Facebook's content policy, moderation, and enforcement processes in his op-ed publication entitled *Facebook Has a Right to Block 'Hate Speech'—But Here 's Why It Shouldn't*.[60]

167. Mr. Amerige, writes:

> When I joined the Facebook team in 2012, the company's mission was to 'make the world more open and connected, and give people the power to share.'
>
> * * *
>
> As of 2013, this was essentially Facebook's content policy: 'We prohibit content deemed to be directly harmful, but allow content that is offensive or controversial. We define harmful content as anything organizing real world violence, theft, or property destruction, or that directly inflicts emotional distress on a specific private individual (*e.g.* bullying).'
>
> * * *

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60 https://quillette.com/2019/02/07/facebook-has-a-right-to-block-hate-speech-but-heres-why-it-shouldnt/ A copy of this publication is attached hereto as **Exhibit S** and incorporated fully herein by reference.

Facebook's content policy evolved to more broadly define 'hate speech.'

* * *

[I]t became clear that they [*i.e.*, Facebook employees] were committed to sacrificing free expression in the name of 'protecting' people.

* * *

Let's fast-forward to present day. This is Facebook's summary of their current hate speech policy:

> We (*i.e.*, Facebook) define hate speech as a direct attack on people based on what we call protected characteristics — race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability. We also provide some protections for immigration status. We define attack as violent or dehumanizing speech, statements of inferiority, or calls for exclusion or segregation.

The policy aims to protect people from seeing content they feel attacked by. It doesn't just apply to direct attacks on specific individuals (unlike the 2013 policy), but also prohibits attacks on 'groups of people who share one of the above-listed characteristics.'

If you think this is reasonable, then you probably haven't looked closely at how Facebook defines 'attack.' Simply saying you dislike someone with reference to a 'protected

characteristic' (*e.g.*, 'I dislike Muslims who believe in Sharia law') or applying a form of moral judgment (*e.g.*, 'Islamic fundamentalists who forcibly perform genital mutilation on women are barbaric') are both technically considered 'Tier-2' hate speech attacks, and are prohibited on the platform.

This kind of social-media policy is dangerous, impractical, and unnecessary.

The trouble with hate speech policies begins with the fact that there are no principles that can be fairly and consistently applied to distinguish what speech is hateful from what speech is not. Hatred is a feeling, and trying to form a policy that hinges on whether a speaker feels hatred is impossible to do.

* * *

The truth is, any list of protected characteristics is essentially arbitrary. Absent a principled basis, these are lists that are only going to expand with time as interest and identity groups claim to be offended, and institutions cater to the most sensitive and easily offended among us.

The inevitable result of this policy metastasis is that, eventually, anything that anyone finds remotely offensive will be prohibited. Mark Zuckerberg not only recently posted a note that seemed to acknowledged this, but included a handy graphic describing how they're now beginning to down-rank content that isn't prohibited, but is merely borderline.

Almost everything you can say is offensive to somebody. Offense isn't a clear standard like imminent lawless action. It is subjective – left up to the offended to call it when they see it.

* * *

The lesson here is that while 'offense' is certainly something to be avoided interpersonally, it is too subjective and ripe for abuse to be used as a policy standard.

Perhaps even more importantly, you cannot prohibit controversy and offense without destroying the foundation needed to advance new ideas. History is full of important ideas, like heliocentrism and evolution, that despite later being shown to be true were seen as deeply controversial and offensive because they challenged strongly held beliefs. Risking being offended is the ante we all pay to advance our understanding of the world.

But let's say you're not concerned about the slippery slope of protected characteristics, and you're also unconcerned with the controversy endemic to new ideas. How about the fact that the truths you're already confident in—for example, that racism is abhorrent—are difficult to internalize if they are treated as holy writ in an environment where people aren't allowed to be wrong or offend others? Members of each generation must re-learn important truths for themselves ("Really, why is racism bad?"). "Unassailable" truths turn brittle with age, leaving them open to popular suspicion. To maintain the strength

of our values, we need to watch them sustain the weight of evidence, argument and refutation. Such a free exchange of ideas will not only create the conditions necessary for progress and individual understanding, but also cultivate the resilience that much of modern culture so sorely lacks.

But let's now come down to ground level, and focus on how Facebook's policies actually work.

* * *

When a post is reported as offensive on Facebook (or is flagged by Facebook's automated systems), it goes into a queue of content requiring human moderation. That queue is processed by a team of about 8,000 (soon to be 15,000) contractors. These workers have little to no relevant experience or education, and often are staffed out of call centers around the world [*i.e.*, foreign actors]. Their primary training about Facebook's Community Standards exists in the form of 1,400 pages of rules spread out across dozens of PowerPoint presentations and Excel spreadsheets [*i.e.*, no ordinary person/ICP could conceivably know what violates these 1,400 rules or not]. Many of these workers use Google Translate to make sense of these rules, [begging the question – how is the ordinary person supposed to know what the delegated state actor [Facebook] has deemed [a] 'rule[ ]' when Facebook's own foreign contractors have no clue?]. And once trained, they typically have eight to 10 seconds to make a decision on

each post. Clearly, they are not expected to have a deep understanding of the philosophical rationale behind Facebook's policies, [begging the question – how is anyone supposed to know what Facebook's philosophical rationale is if Facebook's own moderators do not even know?].

As a result, they often make wrong decisions. And that means the experience of having content moderated on a day-to-day basis will be inconsistent for users. This is why your own experience with content moderation not only probably feels chaotic, but is (in fact) barely better than random. It's not just you. This is true for everyone (*i.e.*, substantial).

* * *

Sometimes, the rules are ignored to insulate Facebook from 'PR Risk.' Other times, the rules are applied more stringently when governments that are more likely to fine or regulate Facebook might get involved [*i.e.*, compelled by government]. Given how inconsistent and slapdash the initial moderation decisions are, it's no surprise that reversals are frequent. . . . It's hard to overstate how sloppy this whole process is.

There is no path for something like this to improve. . . . They think they'll be able to clarify the policies sufficiently to enforce them consistently, or use artificial intelligence (Al) to eliminate human variance. Both of these approaches are hopeless.

Iteration works when you've got a solid foundation to build on and optimize. But the Facebook hate speech policy has no such solid foundation because "hate speech" is not a valid concept in the first place. It lacks a principled definition—necessarily, because "hateful" speech isn't distinguishable from subjectively offensive speech—and no amount of iteration or willpower will change that.

* * *

Case in point: When Facebook began the internal task of deciding whether to follow Apple's lead in banning Alex Jones, even that one limited task required a team of (human) employees scouring months of Jones' historical Facebook posts to find borderline content that might be used to justify a ban. In practice, the decision was made for political reasons [*i.e.*, not for 230(c)(2)(A) offensive reasons], and the exercise was largely redundant.

* * *

No one likes hateful speech, and that certainly includes me. . . . Such attacks are morally repugnant. I suspect we all agree on that.

But given all of the above, I think we're losing the forest for the trees on this issue. 'Hate speech' policies may be dangerous and impractical, but that's not true of anti-harassment policies [harassment being of the 230(c)(2)(A) ilk], which can be defined clearly and applied with more clarity. The same is

> true of laws [government defined standards] that prohibit threats, intimidation and incitement to imminent violence [and also definable impermissible speech]. Indeed, most forms of interpersonal abuse that people expect to be covered by hate speech policies—*i.e.*, individual, targeted attacks—are already covered by anti-harassment policies and existing laws.
>
> So, the real question is: Does it still make sense to pursue hate speech policies at all? I think the answer is a resounding "no." Platforms would be better served by scrapping these policies altogether. But since all signs point to platforms doubling down on [increasing the substantiality of] existing policies, what's a user to do?
>
> First, it's important to recognize that <u>much of the content that violates Facebook's content policy never gets taken down</u>. I'd be surprised if moral criticism of religious groups [*i.e.*, protected speech], for example, resulted in enforcement by moderators today, despite being (as I noted above) technically prohibited by Facebook's policy . . . . [I]n the meantime, I'd encourage you to not let the policies get in your way. Say what you think is right and true [and lawful, legitimate, and permissible], and let the platforms deal with it . . . .

See Ex. S (emphasis added).

168. Mr. Amerige's summary of Facebook's hate speech policy/procedure nicely illustrates the problems

that are inherent when authorizing a private corporation to make decisions as to what is categorically objectionable (*i.e.*, (im)permissible) speech. Impermissible speech restrictions are typically subjected to strict scrutiny by the courts. Courts are often disinclined to broaden speech restrictions because such erodes First Amendment rights. Facebook, like most (if not all) other large tech companies, does substantially more to advance self-interest by restricting permissible speech than it does to restrict patently offensive/impermissible speech. Facebook does not adhere to contemporary community standards; rather, it instead, relies on its own interests and policy agenda to create its own Community Standards others must live by, despite the "others"/"ICPs" having no clue as to, among other things, about Facebook's 1,400 pages of "rules" that not even Facebook's moderators understand or uniformly apply.

169. Per the CRS:

> The contours of [impermissible speech] categories have changed over time, with many having been significantly narrowed by the Court (to protect speech). In addition, the Roberts Court has been disinclined to expand upon this list, declining to recognize, for example, violent entertainment or depictions of animal cruelty as new categories of unprotected speech. *See Browny. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011); *United States v. Stevens*, 559 U.S. 460 (2010).

See Ex. P.

170. Contrary to courts' narrow approach to speech restrictions, online providers have "substantially"

expanded their already vague policies/Community Standards to broaden "impermissible" (*i.e.*, offensive) speech categories to include categories such as "inconvenient," "competitive," or "unwanted" speech.

171. Big Tech's so doing under the CDA, creates "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . . . [The CDA is accordingly eligible for being] facially challenged on overbreadth grounds." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

172. In determining whether a statute's overbreadth is substantial, the courts consider a statute's application to real-world conduct, not fanciful hypotheticals. *See, e.g.*, *U.S. v. Williams*, 553 U.S. 285, 301-302 (2008). Accordingly, the courts have repeatedly emphasized that an overbreadth claimant bears the burden of demonstrating, "from the text of [the law] and from actual fact that substantial overbreadth exists." *See, e.g.*, *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (internal citation omitted).

173. "From the text of [Section 230(c)(2)(A)] and from actual fact," it is plain that 230(c)(2)(A) is overly broad, undertaking an intolerable and unconstitutional interference with personal liberty by restricting protected speech whether or not such material is constitutionally protected.

174. Congress cannot, constitutionally, delegate the power to restrict speech upon any agent (whether official or private) because it is not a power that Congress can rightfully exercise itself. Assuming *arguendo* that Congress did have the power to restrict speech,

then Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. And, assuming *arguendo* that Congress did have the power to transfer its legislative function, then the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.

175. Furthermore, Mr. Amerige's explanation of Facebook's broad policies demonstrate the very real-world overly broad application of Section 230's authority. Hate speech is one example of the real world vague/overly broad/arbitrary implementation of "rules" that restrict permissible/protected speech that fall under the overly broad (*i.e.*, as applied) phrase "otherwise objectionable." Other examples of permissible speech restrictions abound, not as fanciful hypotheticals, but as substantial "real-world" applications of Section 230 authority — we now provide a sampling.

176. Being in Facebook, Twitter, or YouTube "jail" (the word "prison" is more fitting, since the accused is already convicted and sentenced) is so commonplace, that it is now part of the American vernacular. Section 230 enables an ICS to create arbitrary laws (*e.g.*, Community Standards), to arbitrarily enforce those laws (*e.g.*, restrict speech), and to then determine the arbitrary penalty (*e.g.*, ban) for breaking those "laws," all under the same authority. There is no separation of power, no checks and balances, and no congressional or judicial oversight and there is nothing "standard" about the enforcement of Community "Standards."

177. As an example of permissible speech that was arbitrarily penalized, Sue Mosley (a mom) was

restricted for posting a picture of her daughter's cake. The cake was misidentified by the algorithm as a female nipple. A similar misidentification happened with an elbow. This algorithmic "misidentification" happens all too frequently (*i.e.*, substantially) where a user/ICP is convicted of a "crime" that it did not commit and must seek an appeal (which such appeals are farcical, futile endeavors . . . probably carried out by an algorithm rather than a living, breathing human being or United States citizenship) to undo its punishment.

178. Fyk has endured several similar "misidentifications." As an example, Fyk was once punished (banned) by Facebook for posting a picture of a pink circle that Facebook determined "may be offensive or upsetting to others." Here, Fyk's permissible speech was restricted because it "may be" offensive. Facebook penalized Fyk for something that was not determined to be offensive but might be offensive which was, to any rational person, not offensive.

179. "Misidentifications" occur all too often. Most "misidentified" speech restrictions (penalizations) go unchallenged; but, in the rare instance where public outrage presents a public relations concern, companies like Facebook will overturn their decisions and apologize. As an example, Facebook once "misidentified" the Declaration of Independence as "hate speech." In the case of the "mistaken" restriction of the Deceleration of Independence, Facebook's spokeswoman, Sarah Pollack stated, "The post was removed by mistake and

restored as soon as we looked into it."[61] Facebook's order of operation is to restrict first, "look[ ] into it" later only if there is public outrage, then apologize for its "mistake." Big Tech's apologies have been plentiful during myriad congressional hearings and, yet, at most Big Tech gets a scolding or hand slap and goes right back to its CDA immunized illegal ways. The First Amendment does not read: Congress (here, a proxy agent acting on behalf of Congress) shall make no law . . . abridging the freedom of speech, unless of course, it is a "mistake."

180. Big Tech's tactic of issuing public *mea culpas* in response to public backlash underscores the lack of any analogous "agency" regulatory oversight to reign in "agency" abuse. Essentially, there is no repercussion. The two sisters known as Diamond and Silk are a good example of "mistaken" penalization and public push back. Facebook unpublished the ladies' social media content as being "unsafe," a defamatory claim in and of itself. When asked by Congressman Billy Long, "what is unsafe about two black women supporting President Donald J. Trump," Mr. Zuckerberg responded "well, Congressman, nothing is unsafe

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[61] The Washington Post, *Facebook censored a post for 'hate speech.' It was the Declaration of Independence,* https://www.washingtonpost.com/news/the-intersect/wp/2018/07/05/facebook-censored-a-post-for-hate-speech-it-was-the-declaration-of-independence/ For the Court's ease of reference, this news article is attached hereto as Exhibit T and incorporated fully herein by reference.

about that."[62] When challenged, companies like Facebook feign ignorance for having defamed someone's character, restricted their speech, and destroyed their livelihood without compassion or consequence. "Oops, our bad" does not cut it when denying someone of their life, liberty, or property under government authority.

181. Other examples of "mistaken" ("oops our bad") penalizations are found within these publications: (a) "Facebook apologizes for 'mistake' in threatening to ban 81-year-old woolen pig knitter for hate speech." (b) "Facebook Banned This Perfectly Innocent Photo Of A Puppy, For Obvious Reasons." (c) "Twitter apologizes after conservative commentator Candace Owens was briefly locked out of her account." (d) "Stephen: Twitter Apologizes for Banning People Who Tweeted 'Memphis." (e) "Their bad! Twitter apologizes to Dave Rubin for the 'inconvenience' of locking him out of his account for having legit COVID19 concerns." (f) "Google apologizes for accidentally removing the Podcast Addict app."[63]

182. Brian Amerige pointed out that Facebook, like many other online providers, "often make[s] wrong decisions. And that means the experience of having content moderated on a day-to-day basis will be inconsistent for users." The company's decision, whether right or wrong, cannot (as applied) be challenged in a court of law. A third-party simply must

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[62] This testimony from Mr. Zuckerberg is available *via* video at the following: https://www.facebook.com/watch/?v=1909262926038134 This video is incorporated fully herein by reference.

[63] For the Court's ease of reference, this compilation of articles is attached hereto as composite **Exhibit U**, which such composite exhibit is incorporated herein by reference.

accept his/her punishment unless they can muster up enough public outrage to present a public relations fire. Without powerful connections and/or notoriety, the average person cannot expect their "mistaken" punishment to ever be undone because the appeals process is often ignored and is not consistently available.

183. Regarding the "appeals process," even that is a farce — the same company that "mistakenly" bans a user/ICP is the same company considering their appeal. As applied, the user can be "mistakenly" accused of, convicted of, and sentenced to "prison" for of a speech "crime" they did not commit. The user/ICP may not even know what prohibition (*i.e.*, Community Standard) they violated. *See, e.g.*, the article from Mr. Amerige quoted at length above. Companies are not required to make a showing of what specific prohibition a user/ICP violated. What was unsafe about Diamond and Silk? Mark Zuckerberg admitted "nothing." Facebook seems to have simply disagreed with Diamond and Silk's political or ideological viewpoint and restricted the two ladies, claiming they were "unsafe" based on Facebook's own political viewpoint or ideological agenda.

184. Per the CRS:

> The Supreme Court has long considered political and ideological speech to be at the core of the First Amendment, including speech concerning 'politics, nationalism, religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). . . . A government regulation [through a proxy agent] that implicates political or ideological speech generally receives

> strict scrutiny in the courts, whereby the government must show that the law is narrowly tailored to achieve a compelling government interest.

Ex. P (emphasis added). Section 230 is not narrowly tailored, nor does it achieve the compelling government interest (*e.g.*, the need for FOSTA-SESTA). Any restriction, predicated on political or ideological viewpoint, should be subject to strict scrutiny by the courts. But when considering immunity, the courts in practice (as applied) have not implemented any security, because the courts very rarely (if ever) venture into the merits of why a plaintiff was restricted and whether it was done in "good faith" by a "Good Samaritan." Such has been Fyk's plight thus far in the Facebook Lawsuit.

185. Consider this — if an elected official is elected by the public interest and, similarly, popular figures (*e.g.*, Diamond and Silk) are made popular because of the public interest, is restricting their political or ideological speech in the public interest? No. Another consideration — if an online provider/ICS restricts (under the aegis of government authority) an elected political official, popular political figure, political speech, or censors political discourse, is the online provider acting as a "Good Samaritan" to achieve "a compelling government interest" that aligns with the public interest (*e.g.*, to protect our children from offensive materials)? No.

186. If online providers were using the CDA to censor speech for anti-competitive purposes (yep, they are all the time) because they are somehow above the law *via* the CDA, using their authority to quash speech/expression as "otherwise objectionable" (speech

that would otherwise be afforded the highest level of constitutional protection (yep, they are all the time because they are somehow above the law *via* the CDA)), how then might an ordinary citizen know what is prohibited and/or challenge the arbitrary and capricious "enforcement" of the CDA? The ordinary citizen cannot under the broken CDA.

187. Targeting and restricting permissible political or ideological viewpoints as "otherwise objectionable" or "unsafe" speech is repugnant to the core values and purpose of the First Amendment; and, yet, such is authorized conduct under Section 230's currently over broad application. Companies like Facebook, Twitter, and Google have even restricted political candidates during an election. Big Tech's "choice" to silence a candidate during an election, results in millions of others not being able to see that candidate's speech at the most critical time. This hurts not only the candidate's chances of being elected, but also the millions of others who are stripped of their ability to follow that candidate's speech (*i.e.*, not in the public interest). And vice versa — Big Tech even protects politicians of choice (*e.g.*, Hunter Biden's laptop suppression).

188. Chad Prather, running for Texas governor, was banned by Facebook a mere eight days prior to the election. Facebook's moderators determined that Mr. Prather had violated some arbitrary rule by posting the following comment:

> Marilyn Hart interesting piece of bias. Now pull the fbi reports saying an insurrection never happened. Do more research. Please for the love of God. I know you need some bad guys in your life to make you feel better but please . . . you're an over-spoiled first world

> brat that has no actual clue how the world works. Good. God. Travel the world a little bit and realize how well off you are. You've contributed nothing to the freedoms you now enjoy. Troll the internet and create your sense victimhood but please spare me. I literally toy with your responses on Facebook because I'm nice and sometimes have time to waste but your self-conceived sense of intelligence is beyond delusional. Take care. Get help. God bless.

189. Mr. Prather's chance of winning the election was severely hindered by Facebook because he called someone a delusional brat, which is, of course, permissible speech. In response, Mr. Prather filed a temporary restraining order against Facebook alleging (per comment by Mr. Prather's attorney) "What Facebook appears to be actively interfering in the Texas governor's election to benefit the sitting governor, Greg Abbot, in order to protect a private deal that would grant Facebook subsidies with taxpayer dollars to build a new facility in Texas, is a political scandal of epic proportions." Mr. Prather's attorney's comments continued: "This corruption and affront on free and fair elections in Texas is an outrage that must be stopped immediately by the court."[64] This Court has

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64 Texas Scorecard, *Chad Prather, GOP Candidate for Governor, Sues Facebook Over Suspension* https://texasscorecard.com/state/chad-prather-gop-candidate-for-governor-sues-facebook-over-suspension/ For the Court's ease of reference, this article is attached hereto as Exhibit V and incorporated fully herein by reference.

the power to stop this affront on free and fair elections, once and for all.

190. Mr. Prather's banning is not an isolated occurrence. Darlene Swaffar for Congress was restricted during her campaign and Chris Bish for Congress was restricted during her campaign, as well as many more candidates who are currently running for office. Several examples are illustrated in the following: (a) *Facebook Drops 'Hate Speech' Suspension for OH GOP Candidate Josh Mandel*. (b) *Elected officials suspended or banned from social media platforms*. (c) *Far right candidate Laura Loomer, banned from most social media, suspicious of Comcast glitch*.[65]

191. Silencing candidates during an election cycle is one of the most obnoxious forms of First Amendment violations that exists. It not only harms the candidate, but it harms the entire electoral process and, thus, the public interest. A private company can, under Section 230's currently overly broad application, sway the results of an election to the benefit of self-interested private corporations (*e.g.*, seeking to secure government subsidies). This is very dangerous — as applied, Section 230 contravenes the core values of the First Amendment.

192. Information can also be suppressed or supported by biased social media companies to help or hinder a candidate during an election. As touched upon a few paragraphs ago, take, for example, the Hunter Biden laptop scandal. The Hunter Biden laptop scandal is a " . . . perfect example of how politicians

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[65] This compilation of articles is attached hereto as composite **Exhibit W** and incorporated fully herein by reference.

and/or oligarchs weaponize "fact checkers" to deflect criticism and enlist social media to censor articles. Nothing to see here!"[66] "The laptop is 'unsubstantiated' because the media [social media included] doesn't want it substantiated." *See* Ex. W. Here, the suppression of factual information was restricted as misinformation to help a political candidate win an election — the Presidential election. Regardless of one's political leanings, a substantial number of real-world users/ICPs were penalized for sharing factual information (previously deemed misinformation), which would have had real-world effect on elections (including the 2020 presidential election). As Mr. Amerige pointed out, they got it wrong.

193. Political and ideological suppression goes beyond candidates. Sitting congressional members have been restricted by many social media companies; *e.g.*, Louie Gohmert, Jim Banks, Marjorie Taylor Greene, Ron Johnson, and Rand Paul. The most famous example of a political figure being banned was President Donald J. Trump for supposed incitement. And political and ideological suppression often involves political figureheads not presently in office and not presently running for office; *e.g.*, Tulsi Gabbard recently experiencing consistent mystery shadow bans.

194. Whether one agrees politically or ideologically, restricting the speech of a candidate or elected official by way of the overly broad spectrum of

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[66] The New York Post, *The Hunter Biden laptop is confirmed?! Color us shocked!* https//nypost.com/2021/09/21/the-hunter-biden-laptop-is-confirmed-color-us-shocked/ A copy of this article is attached hereto as Exhibit X and incorporated fully herein by reference.

"otherwise objectionable," "unsafe," or even just "mistakenly," is a very slippery and dangerous slope to stand on. Even judges are not exempt from Section 230's overly broad reach; *e.g.*, Justice Clarence Thomas' documentary was pulled (restricted) from Amazon's streaming services: "The documentary film about Thomas, '*Created Equal: Clarence Thomas in His Own Words*,' was removed from Amazon's streaming service last month and the filmmaker said he was never given an explanation."[67]

195. If a sitting President and a Supreme Court Justice can be silenced without repercussion, how long will it be until members of this Court are pulled from public social media discourse, whether mistakenly or deliberately? The CDA's enabling private companies the authority to silence a Supreme Court Justice, the President of the United States, and Congress threatens the very fabric of liberty.

196. Per the Washington Post:

> But there's another, more conceptual debate that transcends partisan politics and carries implications beyond Trump's freedom to tweet. It's the question of whether the largest social media companies have become so critical to public debate that being banned or blacklisted — whether you're an elected official, a dissident or even just a private citizen who runs afoul of their content policies

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67 Fox News, *Amazon pulled Justice Clarence Thomas documentary as censorship of conservative content continues*, https://www.foxnews.com/media/justice-clarence-thomas-amazon-censorship A copy of this article is attached hereto as Exhibit Y and incorporated fully herein by reference.

> — amounts to a form of modern-day censorship. And, if so, are there circumstances under which such censorship is justified?[68]

197. Many other notable public figures, besides political and judicial figures, have been or are serving online "prison" sentences for sharing lawful, legitimate, and permissible content, but deemed "otherwise objectionable," "unsafe," "hate speech," and *et cetera* by an ICS.

198. Another example as to the "substantiality" of the CDA's "substantial overbreadth" was/is found in the Alex Jones saga. Regardless of whether or not one likes Mr. Jones, Mr. Jones' situation illustrated a "concerted effort" by multiple ICSs at once to silence someone for their opinion. Some would argue Alex Jones is nuts, dangerous, harmful, "otherwise objectionable," because he voices dreaded "conspiracy theories" (many of which later prove true, similar to the Hunter Biden laptop scandal). As Mr. Amerige noted, Mr. Jones did not outright violate any specific rules (*i.e.*, he did not actually break any Community Standard/"law"); instead, a team of humans "scouring months of Jones' historical Facebook posts to find borderline content that might be used to justify a ban" were not able to find anything justifiable; so, "[i]n practice, the decision was made [to restrict Jones] for political reasons." Alex Jones' protected permissible speech was, in practice, restricted based on "borderline

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[68] The Washington Post, *Tech giants banned Trump. But did they censor him* https://www.washingtonpost.com/technology/2022/01/07/trump-facebook-ban-censorship/ A copy of this article is attached hereto as Exhibit Z and incorporated fully herein by reference.

content" and for "political reasons." Restricting borderline speech for political reasons is beyond the intended compelling government interest of Section 230; *i.e.*, a substantially overbroad application of the CDA.

199. More examples of notable public figures who were banned, but are certainly not limited to, the following; Paul Joseph Watson, James Woods, Monica Mathews on Air, Mindy Robinson, David Harris Jr., Ann Vandersteel, Sydney Powell, Michael Flynn, John Stubbins, Ian Trottier, Derek Utley, Dan Bongino, and Jack Posobiec, Babylon Bee, Paul Gosar, Stew Peters, Doug Billings, Larry Elder, Col. Rob Maness, Ivory Hecker, April Moss, Disclose.tv, Tim Pool, Jovan Hutton Pulitzer, Dr. Gina, Hodgetwins, Joe Rogan, Elon Musk, Anna Khait, Ron Coleman, George Papadopoulos, Ron DeSantis, Steven Crowder, Mark Dice, Chuck Callesto, James Woods, Dinesh D'Souza, Charlie Kirk, Ryan Fournier, Tucker Carlson, Laura Ingraham, just to name a few. "Not limited to" because there are far more notable public figures (not to mention, unknown citizens) who have been silenced.

200. Section 230's overly broad application goes beyond political restrictions. Examples of notable figures who have been penalized for other permissible speech include, but are not limited to, the following: (a) Clint Eastwood was punished for sharing his delight over the 2016 election outcome. (b) Rihanna was punished for posting a (potentially serious artistic) picture of her buttocks. (c) Courtney Love was punished for posting "derogatory" claims (*i.e.*, not unlawfully defamatory). (d) Rose McGowan was punished for calling out Ben Affleck's knowledge of Harvey Weinstein's behavior. (e) Isis Thompson was punished

for having the "wrong" name. (f) PewDiePie was punished for making a joke about joining "Isis." (g) Elly Mortimer was punished for posting a selfie of herself as part of an art piece. (h) Liberty Memes was punished for poking fun at various political figures. (i) Kendall Jenner was punished for posting a runway picture.

201. We mention notable figures because their stories of restriction have been told; but, the total number of people who are not part of pop culture and who have been punished due to the overbreadth of Section 230 application is staggering. The real-world overly broad application of Section 230 to authorize restriction of permissible speech goes well beyond "substantial" — such is unprecedented in human history.

202. Fyk was punished for nothing at all (*i.e.*, there was no reason given; *i.e.*, the ICS never showed cause). Fyk received a ban of his page WTF Magazine (Where's The Fun) page without any showing of cause (it was blank). In 2016, Fyk's pages were simultaneously unpublished without any showing of cause. Without a requirement to "show cause," Big Tech is free to penalize anyone, for any reason, at any time, without any "good faith" justification/showing. The punished never know whether or not their penalization was done in "good faith" by a "Good Samaritan," as the website is not required to show the cause for penalization.

203. Fyk did not know why his magazine's Facebook business page was penalized or why his approximate six pages were unpublished simultaneously, while others were not unpublished, although restricted nonetheless. It was not until Facebook offered to republish Fyk's content for Fyk's competitor (and not

Fyk) that Facebook's anticompetitive motive for restricting Fyk's material became *prima facie.*

204. Another example of an "unjustified" (no cause shown) banning is the restriction of the website known as the SGT report: "ALERT: On October 15, 2020 YouTube terminated BOTH SGT Report YouTube channels without warning or cause. On October 22, 2020 Patreon terminated the SGT Report Patreon page without warning or cause. This is economic warfare friends."[69]

205. Yet another example of an "unjustified" banning was posted on YouTube's help board by an individual named Andrew Tsurikov. It read in pertinent part, as follows:

> A few weeks ago I got a message from youtube that my account was banned for violation of some rules with a link to general terms and conditions of the service. I was trying to appeal, but got the answer back that they are keeping the ban. The thing is that I never ever posted a single video or commented anything or put likes or anything like that. I was totally confused by the fact something should have happened that lead to the ban, but I haven't got a clue what exactly was wrong.[70]

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[69] SGT Report, https://www.sgtreport.com/2020/08/i-have-been-permanently-banned-by-youtube/ A copy of this article is attached hereto as Exhibit AA and incorporated fully herein by reference.

[70] *Viewer account banned for no reason* post, *see* https://support.google.com/youtube/thread/4433175/viewer-account-banned-for-

206. Claiming someone violated one or several rules and pointing a link to general terms and conditions hardly justifies the claim. Here, on April 18, 2019, Andrew Tsurikov says, in his own words on YouTube' s help board, that he is "totally confused" and he "ha[s]n't got a clue what exactly was wrong." Rarely does anyone know what rule was broken or why they were penalized, they are simply directed to a general rules page in order to guess at which "rule" they broke. Statutes should be provide clear guidelines as to what conduct is being proscribed — as described above, language like "otherwise offensive" is so broad and unintelligible so as to be unconstitutionally vague.

207. The all-too-common cryptic/glossy nature of ICS notifications associated with quashing materials advanced by an ICP makes it almost impossible (if not impossible) for the ICP to comprehend the "good faith" reasons for Big Tech's restrictions. Facebook's Tessa Lyons, shared: "that we [Facebook] removed hundreds of pages and accounts, in that case, it was because of the behavior that was spammy coordinated inauthentic behavior that we were seeing on our platform."[71] Apparently "spammy coordinated inauthentic behavior" (*i.e.*, not materials) is somehow a justifiable reason to cost hundreds of people their livelihoods and restrict those users' permissible (at least by government standards) speech, and somehow "behavior" has become physical materials.

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no-reason?h1=en A copy of this post is attached hereto as **Exhibit BB** and incorporated fully herein by reference.

[71] The video from which this quote was derived, which such video is incorporated fully herein by reference, can be found at https://www.youtube.com/watch?v=do1XECYZ8vw

208. Taking down materials based on behavior and/or without a showing of "good faith" cause is one thing; but, imagine for a moment a social media company making major medical decisions on behalf of millions of Americans? Imagine the real-world dangers associated with restricting medical discourse, or blocking "contrary" medical data, especially if they are wrong. We do not need to imagine such a hypothetical; it is already a real-world scenario.

209. Many of the largest tech companies in the world are acting as medical professionals giving medical advice (*i.e.*, practicing medicine without a license) or, rather, restricting any medical advice (even from licensed doctors) that is contrary to CDC or government "guidance." History has proven that government "guidance" (*e.g.*, CDC) is not always in the best interest of the people and should not always be trusted.

210. For example, the Tuskegee experiments:

> In 1932, the USPHS, working with the Tuskegee Institute, began a study to record the natural history of syphilis. It was originally called the "Tuskegee Study of Untreated Syphilis in the Negro Male" (now referred to as the "USPHS Syphilis Study at Tuskegee"). The study initially involved 600 Black men — 399 with syphilis, 201 who did not have the disease. Participants' informed consent was not collected. Researchers told the men they were being treated for "bad blood," (*e.g.*, akin to COVID immunization) a local term used to describe several ailments, including syphilis, anemia, and fatigue. In exchange for taking part in the study, the men received free medical exams, free meals, and burial

insurance.[72]

211. There was zero informed consent amidst six hundred human beings experimented upon. They were given an injection to see what happened. Many people have concerns about modern vaccinations. Under its current misapplication, Section 230 enables Big Tech to make major medical decisions on behalf of millions of Americans when blocking or developing medical information. Several major Internet platforms have made a concerted effort to censor doctors who question the government's guidance even when presenting facts and professional opinions. One group that was notably censored for providing a "contrary" opinion to the CDC's guidance, is known as the Front-Line Doctors. The Front-Line Doctors gathered on Capitol Hill to give a press conference discussing medical research and their personal experiences as doctors on the frontlines of COVID-19. They exposed explosive details about how relevant information has been censored. Rather than allowing people to view the press conference and decide for themselves, YouTube, Facebook, Twitter, and Squarespace censored and silenced these medical professionals because their opinions did not align with political agendas, Big Pharma views, and/or Big Tech's views.

212. YouTube spokesperson, Ivy Choi, stated: "We quickly remove flagged content that violates our Community Guidelines, including content that expli-

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[72] Center for Disease Control and Prevention, *The Tuskegee Timeline* (emphasis added). https://www.cdc.gov/tuskegee/timeline.htm A copy of this article is attached hereto as **Exhibit CC** and incorporated fully herein by reference.

citly disputes the efficacy of local health authority recommended guidance on social distancing (or any other medical guidance) that may lead others to act against that guidance."[73] In other words, social media companies are restricting valid professional opinions (from actual doctors) about public health and saying to their users "the government is right, you are wrong, do what we say to do, do not listen to contrary information, because we are the authority and we have never had a bad result for the uniformed participant." Suppressing medical information is very dangerous and not a decision that should be made by a website programming company, and, yet, it happens every day and has so far absurdly found protection under the CDA vis-à-vis the overly broad application of same.

213. Facebook also banned two doctors who simply put forward clinical data.[74] These two doctors operated five hospitals and are experts in their field. Apparently, online providers/ICS/Big Tech know more than doctors, who are in charge of multiple health facilities, and can now make major medical decisions and/or practice medicine without a license. The real-world harm that has resulted from silencing doctors' opinions (*i.e.*, denying users' informed consent) is difficult to comprehend, especially if those medical professionals are correct.

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[73] NBC News, *YouTube, Facebook split on removal of doctors' viral coronavirus videos* https://www.nbcnews.com/tech/tech-news/youtube-facebook-split-removal-doctors-viral-coronav irus-videos-n1195276 (6 paragraphs down) A copy of this article is attached hereto as Exhibit DD and incorporated fully herein by reference.

[74] The video discussing same, which such video is incorporated fully herein by reference, can be found at https://www.facebook.com/watch/?v=553927125266189

An ICS, making any major medical decisions on behalf of users, is beyond the breadth of Section 230's intended purpose. This is something that the Court should not take lightly — suppressing health-related information, regardless of whether it aligns with government guidance, may have potential catastrophic (even deadly) real-world consequences. Decisions regarding what medical advice is allowed and what information is suppressed, should not be left up to social media moderators. Mr. Zuckerberg did not complete undergrad, let alone medical school.

214. Public discourse surrounding health issues like COVID mask mandates and vaccinations is of the utmost importance, and this discourse should not be suppressed. Some people argue that COVID is just a government conspiracy, masks are bad, and vaccinations are dangerous and/or killing people. While other opinions include people who are afraid of being sick and want to be sure that they and their loved ones are protected from harm at all costs. All sides are entitled to their opinions and all citizens should have the right to express those opinions assuming their speech is lawful, legitimate, and permissible.

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215. Commercial ICS' censorship of lawful, legitimate, and permissible speech is substantially out of control. Here are just a few more examples of articles relating to vast censorship of lawful speech:

(a) https://thefederalist.com/2021/08/11/youtube-will-censor-you-if-you-disagree-with-the-government-even-if-youre-in-the-government/

(b) https://reclaimthenet.org/twitter-censors-and-locks-out-mma-expert/

(c) https://dailycaller.com/2022/03/01/abuse-censorship-twitter-suspends-republican-vicky-hartzler-tweet-transgender/

(d) https://www.breitbart.com/tech/2021/05/10/5-of-big-techs-most-serious-acts-of-censorship/

(e) https://neeva.com/learn/big-tech-censorship

(f) https://disinformationchronicle.substack.com/p/media-will-not-call-big-tech-censorship?utm_source=url

(g) https://nypost.com/2021/04/06/justice-thomas-shows-how-we-can-end-big-tech-censorship-for-good/

(h) https://www.newsweek.com/big-tech-censorship-threatens-americans-constitutional-rights-opinion-1609286

(i) https://elamerican.com/twitter-censors-el-americans-account/

(j) https://www.dailysignal.com/2022/02/18/youtube-censors-mom-fighting-school-mask-mandates/ [75]

216. As previously mentioned, Facebook serves as a good case study in determining the ratio of permissible to impermissible applications of Section 230's breadth since Facebook makes up a substantial portion of the social media usership world. Other companies follow in similar moderation footsteps as Facebook,

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75 A compilation of these articles is attached hereto as composite **Exhibit EE** and incorporated fully herein by reference.

imposing the same unconstitutional overly broad restrictions on users in relation to permissible third-party speech.

217. For example, Facebook's Newsfeed manager, Tessa Lyons, explains how Facebook handles "problematic content" (*i.e.*, permissible speech): "we reduce the spread of problematic content . . . and when we say problematic content, what we are talking about is, content that violates the values that we hold but might NOT violate our community standards."[76]

218. This is an admission, by one of the largest social media companies in the world, that permissible speech is penalized, even though the speech does not actually violate Facebook's own "rules" but is simply deemed "problematic" (*i.e.*, otherwise objectionable) and restricted anyway. Facebook admittedly applies its content restrictions beyond Section 230's compelling government interest and even beyond its own Community Standards (*i.e.*, "rules"/"laws").

219. As another example, third-parties (not Facebook) "making money" is apparently considered problematic/objectionable for Facebook. Tessa Lyons explains how Facebook handles financially motivated material:

> for the financially motivated actors, their goal is to get a lot of clicks [*i.e.*, reach and distribution] so they can convert people to go to their websites, which are often covered in low quality ads, and they can monetize and

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[76] This video, which such video is incorporated fully herein by reference, can be found at https://www.youtube.com/watch?v=X3LxpEej7gQ

> make money from those people's views, and if we can reduce the spread of those links, we reduce the number of people who click through and we reduce the economic incentives that they have to create that content in the first place.[77]

Reducing economic incentives in order to reduce the creation of third-party content is another example of the chilling effect on lawful speech (and its anti-competitive animus) that the overly broad application of Section 230 has had.

220. Fyk's economic incentives to create content (*i.e.*, future permissible speech) were reduced by Facebook by, for example, blocking Fyk's entire website www.funnierpics.com. Facebook prevented anyone from clicking on Fyk's links to his website and prevented anyone from seeing Fyk's ads, which was/is tortious interference with Fyk's economic advantage. Congress' compelling interest for Section 230 was absolutely not to allow tortious interference or prevent people from creating financially incentivized lawful content (*i.e.*, permissible speech).

221. How does Facebook purportedly handle problematic content "evenhandedly"? Tessa Lyons explains: "it's not as if everyone loses 20%, what we intend to have happen is the spammy low quality content loses a lot of traffic while the high-quality

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77 *Id.*

publishers continue to do well."[78] Facebook's penalizations are admittedly unequally predicated upon content "quality" standards, not predicated on the offensive nature of the content. In other words, content that is of objectionable "quality," but does not actually violate Community Standards, is deemed problematic and still restricted. This is an excellent example of how restrictions are used to develop the remaining information by proxy — low quality users are restricted, while high-quality publishers are allowed/developed.

222. Facebook's founder, Mark Zuckerberg, openly admits that Facebook is developing (at least in part, if not in whole) information based on Facebook's own opinion: "we're showing the content on the basis of us believing it is high quality, trustworthy content rather than just ok you followed some publication, and now you're going to get the stream of what they publish."[79] Facebook is not just passively "allowing" content, they are actively "showing" (*i.e.*, developing in part) the content based on their own values and interests, while reducing any information of less interest. This craziness is, at present, enabled by the overly broad CDA.

223. Inconvenient facts and opinions are of less interest to social media companies. Facts, information, or opinions that the ICS disagrees with (finds otherwise objectionable) are often restricted (as applied)

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[78] This video, which such video is incorporated fully herein by reference, can be found at https://www.youtube.corn/watch?v=DEVZeNESiqw&t=8s

[79] This video, which such video is incorporated fully herein by reference, can be found at https://about.fb.com/news/2019/04/marks-challenge-mathias-dopfner/

under Section 230 protection. "Misinformation" and "fake news" are two more overly broad (as applied) objectionable (yet lawful) categories subjected to Section 230 speech restrictions. As Mr. Amerige pointed out, should truth or accuracy be "treated as holy writ in an environment where people aren't allowed to be wrong or offend others? Members of each generation must re-learn important truths for themselves." How, as a society, do we maintain what the "truth" is? Such is not possible under the current overly broad application of the CDA — under the currently overly broad CDA, Big Tech is the arbiter of "truth," suppressing facts, information, and/or opinions that contradict their version of truth. Congress' compelling interest for Section 230 was not for Big Tech to serve as the judge, jury, and executioner over truth. Refutation and inaccuracies are important to exercise the truth or get at the truth. Again, Section 230's application to restrict inaccuracies and falsities is overly broad.

224. Mr. Amerige continues:

> [u]nassailable truths turn brittle with age, leaving them open to popular suspicion. To maintain the strength of our values, we need to watch them sustain the weight of evidence, argument and refutation. Such a free exchange of ideas will not only create the conditions necessary for progress and individual understanding, but also cultivate the resilience that much of modern culture so sorely lacks.

Most simply put — without discourse or dissent, truth begins to atrophy.

225. Fact checking in general (*i.e.*, manipulation and refutation of truth) is well beyond the breadth of Congress' compelling government interest. Tessa Lyons explains Facebook's fact checking process:

> we identify, potential hoaxes or misinformation . . . and once we predict those things, we send them to Independent third-party fact checkers . . . Once they mark an individual piece of content false, and apply it to the newsfeed ranking algorithm, in order to reduce the relevance score and show that piece of content lower in newsfeed, reducing the number of people who see it.[80]

226. Facebook identifies "misinformation" (*i.e.*, "predicts" problematic content), then sends it to a third-party fact checker (*i.e.*, to launder the creation of contrary information) to rate the subject information as "false," in order to justify restriction, reduction, or refutation. Tessa Lyons explains that Facebook "tak[es] action against pages and domains repeatedly marked false."[81] The same company that identifies the misinformation (repeatedly) is also the same company who "takes action" against the users they disagree with (*i.e.*, the users who are viewed as inconvenient). Congress' compelling interest for Section 230 was not for Big Tech to determine content accuracy. That the CDA presently allows such renders the CDA overly broad in application.

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[80] This video, which such video is incorporated fully herein by reference, can be found at https://www.youtube.com/watch?v=X3LxpEej7gQ

[81] *Id.*

227. "Fact checking" (*i.e.*, content refutation) becomes particularly concerning (*i.e.*, dangerous) during elections, for example. United States political candidates should not be restricted (*i.e.*, "fact checked") during an election. Tessa Lyons explains who handles "fact checking" for Facebook (*e.g.*, during elections): "We partner with fact checkers now in seven countries including the US and the fact checkers are able to review the content and rate its accuracy."[82] In other words, foreign actors (from as many as seven countries, in the case of Facebook) are restricting United States citizens, candidates, and officials during elections, which has a real-world impact on the outcome of an election. Section 230's compelling government interest was not to allow foreign interference in an election. That the CDA presently allows such renders the CDA overly broad in application.

228. Justice Thomas pointed out that

> [u]nder [the current] interpretation [of Section 230], a company can solicit [a third-party to create contrary information], select and edit for publication several of those statements [*i.e.*, identify 'misinformation'], add commentary [*i.e.*, create refuting information in whole or in part], and then feature [*i.e.*, provide/develop] the final product prominently over other submissions [*i.e.*, displacing or restricting user's information] — all while enjoying immunity.

Ex. C, *Malwarebytes*, 141 S.Ct. at 16 (internal citation omitted).

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[82] *Id.*

229. Not only is "fact checking" dangerous, it is Information Content Provision (ICP) by definition, at least in part, through a third-party paid proxy. Big Tech identifies "misinformation" (*i.e.*, any problematic content), then sends the "misinformation" out to third-parties (who are contracted by the social media company) to create (in whole or in part) contradictory material that the online provider solicits (pays for), then features (develops) the created information prominently over users' information. Congress' compelling interest for Section 230 was not to immunize content solicitation, creation, and development. In application, therefore, the CDA is overly broad.

230. Content creation/development (subject to the online provider's prerogative) is being laundered through third-party "fact checkers" so that the information is "provided by another." This is very similar to how third-party speech infringement (*i.e.*, the government's prerogative) is being laundered through the online provider's First Amendment rights so that the information is "restricted by another" (*i.e.*, private entity).

231. It is very important to note that the government is not allowed to restrict permissible speech, so the government offers consideration (*e.g.*, Section 230 liability protection) to solicit third-party's conduct to act (*i.e.*, restrict material) at the prerogative of the higher authority, while hiding behind an arm's length transaction. The government is soliciting actions that the government does not have the authority to undertake itself.[83] Similarly, corporations are not able to

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[83] John Stossel is a prime example of "misinformation" being used to silence opposition, as Mr. Stossel explains in his video found

provide content without liability, so the corporation offers consideration (*e.g.*, pays a "partner"/"fact checker") to solicit a third-party's conduct to act (*i.e.*, to create material) at the prerogative of the higher authority, while hiding behind an arm's length transaction. Neither the government nor the corporations should be allowed, by this Court, to continue laundering their prerogatives through solicited third-party actions.

232. Facebook and other ICSs are never (or very rarely) held accountable for third-party information even when the ICS pays for/solicits same (*i.e.*, offers consideration under obligation) and is a party to the creation and/or development of that information. Ironically, Facebook group admins (users) are generally held accountable for unsolicited third-party information. Tessa Lyons explains: "we will be holding the admins of Facebook Groups more accountable for (*i.e.*, third-party content) Community Standards violations . . . When people in a group repeatedly share content that has been rated false by independent fact-checkers, we will reduce that group's overall News Feed distribution [*i.e.*, punish everyone else)."[84] Is that which is good for the goose not good for the gander? Congress' compelling interest for Section 230 was not to restrict the permissible speech of one user for the

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at https://www.facebook.com/JohnStossel/videos/5114126171684 27. This video is incorporated fully herein by reference.

84 "April 10 2019 FB newsroom Steps to manage problematic content." This article can be found at https://about.fb.com/news/2019/04/remove-reduce-inform-new-steps/ For the Court's ease of reference, a copy of this article is attached hereto as **Exhibit FF** and is incorporated fully herein by reference.

speech or actions of another user. In this way, the CDA is overly broad in application.

233. Ms. Sandberg, Facebook's COO, goes far afield by equating "misinformation" with financial motivation and with spam (amongst other things): "The misinformation and fake news that we see on Facebook is financially motivated. It's spammers . . . people who are trying to generate clicks to low quality websites covered in ads so they can generate impressions and ad revenue."[85] Apparently, "financially motivated" equates to "spam," which equates to accuracy. The ordinary person cannot possibly know what is prohibited if financial interest is, in reality, misinformation.

234. The ordinary user cannot possibly know what is prohibited if the rules are "expressed in a way that is too unclear for a person to reasonably know whether or not their conduct falls within the law." Users tend to avoid the risk of consequences by staying far away from anything that could possibly fit the uncertain wording of the Community Standards. The ordinary user cannot possibly know what is prohibited activity if offensive content is anything the provider or user considers objectionable (which is anything that is problematic), anything problematic is spam, anything that is spam is financially motivated, and anything that is financially motivated is misinformation.

235. Big Tech "rules" are so unclear that no ordinary user knows where one "rule" ends and the

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[85] This video, which such video is incorporated fully herein by reference, can be found at https://www.youtube.com/watch?v=do1XECYZ8vw

next begins. Facebook's rules are so vague and unclear that Facebook's own COO cannot even distinguish between them. Financially motivated content is not necessarily spam and it is not necessarily misinformation. Congress' compelling interest for Section 230 was not to allow an ICS the ability to deem anything and everything prohibited and then arbitrarily enforce "rules" whenever it best suits the ICS, regardless of whether or not the ICS is acting as a "Good Samaritan." In this sense, the CDA is overly broad in application.

236. "By removing, reducing and informing we disrupt the incentives that exist for spreading inauthentic harmful communication."[86] Here, again, Facebook is "disrupting incentives" (*i.e.*, tortiously interfering) under vague prohibited categories. There is no measure for the ordinary person to know what content is authentic. Congress' compelling interest for Section 230 was not for Big Tech to determine content authenticity. In this sense, the CDA is overly broad as applied.

237. Facebook and other platforms use terms/phrases like "click bait," "spam," "financially motivated," "hate speech," "sensationalism," "bullying," "inauthentic," "harmful," "low quality," and *et cetera* interchangeably to broadly define all problematic (*i.e.*, objectionable) content in order to justify any arbitrary

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[86] May 22, 2018 Three-part recipe for cleaning up newsfeed. This article can be found at https://about.fb.com/news/2018/05/inside-feed-reduce-remove-inform/ For this Court's ease of reference, a copy of this article is attached hereto as **Exhibit GG** and incorporated fully herein by reference. The quote featured in this filing is found in the video associated with this article, and the video can be found by way of the preceding hyperlink. This video is incorporated fully herein by reference.

restriction (*i.e.*, punishment) and to, when no real reason exists, justify a ban under the "rules" (*e.g.*, the Alex Jones saga discussed above). Congress' compelling interest for Section 230 was not to enable arbitrary justification for removing any and all information. In this sense, the CDA is overly broad as applied.

238. Even the subject of Kyle Rittenhouse's innocence was deemed "objectionable" by many online platforms. Expressing support for Kyle Rittenhouse's innocence resulted in the banning of many. It does not matter how the reader of this filing felt/feels about Mr. Rittenhouse's case. What matters is that these monolithic platforms could potentially sway a jury's decision because of their ability to sway public opinion. Congress' compelling interest for Section 230 was not to enable Big Tech to determine guilt or innocence or sway public opinion and juries. In this sense, the CDA is overly broad as applied.

239. Another generic reason why users get penalized or punished due to Section 230's overbreadth is using the service too much; *e.g.*, joining too many groups, sending too many friend requests, liking too many posts, commenting too much, poking too many people, or messaging too often. Congress' compelling interest for Section 230 was not to enable Big Tech to prevent too much use of a service.

240. As Facebook's Tessa Lyons has publicly admitted, an ICS' sponsored partner could cause another user's content to be displaced (*i.e.*, restricted or reduced availability). Stories that are higher in the Newsfeed are more likely to be seen. Someone pays Facebook to become responsible for developing (*i.e.*, "increase its distribution" and do the placement) the information, in part, which then displaces (*i.e.*, restricts

other users' content availability). In other words, Facebook restricts lower-valued users' content (who do not pay Facebook, or who do not pay Facebook enough) in order to displace their content and develop the content of the ICP who pays more and is accordingly valued more. Simply put, Facebook acts as a direct competitor, in partnership with sponsored advertisers, of its own users, displacing their information in favor of Facebook's high paying partners, such was the case in the Facebook Lawsuit. This is the advertising business model of most major social media platforms — offer reach and distribution for free initially to increase the user base, then once the user base is large enough, restrict the reach and distribution (restrict access to or availability of material) in order to displace the user's content with content the ICS is paid to develop. Congress' compelling interest for Section 230 was not to enable Big Tech to restrict user's speech to allow for the ICS' own financial gain as a direct competitor. In this sense, the CDA is overly broad as applied.

241. One "simply stat[ing] on an online platform, such as a Facebook, that he does not like someone of a certain class . . . often results in restriction by the online provider," explained Ryan Hartwig ("Hartwig"), a former moderator and employee of Cognizant.[87] Hartwig further explained: "If someone says something like 'I dislike Muslims who believe in Sharia law,' that statement is a tier 2 hate speech offense, at least as it pertains to Facebook for example, and your statement will be deleted off Facebook's platform."[88] This kind of

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[87] *See* R. Hartwig April 6, 2022, affidavit attached hereto as Exhibit HH and incorporated fully herein by reference.

[88] *See id.*

speech may be objectionable, but such is not constitutionally impermissible. Allowing Big Tech to cripple users' speech that is permissible under the guise of the First Amendment because it is "objectionable" under the CDA renders the CDA overly broad as applied because Congress' compelling interest was certainly not to create a law that violates constitutional rights in application.

242. Per Hartwig, "an online provider can even choose to exempt [*i.e.*, waive their own rules] offensive speech whenever it benefits the company or aligns with the company's own views and policy agenda."[89] Hartwig further explained: "generally advocating for the death of babies or fetuses is patently offensive and is a violation of Facebook's policies, but Facebook instructed us [*i.e.*, Cognizant's moderation employees] in an internal correspondence that, 'advocating for killing babies /fetuses in an abortion context should be ignored [*i.e.*, exempted]."[90] In other words, advocating for killing babies/fetuses is not okay in one context but is okay in another. Where prohibition is based on the context in which something is said, the ordinary person cannot possibly know what is or is not prohibited. The CDA's enabling of Big Tech to engage in context coin flipping in deciding the (im)permissibility of content/speech renders the CDA overly broad in application.

243. Even Mother Teresa is not above violating Big Tech content policies, which such policies are enabled by CDA overbreadth. A tweet consisting of Mother Teresa's words and her picture read as follows:

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89 *See id.*

90 *See id.*

"Abortion is profoundly anti-women. Three quarters of its victims are women: Half the babies and all the mothers." This content was deemed "hate speech" and restricted by Twitter.[91] Advocating for abortion is fine, but quoting Mother Teresa's stated opinion that abortion is profoundly anti-women is "otherwise objectionable" and warrants censorship. Again, the CDA is absurdly overbroad in application.

244. Per Hartwig, "[c]ontent provision was/is not always in the control of the third-party moderator . . . ."[92] For example, Hartwig explained:

> Cognizant was seeing content trending around an anti-abortion law passed in Alabama. An image relating to that was brought to the attention of a client, Facebook, as it met our hate speech policy for political exclusion. Given the newsworthy nature of the content, however, Facebook directed us to ignore this image and told us to be advised of further violations in captions and comments.[93]

Here, the client (Facebook) is making the editorial determination (knowingly) to provide content that is being reported as offensive because the client (Facebook) thinks it is news-worthy. Congress' compelling interest for Section 230 was not to allow an ICS to act

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91 Townhall, *When Twitter Blocked Mother Teresa* https://townhall.com/columnists/michaelbrown/2019/04/12/when-twitter-blocked-mother-teresa-n2544687 A copy of this article is attached hereto as **Exhibit II** and incorporated fully herein by reference.

92 *See* Exhibit II.

93 *See id.*

as an ICP knowingly hosting offensive content. In this sense, the CDA is overly broad as applied.

245. There is nothing "standard" about the application of Community "Standards." Users are treated differently based on their notoriety, social status, or economic benefit to the platform, just to list a few of the many treatment incongruences. For example, Facebook maintains an internal "shielding" process for special status users. For example, the PR Fire shield is used to prevent bans on users' accounts that pose a public relation concern (fire) such as major media figures or celebrities. Other examples include, the viral content shield, electoral shield, legal shield, media ops notable shield, popular page shield, media ops BOB (*i.e.*, book of business) partner shield, or verified page shield. In other words, a caste system.

246. One shield is particularly notable — the advertising shield better aligns with racketeering than it does with special status protection. An unnamed Facebook whistleblower (who called herself Foxtrot — to remain anonymous- when interacting with Fyk because she was scared of Facebook) explained to Fyk how the advertising shield works. The advertising shield is a three-tier protection system that Facebook implements for advertisers. The more an advertiser pays, the higher tiered protection shield the advertisers receives. An advertising shield prevents the algorithm from "accidentally"/"mistakenly" getting it wrong and it also prevents lower leveled moderators from being able to ban (punish) higher valued customers (*e.g.*, like Fyk's competitor, at issue in the Facebook Lawsuit) since they pay Facebook more. In other words, the overbreadth of the CDA enables Facebook to penalize third-party users; but, if those third-party

users pay for protection from Facebook, Facebook will not penalize them. The mob once had (well, still does have) a similar racket going, and the compelling government interest behind the CDA was not to promote mob-like conduct. In this sense, the CDA is overbroad as applied.

247. Social media companies can even choose to temporarily enact or exempt rules when it benefits the company or aligns with the company's views and policy agenda. For example, calling someone a "retard" will not get a user banned, but calling Greta Thunberg a retard or any other pejorative will get a user restricted. Again, status of the user apparently changes the rules. Prohibitions change on the fly. Congress' compelling interest for Section 230 was not to allow Big Tech to change rules on a case-by-case basis predicated on status, notoriety, or financial value to the company. In this sense, the CDA is overbroad as applied.

248. Some websites even ban words (*e.g.*, hashtags). How, for example, does restricting the hashtags "Save the children" and "Stop the Steal" align with Congress' compelling interest for Section 230? It does not. Was it the compelling government interest of Congress to prevent children from being saved or from an election being stolen? No. It is absurd to think that restricting hashtags like "Save the Children" or "Stop the Steal" is acting in the public interest, as a "Good Samaritan," or to protect children from harm. Restricting the hashtag #SavetheChildren is antithetical to the legislative intent of Section 230. In this sense, the CDA is overbroad as applied.

249. Other Hashtags that have been inexplicably banned by Instagram, for examples, include: #alone,

#assday, #beautyblogger (but #beautybloggers works), #bikinibody, #boho. #brain, #costumes, #curvygirls, #date, #dating, #desk, #dm, #elevator, #graffitiigers, #hardworkpaysoff (but #hardworkpaysoff works), #happythanksgiving, #humpday, #iphonegraphy, #italiano, #kansas (but #kansascity works), #killingit, #kissing, #master, #models, #mustfollow, #nasty, #newyearsday, #petite, #pornfood, #pushups, #saltwater, #shit, #shower, #single, #singlelife, #skype, #snap, #snapchat (but #snapchat works), #snowstorm, #sopretty, #stranger, #streetphoto, #sunbathing, #swole, #tag4like, #tanlines, keens, #thought, #undies, #valentinesday, #workflow. Allowing Big Tech to get away with such absurd speech restriction by way of CDA immunity *prima facie* demonstrates the overbreadth of the CDA as applied.

250. Acting in a concerted/conspiring effort to restrict user speech across multiple platforms at once is yet another example of the overly broad application of Section 230 immunity. Alex Jones, Laura Loomer, and President Trump are a few examples of users that were not-so-coincidentally restricted across multiple platforms at the same time pursuant to concerted Big Tech effort. These individuals' materials were not just restricted as being offensive, they were (as an individual) eradicated from existence online. Whether one agrees or disagrees with their speech, how is conspiring between platforms to silence individuals as a whole within the breadth of Section 230 immunity? It is not. The message being sent to all users is: "if you do not play by our rules and agree with what we think, we will act in unison to de-person you from society (*i.e.*, deter permissible speech across multiple platforms) and we are completely immune from liability . . . haha,

sucker." Congress' compelling interest for Section 230 was not to enable Big Tech to eradicate individuals from all online public discourse simply because of their lawful opinions. In this sense, the CDA is overly broad as applied.

251. When a user is penalized for posting purportedly "violative content," Big Tech companies like Facebook also restrict the users' ability to private message people, disconnecting users from their friends, family, or loved ones as a result of something they posted publicly. This is one of the most nauseating bans that exists — even prisons allow inmates to contact their friends, family, and loved ones, notwithstanding their violations. Congress' compelling interest for Section 230 was not to enable Big Tech to restrict private conversations (permissible speech). In this sense, the CDA is overly broad in application.

252. Fyk has endured many of the same arbitrary restrictions mentioned above, based on absurd and dubious CDA-based "justifications" that have no basis in reality, "good faith," or "Good Samaritanism." For example, in or around the end of 2016, Facebook deleted one of Fyk's businesses/pages (with millions of viewers and thousands in advertising and/or web trafficking earnings at issue) because, for example, it contained a posted screenshot from the Disney movie *Pocahontas*. Facebook claimed that this screenshot (from a Disney children's movie) was racist and accordingly violative of the CDA; *i.e.*, to use Facebook terminology, the *Pocahontas* screenshot post constituted a "strike." Meanwhile, for comparison's sake, Facebook allowed other businesses/pages at that same time (in or around the end of 2016, and thereafter for that matter) to maintain, for examples, a posted

screenshot of a mutilated child or instant article Facebook advertisements (moneymakers for Facebook) of things like people engaged in overly sexual activities, among other things that really were violative of the CDA.[94]

253. As another example of lawful, legitimate permissible speech restricted vis-a-vis Section 230's overbreadth was Fyk's picture of a child riding a tricycle with Sloth's head (from the movie *Goonies*) photo-shopped in place of the child's head. There are no identifiable aspects of the child in the photo. The words on the photo were: "When you post a picture of your kids, this is what we see." If this type of humor was considered patently offensive, shows such as Tosh.O, Family Guy, South Park, and the Simpsons would be censored on every social media platform.

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[94] Fyk reported the disgusting posted screenshot of the mutilated child to Facebook; but, in December 2016, Facebook advised Fyk that such disgusting post was acceptable. Facebook advised Fyk as follows: "Thank you taking the time to report something that you feel may violate our Community Standards. Reports like yours are an important part of making Facebook a safe and welcoming environment. We reviewed the photo you reported for being annoying and uninteresting and found it doesn't violate our Community Standards." Apparently posts of decapitated children are of "interest" to Facebook, whereas a photo of Chief Powhatan in *Pocahontas* is "annoying" (or who knows what). Fyk had put together a nice video compilation further showing Big Tech CDA abuses and allowance of garbage over the years, which such video compilation had been posted on YouTube for quite some time (about a year); but, not-so-surprisingly/not-so-coincidentally, YouTube deleted the video very shortly before this filing for who knows what "reason." Thankfully, Fyk saved the video compilation; so, when the time is right for Fyk to share that video with the Court (or if the Court requests same now), Fyk's work product will be shared.

Fyk's posted picture may offend someone, somewhere, but it was certainly not unlawful, impermissible speech and everyone who would see Fyk's picture initially elected to view his content by liking his page. Yet Facebook deemed Fyk's post violative of Community Standards. Congress' compelling interest for Section 230 was not to prevent humorous content. In this sense, the CDA is overbroad as applied.

254. An example of an ICS' double standards is Google's policy on "doxing," which such policy specifically prohibits the act of revealing personal information or contact details of a person without consent. And, yet, Google made the names and addresses of people who donated to the Canadian truckers available to the public on Google Maps. The information was later removed after public outrage. Here, per Google rules, no one can reveal personal information about someone else but Google can reveal personal information about anyone it so chooses.[95]

255. Another example of double standards is Facebook's articulated position on "spam." Facebook has knowingly hosted (*i.e.*, taken payment to develop information) sponsored ads that are full-blown scams. For example, an electric scooter selling for $99.00, which should sell for over $l,000.00. It was a sponsored ad that Facebook was paid to develop, that scammed users. Anyone who attempted to buy the item would never see the item or their money again. Why does

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95 An article regarding Google's conduct can be found at: https://yournews.com/2022/02/23/2303820/google-maps-1ocation-data-of-freedom-convoy-donors-posted-online/ A copy of this article is attached hereto as **Exhibit JJ** and incorporated fully herein by reference.

Facebook have no responsibility when they are paid to promote an online scam? The CDA's allowing Facebook to participate in and get away with this scam is further evidence that the CDA is overly broad in application.

256. Most people are completely unaware of the largest permissible speech restrictions that occur online. The phrase "shadow ban" was coined to describe the content restriction in a more covert general sense. Wikipedia describes it as: "Shadow banning, also called stealth banning, ghost banning or comment ghosting, is the practice of blocking or partially blocking a user or their content from some areas of an online community in such a way that it will not be readily apparent to the user that they have been banned."[96] In the shadow ban vein, online platforms will downrank content that is found problematic, showing it lower in Newsfeeds or potentially not at all, without ever notifying the individual being penalized (no showing of cause or "good faith"). The concept of punishment without notice is unfathomable; and, yet, the overbreadth of the CDA enables Big Tech to engage in such absurd misconduct free of any civil liability. Giant swaths of permissible speech are restricted and reduced by tech platforms, without any notification, reasoning, or ability to be challenge the punishment. This is a substantial use of Section 230's breadth to restrict nearly all online permissible information without the user's knowledge. Such is violative of the Substantial Overbreadth Doctrine, as is every example above.

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[96] This article is attached hereto as part of composite Exhibit H and incorporated fully herein by reference.

257. Examples substantiating the substantiality of overbreadth are, quite seriously, limitless. Should the Court somehow require more examples, we would be happy to oblige.

258. It is plain to even the casual observer that Big Tech is using/hiding behind the overly broad immunity of Section 230 (that has somehow absurdly evolved over the last twenty-six-years) to advance personal agendas that benefit social media companies; *i.e.*, that are the antithesis of "Good Samaritanism" and/or in the interest of the public.

259. Section 230 (intended to protect and advance public discourse and to protect children from offensive materials) is overly broad (and, thus, unconstitutional) facially and as applied.

260. Social Media companies do not have, and never will have, (im)permissible speech figured out. Reason being, self-interested private companies were never supposed to be the government authorized judge, jury, and executioner of (im)permissible speech.

D. Canons of Statutory Construction Violated by the CDA

261. The CDA also fails upon a statutory construction examination.

1. Absurdity Canon/Harmonious-Reading Canon/Whole-Text Canon/Surplusage Canon

262. Consider this statement — the CDA grants absolute immunity from, for, in relation to all things online. Consider this related statement — a private corporation, motivated by self-interest, can voluntarily

engage in any editorial conduct it considers beneficial, without fear of civil liability, so long as the misconduct swirls about the magical ether of the Internet. In the words of John McEnroe to a Wimbledon chair umpire in 1981, "You cannot be serious?!" Alas, this is serious.

263. As the DOJ has aptly stated:

> Platforms no longer function as simple forums for posting third-party content, but instead use sophisticated algorithms to promote content (*i.e.*, to develop third-party information) and connect users . . . . [C]ourts have interpreted the scope of Section 230 immunity very broadly, diverging from its original purpose. This expansive statutory interpretation, combined with technological developments, has reduced the incentives of online platforms to address illicit activity on their services and, at the same time, left them free to moderate lawful content without transparency or accountability.

Ex. E.

264. As Justice Thomas aptly stated in *Malwarebytes:*

> The decisions [*e.g.*, *Zeran*, the Facebook Lawsuit, et *cetera*) that broadly interpret § 230(c)(1) to protect traditional publisher functions also eviscerated the narrower liability shield Congress included in the statute [§ 230(c)(2)].[97] Section 230(c)(2)(A) encourages companies to create content

97 As for the Surplusage Canon (discussed in greater detail below), *see* n. 16, *supra*, and Ex. G at 2.

> guidelines [*i.e.*, fill in the details] and protects those companies that 'in good faith . . . restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.'" Taken together[98] both provisions in § 230(c) most naturally[99] read to protect companies when they unknowingly decline to exercise editorial functions to edit or remove third-party content [*i.e.*, omit action], § 230(c)(1), and when they decide to exercise those editorial functions in good faith [*i.e.*, 'any action voluntarily taken,' § 230(c)(2)], § 230(c)(2)(A).

Ex. C, *Malwarebytes*, 141 S.Ct. at 16-17 (emphasis in original).

265. Justice Thomas further aptly stated:

> But by construing § 230(c)(1) to protect any decision to edit or remove content [*i.e.*, a voluntarily action), *Barnes v. Yahoo!, Inc.*, 570 F. 3d 1096, 1105 (CA9 2009), courts have curtailed the limits Congress placed on decisions to remove content, see *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, *3 (MD Fla., Feb. 8, 2017) (rejecting the interpretation that §230(c)(1) protects removal decisions because it would 'swallo[w] the more specific immunity in (c)(2)' [*i.e.*,

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98 As for the Whole-Text Canon (discussed in greater detail below), *see* n. 15, *supra*, and Ex. G at 2.

99 As for the Harmonious-Reading Canon (discussed in greater detail below), *see* n. 17, *supra*, and Ex. G at 2.

> § 230(c)(1) renders § 230(c)(2) mere surplusage]. With no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content [which is absurd]. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (CA9 2017), aff 'g 144 F. Supp. 3d 1088, 1094 (ND Cal. 2015) (concluding that '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 (c)(1)).

Ex. C, *id.* at 17 (emphasis in original).

266. Under this mistaken application whereby Section 230(c)(1) purportedly protects "any decision to edit or remove content," online platforms can (without consequence) promote, advance, sponsor, boost, suggest, and/or develop (even in part or by proxy) a host of unlawful activities; *e.g.*, child sexual exploitation, illicit drug sales, cyberstalking, human-trafficking, terrorism, harassment, pirating, impersonation, discrimination, Internet advertising scams, reckless driving, or even help to facilitation of child suicide (such as with www.sanctionsuicide.com).

267. Continuing with illustration of the absurdity at play, online platforms are free (under the currently unbridled, facially and as applied, CDA) to restrict anyone or anything for any reason or any motive that they consider "objectionable;" *e.g.*, undesirable users, gold star parents, politicians/elected officials, inconvenient factoids, differing opinions (*i.e.*, "wrong" thoughts), and *et cetera.* Section 230 has even left Internet companies free to restrict their competition

and clear of any concern whatsoever of any civil lability; *see, e.g.*, the Facebook Lawsuit.

268. As a result of Section 230(c)(l)'s unlimited editorial authority (the whacky result of *Zeran* and subsequent decisions; *e.g.*, the Facebook Lawsuit), online platforms (like Facebook, Google, Twitter, *et cetera*) are able to, for examples, institute a preferential caste system (*e.g.*, the blue checkmark/"high-quality"/"trustworthy"/"authentic sources"), restrict one's ability to run one's business (*i.e.*, reducing visibility/arbitrary bans) and/or make money online (*i.e.*, demonetization/account cancellation) (*e.g.*, Facebook Lawsuit), predetermine someone's guilt (*e.g.*, Kyle Rittenhouse),[100] arbitrarily penalize lesser valued (*i.e.*, organic) users while allowing higher valued customers (*e.g.*, advertisers) to be exempted from the rules (*i.e.*, lack of uniform enforcement) (*e.g.*, Facebook Lawsuit).

269. The text of Section 230 has rarely (if ever, other than perhaps Justice Thomas' *Malwarebytes* and *Doe* Statements, *see* Ex. C) been considered as a whole, implicating the Whole-Text Canon generally. The CDA's individual provisions have been interpreted in isolated ways (all six ways to Sunday, with hardly any rhyme or reason, over the last twenty-six years) that are absurd (Absurdity Canon), duplicative (Surplusage Canon), and certainly not compatible with the rest of the statute (Harmonious-Reading

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[100] Neither Fyk nor counsel (pending District Court admission) take any position whatsoever on the result of Mr. Rittenhouse's trial — proper or improper. The point herein is that online providers quashed public participation based on preferred opinions by banning participation or speech deemed less worthy or palatable by unknown (and likely foreign) decision-makers.

Canon/Irreconcilability Canon).[101] This has accordingly led to contradicting (and irreconcilable) court decisions, such as the polar opposite (even if just viewed through the anti-competitive animus lens) paths/fates of the Facebook Lawsuit and *Enigma*. It is well-past time for a declaration as to the CDA's unviability leading to so many conflicting decisions, associated legal chaos, and associated inconsistent case results ((in)justices) over more than two and a half decades; hence, this challenge.

270. When read accurately (still not the case in the Facebook Lawsuit; hence, the current/second appeal lodged by Fyk before the Ninth Circuit), *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019), cert. denied *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13 (2020) (with Justice Thomas providing a spot-on detailed statement, referenced several times throughout this filing), the Ninth Circuit panel in *Enigma* did not limit its examination to Subsection 230(c)(2) although the factual background of that case was seemingly of a 230(c)(2) ilk; but, instead, considered the whole-text of the statute with a focus on the "Good Samaritan" intelligible principle/general directive/general provision articulated in Section 230 (c) as a whole in denying immunization of anti-competitive conduct. Simply put, self-motived anti-competitive blocking decisions cannot harmoniously (enter, again, the Harmonious-Reading Canon) be the actions of a "Good Samaritan." Courts have rarely ever given

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[101] Again, for a nice generalized understanding of various canons at issue here, there is Exhibit G attached hereto and incorporated fully herein by reference.

effect (*i.e.*, given meaning) to the "Good Samaritan" general provision (*i.e.*, the general motivation) of the statute, which, again, is the intelligible principle underlying or overarching the above-discussed Non-Delegation Doctrine, which links to the above-discussed Major Questions Doctrine.

271. "[W]e are advised by the Supreme Court that we must give meaning to all statutory terms, avoiding redundancy or duplication wherever possible." *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (citing *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 197 (1985)). Translated — we are to respect things like the Whole-Text Canon, the Harmonious-Reading Canon, the Surplusage Canon, the Irreconcilability Canon, the Absurdity Canon, *et cetera.*

272. Again, a proper application of Section 230 started going down the proverbial tubes (although the CDA was destined to go down the tubes from the get-go for the myriad reasons discussed throughout this filing) as early as 1997 in *Zeran* (Fourth Circuit Court):

> Courts have discarded the longstanding distinction between 'publisher' liability and 'distributor' liability. Although the text of § 230(c)(1) grants immunity only from 'publisher' or 'speaker' liability, the first appellate court to consider the statute held that it eliminates distributor liability too — that is, § 230 confers immunity even when a company distributes content that it knows is illegal. *Zeran v. America Online, Inc.*, 129 F. 3d 327, 331-334 (CA4 1997).

Ex. C, *Malwarebytes*, 141 S.Ct. at 15 (emphasis in original).

273. If Section 230(c)(1) eliminates all liability (as the *Zeran* court incorrectly determined and the California courts have thus far absurdly determined in the Facebook Lawsuit), it would swallow the purpose of the very next subsection (Section 230(c)(2), which governs removal of content either directly by the ICS as to 230(c)(2)(A) or indirectly by the ICS as to 230(c)(2)(B)); *i.e.*, Section 230(c)(1) is disharmonious to Section 230(c)(2) and renders Section 230(c)(2) mere surplusage under the current judicial misinterpretation/misapplication of Section 230(c)(l), violative of the Harmonious-Reading Canon and/or the Surplusage Canon.

274. As Justice Thomas correctly stated:

> . . . Congress expressly imposed distributor liability in the very same Act that included § 230. Section 502 of the Communications Decency Act makes it a crime to 'knowingly . . . display' obscene material to children, even if a third party created that content. 110 Stat. 133-134 (codified at 47 U.S.C. § 223(d)). This section is enforceable by civil remedy [as it should be]. 47 U.S.C. § 207. It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability [*i.e.*, § 230(c)(1) eliminates all publisher and distributor liability] in the very Act in which Congress explicitly imposed it.

Ex. C, *Malwarebytes*, 141 S.Ct. at 15. Justice Thomas is correct, it is "odd" (*i.e.*, disharmonious) that Congress

would impose distributor liability while also eliminating distributor liability in the very same statute. Once again, Section 230 falls flat on its face under a canon of statutory construction (the Harmonious-Reading Canon) examination.

275. Continuing with Justice Thomas' *Malwarebytes* Statement:

> Traditionally, laws governing illegal content distinguished between publishers or speakers (like newspapers) and distributors (like newsstands and libraries). Publishers or speakers were subjected to a higher standard because they exercised editorial control. They could be strictly liable for transmitting illegal content. But distributors were different. They acted as a mere conduit without exercising editorial control, and they often transmitted far more content than they could be expected to review. Distributors were thus liable only when they knew [*i.e.*, exercised editorial control] (or constructively knew) that content was illegal. *See, e.g.*, *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, *3 (Sup. Ct. NY, May 24, 1995); Restatement (Second) of Torts § 581 (1976); cf. *Smith v. California*, 361 U.S. 147, 153 (1959) (applying a similar principle outside the defamation context).

Ex. C, *Malwarebytes*, 141 S.Ct. at 14. It is reasonable to conclude that the delineation (in regards to Section 230 immunity) is not whether the online provider (like an ICS, like a Facebook, Google, Twitter, *et cetera*) is a publisher or distributor; but, rather, whether the

online provider exercised editorial control (*i.e.*, took action).

276. Continuing with our canons analysis grounded within Justice Thomas' appropriate framework:

> The year before Congress enacted § 230, one court blurred this distinction [between publisher and distributor]. An early Internet company [Stratton Oakmont] was sued for failing to take down defamatory content posted by an unidentified commenter on a message board. The company contended that it merely distributed the defamatory statement. But the company had also held itself out as a family-friendly service provider that moderated and took down offensive content. The court determined that the company's decision to exercise editorial control over some content 'render[ed] it a publisher' even for content it merely distributed. *Stratton Oakmont*, 1995 WL 323710, *3-*4.
>
> Taken at face value, § 230(c) alters the Stratton Oakmont rule in two respects. First, § 230(c)(1) indicates that an Internet provider does not become the publisher of a piece of third-party content [*i.e.*, when the Internet provider exercises editorial control subject to the provisions of §230(c)(2)] — and thus subjected to strict liability — simply by hosting or distributing that content. Second, § 230(c)(2)(A) provides an additional degree of [direct immunity when companies take down or restrict access to objectionable content, so long as the company acts in good

> faith. In short, the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected from § 230(c)(2)(A).

Ex. C, *Malwarebytes*, 141 S.Ct. at 14-15 (emphasis added). Distilled, Section 230(c)(2) provides immunity when the online provider takes any action (directly in regards to 230(c)(2)(A) and indirectly as to 230(c)(2)(B), *see, e.g.*, n. 22, *supra*) and Section 230(c)(1) informs courts not to treat the online provider (ICS) as the content provider (ICP) when the online provider does not act upon the content in question (*i.e.*, fails to remove offensive materials).

277. "To be sure, recognizing some overlap between publishers and distributors is not unheard of. Sources sometimes use language that arguably blurs the distinction between publishers and distributors. One source respectively refers to them as 'primary publishers' and secondary publishers or disseminators,' explaining that distributors can be 'charged with publication." Ex. C, *Malwarebytes*, 141 S.Ct. at 15 (*citing* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 799, 803 (5th ed. 1984)).

278. Overlap between publishers and distributors does exist and it does blur their distinction. Many courts have tried to distinguish between publishers and distributors (the "publisher/platform debate"). Under Section 230, an online provider's liability does not simply end at "distributor" and begin with being a "publisher." An online provider's liability distinction relies wholly on who acted (*i.e.*, who exercised editorial control), how they acted, and under what motivation

they acted. Any other read or application is the epitome of disharmonious (at minimum).

279. An online provider (ICS) can act as both a publisher and a distributor simultaneously. In Section 230, there is no delineation made between a publisher and a distributor (*i.e.*, a platform) because their functions overlap. Determining whether the online provider can (or cannot) be "charged with publication" depends entirely upon their exercise of editorial control (*i.e.*, their actions). To better understand how this overlap occurs, we now define the interlaced roles (publisher/distributor) an online provider can play.[102]

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[102] The discussion found within the next paragraphs is precisely one of the aspects of CDA immunity that Justice Thomas quite recently (as of March 7, 2022) welcomed review of (with Justice Thomas having welcomed the SCOTUS' review of Section 230 immunity more generally by way of his October 13, 2020, *Malwarebytes* Statement) but was unable to vis-A-vis the *Doe* case because the *Doe* case presented itself to the SCOTUS in a not yet "final" state. Again, this constitutional challenge is being presented to the judiciary as doubtless the welcomed, "appropriate case" within which to "address the proper scope of immunity under § 230:"

> This decision exemplifies how courts have interpreted § 230 'to confer sweeping immunity on some of the largest companies in the world,' *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 592 U. S. ___, ___, 141 S.Ct. 13, 13, 208 L.Ed.2d 197 (2020) (statement of THOMAS, J. respecting denial of certiorari), particularly by employing a 'capacious conception of what it means to treat a website operator as [a] publisher or speaker,' *id.,* at ___, 141 S.Ct., at 17 (internal quotation marks omitted). Here, the Texas Supreme Court afforded publisher immunity even though Facebook allegedly 'knows its system facilitates human traffickers in identifying and cultivating victims,' but has nonetheless 'failed to take any reasonable steps to

280. Under Section 230 (c)(1) : (a) A passive distributor (*i.e.*, an inactive host) cannot be "charged with publication" (*i.e.*, treated as "the publisher") when, and if the online provider fails to moderate (*i.e.*, omits editorial control/"unknowingly" distributes/acts as a

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> mitigate the use of Facebook by human traffickers' because doing so would cost the company users—and the advertising revenue those users generate. . . .
>
> It is hard to see why the protection § 230(c)(1) grants publishers against being held strictly liable for third parties' content should protect Facebook from liability for its own 'acts and omissions.'
>
> At the very least, before we close the door on such serious charges, 'we should be certain that is what the law demands.' *Malwarebytes,* 592 U. S., at ___, 141 S.Ct. at, 18. As I have explained the arguments in favor of broad immunity under § 230 rest largely on 'policy and purpose,' not on the statute's plain text. *Id,* at ___, 141 S.Ct., at 15. Here, the Texas Supreme Court recognized that 'Nile United States Supreme Court—or better yet, Congress—may soon resolve the burgeoning debate about whether the federal courts have thus far correctly interpreted section 230.' 625 S.W.3d, at 84. Assuming Congress does not step in to clarify § 230's scope, we should do so in an appropriate case.

Ex. C, *Doe*, 2022 WL 660628, at *1-2 (internal case record/docket entry cites omitted). The answer to the question of "whether the federal courts have thus far correctly interpreted section 230" is a resounding "no;" hence, this constitutional challenge. And the judiciary has to take on this monumentally important constitutional challenge because Congress has "not step[ped] in to clarify § 230's scope" in the CDA's twenty-six-year existence and because citizens of this country (including Fyk) desperately need the law to work correctly immediately . . . yesterday . . . a week ago . . . a year ago . . . twenty-six years ago. All that has occurred over the last twenty-six years is that Section 230 has become more and more messed up by the minute.

mere conduit of information); (b) An active distributor (*i.e.*, an active host - publisher) *can* be "charged with publication" (*i.e.*, treated as "a" publisher — not to be confused with "the publisher") when, and if the online provider engages in primary and/or secondary publishing conduct (*i.e.*, exercises any editorial control/"knowingly" chooses to distribute or provide information in a secondary capacity).

281. Under Section 230(c)(2), an active distributor (*i.e.*, an active host/publisher) cannot be "charged with publication" when it acts as "a" secondary publisher when restricting offensive content *entirely* provided by third-parties (*i.e.*, not created or developed, even in part, by the online provider), subject to the "Good Samaritan" intelligible principle/general directive/general provision of Section 230(c) and the "good faith" provisions of Section 230(c)(2).

282. In reality, however, no delineation exists between the publisher and a distributor within the text of Section 230. The only delineation that exists is between "the [primary] publisher" (who the online provider cannot be treated as) and "a secondary publisher" (who can be "charged with publication" for their actions, excluding the good faith moderation editorial control described in Section 230(c)(2)).

283. If Section 230 is applied properly (*i.e.*, in a harmonious fashion, in a non-surplusage fashion, in a reconcilable fashion, in a not absurd fashion, call it whatever), an online provider could be treated as "a [secondary] publisher" (not "the publisher"/*i.e.*, as another) under Section 230(c)(l) when it knowingly chooses to allow (*i.e.*, knowingly hosts/develops/distributes) unlawful information. This would encourage the online provider to error on the side of caution, when

engaged in secondary editorial moderation. The online provider would then be liable for content it knowingly allowed (*i.e.*, distributed) while still not being liable for information it failed to moderate. This would increase "the incentives of online platforms to address illicit activity on their services . . ." and not leave "them free to moderate lawful content without transparency or accountability." *See* DOJ publication, Ex. E.

284. The analytical framework espoused above ("a modest understanding" of CDA immunity or lack thereof) "is a far cry from [the disharmony, absurdity that] has prevailed in court. Adopting the too-common practice of reading extra immunity into statutes where it does not belong, see *Baxter v. Bracey*, 590 U.S. ___, 140 S.Ct. 1862, 207 L.Ed.2d 1069 (2020) . . . courts have relied on policy and purpose arguments to grant sweeping protection to Internet platforms." Ex. C, *Malwarebytes*, 141 S.Ct. at 15 (*citing* 1 R. Smolla, Law of Defamation § 4:86, p. 4-380 (2d ed. 2019) ("[C]ourts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress") and Rustad & Koenig, Rebooting Cybertort Law, 80 Wash. L. Rev. 335, 342-343 (2005) (similar)); Ex. C, *Doe*, 2022 WL 660628 at *1-2 (*see* n. 102, *supra*).

285. "[F]rom the beginning, courts have held that § 230(c)(1) protects the 'exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content." *E.g., Zeran*, 129 F. 3d, at 330 (emphasis added); *cf id.*, at 332 (stating also that § 230(c)(1) protects the decision to 'edit')." *Id.* at 16 (emphasis in original).

286. Neither Section 230(c)(1)'s definitional protection, nor Section 230(c)(2)'s direct protection, relates to deciding whether to publish, edit, or alter content or to the creation or development of any information, even in part/in any capacity. Deciding whether to publish, edit, or alter information are all the editorial actions of an ICP. The online provider (like an ICS, like Facebook, Google, Twitter, and *et cetera*) cannot, in any semblance of a reconcilable fashion, be an ICP (*i.e.*, even in a secondary capacity) and still receive CDA protection; and, yet, it happens (in a statutory canon repugnant fashion) every day and everywhere in the real world because of the exploitation of the statute (*e.g.*, Big Tech's collecting copious amounts of money to develop advertising content in a secondary publishing capacity).

287. Continuing on with Justice Thomas' *Malwarebytes* Statement:

> Courts have [ ] departed from the most natural reading of the text by giving Internet companies immunity for their own content (*i.e.*, laundering information content provision through the development of third-party content).[103] Section 230(c)(1) [, if interpreted/applied in a harmonious way,] protects a company from publisher liability only

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103 As an example, Mark Zuckerberg openly admits that Facebook knowingly distributes (through development/advancement) its own content: "We're showing the content on the basis of us believing it is high quality, trustworthy content rather than just ok you followed some publication, and now you're going to get the stream of what they publish." https://about.fb.com/news/2019/04/marks-challenge-mathias-dopfner/ (which such video is also cited in n. 79, *supra*).

> when content is provided entirely by another [ICP]. . . . Nowhere does this provision protect a company that is itself the [ICP].

Ex. C, *id.* at 16 (emphasis in original, and citing *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1165 (CA9 2008). Justice Thomas continued: "[a]nd an [ICP] is not just the primary author or creator, it is anyone 'responsible, in whole or in part, for the creation or development' of the content." Ex. C, *id.* (emphasis in original, and citing Section 230(0). "Depart[ure] from the most natural reading" implicates, to one degree or another, the Harmonious-Reading Canon, the Irreconcilability Canon, the Whole-Text Canon, Surplusage Canon and the Absurdity Canon.

288. Implicating the Whole-Text Canon and/or Harmonious-Reading Canon, Justice Thomas' *Malwarebytes* Statement continued with this sagely discussion:

> [H]ad Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in § 230(c)(1): No provider 'shall be held liable' for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content. § 230(c)(2). Where Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful. *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983); cf. *Doe v. America Online, Inc.*, 783

> So.2d 1010, 1025 (Fla. 2001) (Lewis, J., dissenting) (relying on the rule to reject the interpretation that § 230 eliminated distributor liability.

Ex. C, *id.* at 16 (emphasis added because Congress created no such "categorical immunity" in the real world). And "[w]here Congress uses a particular phrase in one subsection and different phrase in another . . . [and the court is to] ordinarily presume that the difference is meaningful" implicates, to one degree or another, the Harmonious Reading Canon, the Irreconcilability Canon, the Whole-Text Canon, Surplusage Canon and perhaps even the Absurdity Canon.

289. The definition of an ICP in Section 230(f)(3) reads: "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* Given the current state of the jurisprudence that Section 230(c)(1) protects <u>any</u> editorial conduct, Section 230(c)(1) could be read as "[n]o provider or user of an ICS shall be held liable for any editorial conduct (*i.e.*, treated as "a" publisher - themselves) of any information provided by another ICP. To morph the statutory "the publisher" (immunized in some contexts) language into "a publisher" cuts a far too overbroad immunity swath for Big Tech and is, put a bit more harshly (but appropriately), absurd. This runs afoul of the Substantial Overbreadth Doctrine and the Absurdity Canon.

290. Said differently, an ICP is any entity responsible, in whole or in part, for creating or "deciding whether to publish, edit or alter information" (*i.e.*,

development) even if the information is provided by a third-party. If the *Zeran* decision was correct that Section 230(c)(1) protects all "traditional editorial function" and the *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) decision was also correct that Section 230(c)(2) protects development (even in part), then Section 230(c)(1) and/or Section 230(c)(2) defeat/swallow the purpose of defining an ICP because both subsections would protect information content provision. This contravenes the Surplusage Canon. Section 230(f)(3)'s definition of an ICP would have no purpose if an online provider cannot be treated as "a publisher" (*i.e.*, as an ICP) in the general sense; thus, the online provider (ICS, like Facebook, Google, Twitter, *et cetera*) can also be an ICP free of all civil liability for any editorial conduct. This current misinterpretation, as Justice Thomas noted, is a "categorical immunity" that no reasonable person would approve of; *i.e.*, does not survive the Absurdity Canon, for example.

291. Section 230(c)(1) cannot plausibly (*i.e.*, reconcilably) protect all "traditional editorial function" because both information content provision and content restriction (the purpose of Section 230(c)(2)) are both editorial functions. "The decisions that broadly interpret § 230(c)(1) [*e.g.*, *Zeran*, the Facebook Lawsuit) to protect traditional publisher functions also eviscerated the narrower liability shield Congress included in the statute [§ 230(c)(2)(A)]." Ex. C, *Malwarebytes*, 141 S.Ct. at 16. The misinterpretation that Section 230(c)(1) protects all editorial control, and the fact that such "eviscerates" Section 230(c)(2)'s purpose, renders Section 230(c)(2) superfluous; *i.e.*, mere surplusage. This cannot survive under the Surplusage Canon.

292. In the Facebook Lawsuit, the Ninth Circuit Court (thus far) wrongly shrugged off Fyk's valid surplusage points, among many other valid points, and, in so doing, put a very bizarre spin on the supposed interaction between Section 230(c)(1) and Section 230(c)(2), stating:

> We reject Fyk's argument that granting § 230(c)(1) immunity to Facebook renders § 230(c)(2)(A) mere surplusage. As we have explained, §230(c)(2)(a) 'provides an additional shield from liability.' *Barnes*, 570 F.3d at 1105 (emphasis added). '[T]he persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects [*i.e.*, all providers and users], but any provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue can take advantage of subsection (c)(2).' *Id.*

Fyk v. Facebook, Inc., 808 Fed.Appx. 597, 598 (9th Cir. 2020) (emphasis in original).

293. In the Facebook Lawsuit thus far, the Ninth Circuit Court has done nothing to resolve the statutory conflict raised in *Fyk vs. Facebook;* rather, the Ninth Circuit Court has only emphasized non-textual arguments when interpreting Section 230, leaving yet more questionable precedent in the CDA wake. In the Facebook Lawsuit, the Ninth Circuit's "additional shield from liability" (*i.e.*, additional to §230(c)(l)) is "develop[ment], even in part," which does not exist anywhere within the text of Section 230(c)(2)(A)). By including development in part in the protections of

Section 230(c)(2)(A), the Ninth Circuit "eviscerated" an ICP by creating another disharmonious conflict with Section 230(0(3)' s definition of an ICP. Section 230(c)(2)(A) would, therefore, protect information content provision, even though Section 230(c)(2)(A)'s specifically articulated purpose is to exclusively allow an online provider or user the ability to "restrict access to or availability of material." And again, if (as courts wrongly believe, including the courts in the Facebook Lawsuit thus far) all traditional editorial function is perforce immune under Section 230(c)(1) and "development, even in part" is, or course, an editorial function, then information content provision is already immune under Section 230(c)(1) and Section 230(c)(2)(A) is by no means something "additional," let alone an "additional shield from liability." Not only is this Ninth Circuit view in the Facebook Lawsuit violative of the Surplusage Canon, but this view renders Section 230(c)(1) disharmonious with Section 230(c)(2)(A) and disharmonious with Section 230(0(3), which creates an irreconcilable conflict across the various CDA subsections.

294. Further in the Section 230(0(3) vein:

> Only later did courts wrestle with the language in § 230(f)(3) suggesting providers are liable for content they help develop 'in part.' To harmonize [§ 230(c)(2)(A), protecting 'development, even in part'] with the interpretation that § 230(c)(1) protects 'traditional editorial functions,' courts relied on policy arguments to narrowly construe § 230(f)(3) to cover only substantial or material edits and additions. *E.g.*, *Batzel v. Smith*, 333 F. 3d 1018, 1031, and n. 18 (CA9 2003) ('[A] central

> purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted').

Ex. C, *Malwarebytes*, 141 S.Ct. at 16. The Central purpose of the CDA was the "blocking and screening of offensive material;" *i.e.*, the purpose of the CDA was to restrict materials, not "edit" (*i.e.*, modify) or develop them. Justice Thomas himself uses "harmonize" in discussing that the CDA is anything but; *i.e.*, violative of the Harmonious-Reading Canon.

295. In the disharmonious and absurdity analysis, Justice Thomas' *Malwarebytes* statement continues:

> Under this [mis]interpretation, a company can solicit thousands of potentially defamatory statements,[104] 'selec[t] and edi[t] . . . for publication' several of those statements, add commentary, and then feature the final product prominently over other submissions — all while enjoying immunity. *Jones v. Dirty World Entertainment Recordings LLC*, 755 F. 3d 398, 403, 410, 416 (CA6 2014) (interpreting 'development' narrowly to 'preserv[e] the broad immunity th[at § 230] provides for website operators' exercise of traditional publisher functions'). To say that editing a statement and adding commentary in this context does not 'creat[e] or develo[p]' the final product, even in part, is dubious.

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104 Or solicit a new owner of the materials in the case of Fyk vs. Facebook. *See, e.g.*, Ex. B.

Ex. C, *Malwarebytes*, 141 S.Ct. at 16 (emphasis added). Picking/choosing/allowing/selecting is not a harmonious way to read the CDA or, in any sort of way, reconcilable. And "dubious" might as well mean "absurd." Implicating the Harmonious-Reading Canon, Irreconcilability Canon, and the Absurdity Canon.

296. The *Batzel* court indicated the development of information that transforms one into an ICP is "something more substantial than merely editing portions of an email and selecting material for publication." *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003). If an online provider can "select and edit materials for publication," it is responsible, at least in part in a secondary divisible capacity, for the development of that information. This has left many courts (and everybody else, including Fyk) scratching their heads as to where the arbitrary line exists between insignificant development protected by Section 230(c)(1) and Section 230(c)(2) and significant development not protected by those sections (implicating, at the very least, the irreconcilability canon).

297. In the Facebook Lawsuit, the Ninth Circuit Court in its first go-round (again, the Facebook Lawsuit is presently pending in the Ninth Circuit Court for a second time) defined this arbitrary development line in this way: "a website may lose immunity under the CDA by making a material contribution to the creation or development of content." *Fyk*, 808 Fed.Appx. at 598 (citing *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016) and *Fair Housing*, 521 F.3d at 1166). The Ninth Circuit Court in the first Facebook Lawsuit go-round further stated:

> Fyk, however, does not identify how Facebook materially contributed to the content of the

> pages. He concedes that the pages were the same after Facebook permitted their re-publication as when he created and owned them. We have made clear that republishing or disseminating third party content 'in essentially the same format' 'does not equal creation or development of content.' *Kimzey*, 836 F.3d at 1270, 1271.

Id. It is important to note, "re-publishing" is the act of knowingly distributing third-party content while disseminating may not involve any action when distributing.

298. A "material contribution" applies to a divisible injury. A material contribution to the information provided would accordingly be any divisible alteration (*i.e.*, primary creation or secondary development) of the information, even in part. In the Facebook Lawsuit, Facebook's actions (as "a publisher") were divisible from Fyk's actions (as "the publisher") and/or from Fyk's competitor's actions, but the California courts involved in the Facebook Lawsuit have (so far) made the erroneous determination that Facebook's divisible involvement in the development of Fyk's information did not meet the arbitrary (and imaginary, for that matter) "material" development "line."

299. In the Facebook Lawsuit, Fyk's property was made unavailable by Facebook under Fyk's ownership (*i.e.*, a divisible harmful action), Facebook solicited a new high valued owner (*i.e.*, a divisible anti-competitive development action), and then Facebook made Fyk's content available again (*i.e.*, actively altering the availability and value of Fyk's material) for Fyk's competitor (*i.e.*, a divisible anti-competitive development action).

300. With no limits to liability and a narrow interpretation of development, Section 230(c)(1) is the functional equivalent of "sovereign immunity." In the present broken CDA landscape, an online provider can do anything to anyone for any reason, without exposure to civil liability. As noted above, under the Absurdity Canon, "a provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve." Ex. G. Section 230(c)(l) could conceptually be judicially corrected (Paragraph 4, *supra*) by, for example, giving the word "the" effect (thus aligning it with its most harmonious interpretation); but, given the overall disaster that is the CDA (and considering Section 230(c)(2)(A) is not realistically fixable), we submit that "disregard[ing]" the CDA *via* eradication is the proper course.

301. Under the Surplusage Canon (*see* Ex. G at 2) every word and every provision are to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence. Section 230(c)(2) should not be ignored, should not be duplicative, and every word should be given effect. The difference between Section 230(c)(1) and Section 230(c)(2) must be meaningful because a statute is to be read as a whole-text (*i.e.*, taken together) and "we must give meaning to all statutory terms, avoiding redundancy or duplication wherever possible." The current lay of the CDA land does not give every word in Section 230 effect, far from it (in "evisceration" fashion in the appropriate words of Justice Thomas).

302. The Fourth Circuit Court's *Zeran* decision and the Ninth Circuit Court's *Fyk* decision (so far), just as a couple examples, were/are infected (taking such decisions beyond the point of viability) by the all-too-common practice of reading extra immunity into a statute — those courts failed to read Section 230 as a whole-text and give meaning to all statutory terms. Section 230(c)(1) is a "definitional" protection (*i.e.*, a directive). *See*, Ex. C, *Malwarebytes*, 141 S.Ct. at 14. Section 230(c)(1) instructs courts on how to treat an online provider that serves as a mere bulletin board for content; *i.e.*, does nothing to the content — fails to moderate. Section 230(c)(2), on the other hand, provides immunity from civil liability for acting as a publisher or speaker, so long as such action is that of a "Good Samaritan" and in "good faith."

303. To unravel the Section 230 Gordian knot, we must give meaning to <u>every term</u>. The word "the" may seem like an insignificant statutory term, but it has a dramatic impact on the proper interpretation and application of Section 230(c)(l). The word "the" serves to define the "meaningful" distinction between Section 230(c)(1) and Section 230(c)(2). We submit, this singular term "the" (which has not been afforded adequate effect, some courts even misquoting the "the" of the statute as "a"), is the origin of Section 230's court misinterpretation and the absurd unlimited liability protection of Section 230(c)(1).

304. 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. Section 230(c)(1) specifically reads, "Treatment of Publisher or Speaker: 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). If we give proper effect to the word "the," the distinction between Section 230(c)(1) and Section 230(c)(2) becomes meaningful. "The publisher or speaker" denotes the preexisting publisher or speaker. An online provider (ICS, as in Facebook, Google, Twitter, *et cetera*) cannot be treated as "the" (*i.e.*, the original) publisher or speaker who entirely provided the information (*i.e.*, which in the Facebook Lawsuit, Fyk was "the publisher"). The online provider can, however, be treated as "a publisher" (*i.e.*, treated as itself, which, in the Facebook Lawsuit, Facebook was "a publisher" in a secondary capacity). When the proper effect is given to the word "the," Section 230(c)(2) would afford a separate protection for certain active "good faith" publisher liability protection and Section 230(c)(1) would maintain its definitional liability protection pursuant to the treatment of publisher or speaker. The difference between Section 230(c)(l) and Section 230(c)(2) becomes meaningful (*i.e.*, harmonious).

2. The Irreconcilability Canon

305. Private companies have the First Amendment right to "voluntarily" allow or disallow any information on their private platforms and can "create, develop, restrict, edit, alter or modify" any information they want within their discretion; but a private company's having the "right" to do something does not mean the private company would not be subject to liability for its own decisions (*i.e.*, conduct). The company's conduct is its prerogative, but is subject to civil (and potentially criminal) liability for its own conduct. *See* n. 47, *supra.*

306. A lot of the confusion surrounding Section 230 protection resides within the quandary of whether an Internet company is engaged in voluntary "private" editorial function or whether an Internet company is engaged in involuntary (*i.e.*, state-induced/mandated) obligatory (*i.e.*, government) function. In *Carter*, Justice Sutherland stated that there is a difference between a private activity and a governmental function:

> The difference between producing coal [operating an interactive computer and advertising service] and regulating [restricting] its production [materials] is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be [e]ntrusted with the power to regulate the business of another, and especially of a competitor.

Id. at 311 (emphasis added) (citing, *inter alia, A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 537 (1935)).

307. Operating an ICS is a private function (accompanied by First Amendment rights), but the power (*i.e.*, Section 230 regulatory authority) to regulate the business or personal affairs of another is necessarily a government function. A private entity cannot be entrusted with the power to regulate the business of another, such as was the case in the Facebook lawsuit in which Facebook regulated its own competition, Fyk. Most, if not all, "Community Standards" are rarely (if ever) enforced (*i.e.*, prosecuted) uniformly or in the interest of the general public. A private entity has the First Amendment right to arbitrarily take actions against another if those actions are entirely voluntary;

but, if its actions are somehow induced or directed by governmental obligation (which is absolutely the case of all tech companies functioning within CDA protections), the entity is no longer acting entirely voluntarily, as a private entity, it is a functioning governmental agent/state authorized actor regulating speech, liberty, and property of others and destroying lives, like Fyk's, in the process. "Private actions" to regulate speech are constitutionally protected while "state actions" to regulate the speech, liberty, and property of other are (for the most part), constitutionally prohibited.

308. The answer to whether an online provider is acting as a private entity or as a state actor resides in the definition and placement of a singular word — "voluntarily." In order for the "action taken" to be a constitutionally protected act, the action must be taken entirely "voluntarily" (*i.e.*, not induced by government obligation). Section 230(c)(2)(A) reads, in pertinent part, as follows: "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." *Id.* (emphasis added). The statute does not read as "any voluntary action taken . . . ."

309. Webster' s Dictionary defines the word "voluntary" as follows: "done by design or intention; acting or done of one's own free will without valuable consideration or legal obligation."[105] Simply stated, any action taken by a private entity, in its entirety,

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105 Merriam-Webster Dictionary, *Voluntary,* https://www.merriam-webster.com/dictionary/voluntary *See* Ex. I (emphasis added).

must be done "without valuable consideration or legal obligation" (*i.e.*, not for protection or under inducement or directive) for the action to be considered a "voluntary" private act.

310. If a provider or user takes any action "voluntarily" (*i.e.*, as a private actor under no government obligation or for any immunity consideration) it cannot legally seek statutory "protection" (*i.e.*, the immunity consideration) because if a provider or user seeks the "protection," it must have taken its action under the legal obligation (*i.e.*, the directive of government — state action to block and screen offensive material in "good faith" as a "Good Samaritan"). Delineating the line between entirely voluntary private activity and obligatory governmental function is blurred within the CDA. The placement of the word "voluntarily," however, serves to define the line between what acts are private and what acts are state activity.

311. Section 230(c)(2)(A) reads, in pertinent part, as follows: "any action voluntarily taken to restrict . . . material." It does not read; "any voluntary action taken to restrict . . . material." In order to seek protection consideration (*i.e.*, immunity), <u>any action taken</u> by an ICS must be done in order to restrict materials in "good faith" as a "Good Samaritan" within the confines of Section 230(c)(2)(A)' s state directive. The choice of whether or not to engage in the state activity is voluntary (a private act). Had the statute read as "any voluntary action taken to restrict . . . materials," the activities taken would not be mandated but would instead capture any act the private entity chose to engage in. Put differently, Section 230(c)(2)(A) is a private entity's <u>voluntary</u> choice to engage in state activity (*i.e.*, act under the state

directive/obligation; *e.g.*, to restrict access to or availability of obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable materials) if it seeks statutory protection (*i.e.*, immunity/consideration).

312. The term "voluntarily" creates an irreconcilability within Section 230(c)(2)(A). The actions taken must be voluntary private actions but, at the same time, the action must also follow the state directive, and any action taken by an ICS within the statutory framework (which, again, such statutory framework is not voluntary, it is obligatory state delegated action) can never be classified as private activity. Put differently, and to be abundantly clear, none of the actions taken by an ICS under the protection and provisions of Section 230(c)(2)(A) (*i.e.*, to restrict materials at the directive of state) can ever be entirely voluntary (*i.e.*, only the choice of whether to engage in state activity is voluntary) because, if the ICS voluntarily takes any action to restrict materials under Section 230(c)(2)(A) and seeks Section 230(2)(A)'s protection, the private entity must have acted at the directive of state (*i.e.*, to restrict access to or availability of obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable material in "good faith" as a "Good Samaritan").

313. The statutory term "voluntarily" (*i.e.*, interpreted as a private activity, not as a private choice to engage state activity) is irreconcilable with its own obligatory (*i.e.*, mandated) governmental function to block and screen obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable material. A private entity simply cannot (at least not in a reconcilable fashion) act entirely "voluntarily"

while simultaneously acting under obligation or for consideration (*i.e.*, under governmental directive or for civil liability protection). Section 230(c)(2)(A) is irreconcilable with its own statutory use/directive and, as a result, Section 230(c)(2)(A) (at minimum) must be struck.[106]

314. In addition to the "voluntarily" quandary is the quandary surrounding the understanding, scope, and application of the phrase "development, even in part."

315. There are two active roles and one passive role played by an ICS that are protected from liability under Section 230: (a) an inactive entity — passively hosting information, which is the purpose of Section 230(c)(1) protection; (b) an active entity — actively restricting offensive information, voluntarily following the directive of state, which is the purpose of Section 230(c)(2)(A) protection; or (c) an active entity — actively providing the tools necessary to a third-party to restrict information themselves, but the ICS is passive in relation to hosting the information of another, which is the purpose of Section 230(c)(2)(B).

316. There are two active roles played by an ICP that are not protected from liability, in any way, under Section 230: (a) an active entity, responsible for (*i.e.*, liable for) creating, in whole or in part, information provided online; or (b) an active entity, responsible for (*i.e.*, liable for) developing, in whole or in part, information provided online. "Creation" means to bring information into existence, whereas "development"

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106 As noted above, Section 230(c)(1) could stand in current form if the word "the" was to be given actual effect.

means any divisible manipulation of information already in existence.

317. An "interactive computer service" (ICS) is defined under Section 230(f)(2) as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." *Id.*

318. And an "information content provider" (ICP) is defined under Section 230(f)(3) as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.*

319. Section 230(c)(2)(A) specifically provides an ICS with liability protections when it, itself, takes certain restrictive actions, whereas Section 230(c)(2)(B) contemplates an ICS providing the tools to another to restrict materials for themselves. And if the ICS fails to restrict offensive materials (230(c)(2)(A) omission), it cannot be treated as the entity or person who provided the information because of Section 230(c)(1)'s definitional protection.

320. All of Section 230's protection provisions fall squarely within protecting information restriction actions (*i.e.*, blocking and screening actions). Section 230 does not, however, provide any liability protections for any information provision actions. An Information Content "Provider" (ICP) is not afforded any liability protections for the creation or development of any information in whole or even "in part" (*i.e.*, in any

insignificant divisible measure). An ICS' role is to passively host information (*i.e.*, provide only the service, not the information) or restrict certain information (in a "good faith" and "Good Samaritan" way). An ICS' role is not to create or develop any information, even in part. As soon as the ICS steps over the line of creation or development, even in part, it transforms itself into an ICP and is subject to liability for its own material contribution, whether or not the underlying content was originally provided by another.

321. Courts have struggled with the proper interpretation and application of the phrase "development, in part." The phrase "development, in part" seems relatively intelligible to the ordinary person — if an entity is responsible for any divisible contribution (*i.e.*, even "in part," and no matter how (in)significant), to solicit, sponsor, advance, alter, expound upon, make available (*i.e.*, allow or provide), modify, manipulate, organize, promote the growth of (especially by deliberate effort over time) and/or *et cetera*, the entity is, by definition, an information content provider (ICP) developing information and is accordingly liable for its own provisional conduct and content (*i.e.*, liable for its own secondary material "development" contribution), even if that information was initially provided (*i.e.*, created or developed) "by another."

322. This is where the irreconcilability of the phrase "development, even in part" begins to take shape. Under Section 230, an ICS can have absolutely no active role in the provision of information (*i.e.*, no creation or development, even in part) in order to maintain civil liability protections. An ICS cannot be both an ICS and an ICP at the same time (if CDA immunity is to be had) because an entity cannot have

both an active development role and also not have an active development role simultaneously — such is irreconcilable/impossible.

323. Whenever an ICS "considers" information, it is acting in a traditional editorial role. Section 230 (c)(2)(A) limits (*i.e.*, under the proper, narrow read of the provision) that editorial role to the exclusion of materials; but, an inherent result (*i.e.*, by proxy) of exclusion consideration, is inclusion consideration (*i.e.*, content provision/development in part).

324. Development, in whole or in part, is the exclusive role of an ICP by Section 230(f)(3) definition and by the purpose of 230(c)(1); but, the ICS' role as an information content restrictor also allows the ICS (by proxy) to act as an ICP who can "knowingly distribute" (*i.e.*, "allow") unlawful information. This is at odds with the "Good Samaritan" general provision (*i.e.*, intelligible principle) of the statute and creates an irreconcilable conflict between Sections 230(c)(2) and 230(c)(1) and between Section 230(0(3)'s definition of an ICP.

325. Information "consideration" (*i.e.*, restriction, or allowance/provision by proxy) gave rise to the mistaken *Zeran* decision. Any information that is "considered" (*i.e.*, traditional editorial responsibility) and "allowed" (*i.e.*, knowingly provided/ advanced; *i.e.*, developed in part) by an ICS, is development in part, and must be subject to civil liability or, as a result, all distribution, publishing, information content providing liability is eliminated, including unlawful distribution and publishing (*i.e.*, knowingly causing harm). The statute cannot be reconciled in a way that distinguishes between "development by proxy" (as an inherent result of information content consideration

— 230(c)(2)(A)) and "development in part" (information content provision — in conflict with 230(c)(1) and 230(0(3)).

326. The definition of an ICP is at odds with (*i.e.*, irreconcilable with) the role of an ICS, who is acting as an ICP when "considering information" to restrict because it is also considering what to "allow" (*i.e.*, developing information in part — by proxy) under Section 230(c)(2)(A). Section 230(0(3)'s ICP definition and use of the phrase "development, in part" is irreconcilable with the function of Section 230(c)(2)(A) and the purpose of Section 230(c)(1). Section 230(c)(2)(A) is irreconcilable with its own statutory terms/use/function and, as a result, the CDA Section 230(c)(2)(A), at minimum, must be struck.

E. Conclusion

327. As stated at the outset of this constitutional challenge, this Court has the ability 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").

328. In its current state (some of it having to do with on its face, some of it having to do with as applied, some of it having to do with statutory construction, and some of it having to do with judicial misinterpretation, as demonstrated above), the CDA strips United States citizens of their constitutionally protected First Amendment and Fifth Amendment rights (case in point being the Facebook Lawsuit, primarily implicating deprivation of Fyk's Fifth Amendment rights, but also implicating his First Amendment

rights). That untenable end result comes from the CDA being so badly broken in myriad ways (*e.g.*, vague, misunderstood, misapplied, overbreadth, and unconstitutional, *et cetera*). Section 230, on its face and/or as applied, violates the Non-Delegation Doctrine/Major Questions Doctrine, Void-for-Vagueness Doctrine, Substantial Overbreadth Doctrine, Harmonious-Reading Canon, Irreconcilability Canon, Whole-Text Canon, Surplusage, and Absurdity Canon. Under any of these legal tenets (again, with the end result being the deprivation of constitutionally guaranteed rights), and whether considered separately or together, the CDA is unconstitutional and/or legally untenable and is due to be struck. And this is precisely the declaratory judgment that Fyk respectfully requests from this Court here — striking all of the CDA as unconstitutional and/or legally untenable (in the primary) or striking a portion of the CDA as unconstitutional (in the alternative).

329. Alternatively, the Court has the power and obligation to rein in Section 230 by narrowly conforming the application of Section 230 consistent with legislative intent, with constitutional tenets/mandates, and with the actual language of Section 230. If there was ever a way to fix the CDA in the alternative, amidst the CDA's so presently broken condition, the "fix" would necessarily have to involve the following immunity analysis (there is simply no other way in which the CDA could work, any underlying immunity analysis other than the following fails for one or more of the various reasons discussed throughout this constitutional challenge):

(a) The first logical point of Section 230(c) immunity analysis is the intelligible principle/general directive/general provision found in the very title of 230(c) — "Good Samaritan[ism]." If an ICS (*e.g.*, Facebook, Twitter, Google, YouTube) is not acting as a "Good Samaritan" (for example, one cannot be an anti-competitor and a "Good Samaritan" at the same time, that is *prima facie* oxymoronic, as observed in *Enigma*), then the Section 230(c) immunity analysis stops there; *i.e.*, does not proceed to the subsections of Section 230(c). If the "Good Samaritan" threshold is cleared, then the immunity analysis of 230(c)'s subsections necessarily begins to unfold as follows.

(b) Section 230(c)(1) immunizes a passive (inactive) ICS/provider/host/platform when the ICS takes no action with respect to the content provided by another ICP/user; *i.e.*, the provider or user is not treated as another publisher for the conduct of, or the content (exclusively) provided by, another. It makes perfect sense that where there is no harm inflicted by the ICS because there was no action taken by the ICS as to another ICP' s content, there is no foul that can be called against the ICS.[107] Section 230(c)(1) could

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[107] Originating with *Barnes,* courts have often applied a three-part test to determine Section 230(c)(1) immunity (or not) at the threshold. Unfortunately, this three-part Section 230(c)(1) immunity test lacks critical elements and converts "the publisher" (the actual language of Section 230(c)(1)) to "a publisher," which creates the irreconcilable conflict between Section 230(c)(1) and Section 230(c)(2) and otherwise renders Section 230(c)(2)(A) mere surplusage to Section 230(c)(1). The

remain intact, if clarified and narrowed down to its proper interpretation and application, namely proper effect being given to the actual statutory language ("the publisher") rather than the make-believe statutory language ("a publisher") that has somehow come about.

(c) Section 230(c)(2)(A) must be struck. Under no circumstance can Section 230(c)(2)(A) constitutionally delegate regulatory authority (*i.e.*, governmental obligation for consideration) to self-interested private entities (acting as an agent of government) to deny a United States citizen their Constitutional rights to free speech and due process. Section 230(c)(2)(A) must be struck and sent back to the legislature to be rewritten in accordance with the Constitutional doctrines. It makes perfect sense that an ICS should be able to delete patently offensive or universally recognized impermissible material provided by another ICP/user, without fear of liability. Decisions as to what is considered patently "offensive"

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incorrect *Barnes* three-part Section 230(c)(1) test goes as follows — Section 230(c)(1) immunity from liability exists for (a) a provider or user of an interactive computer service, (b) whom a plaintiff seeks to treat, under a state law cause of action, as "a" publisher or speaker, (c) of information provided by another information content provider. The correct Section 230(c)(1) test would actually be four parts and would go like this — Section 230(c)(1) immunity from liability exists for (a) a "Good Samaritan," (b) who is a provider or user of an interactive computer service, (c) whom a plaintiff seeks to treat, under a state law cause of action, as "the" publisher or speaker, (d) of information provided exclusively by another information content provider.

> or impermissible and immune from liability, however, cannot be left to self-interested private corporations, as has been demonstrated by one or more of the various reasons discussed throughout this constitutional challenge. Instead, an official regulatory commission must be formed[108] to determine universal contemporary community standards, which would be granted immunity provided the ICS restricted materials in accordance with the commission's standards. In its present form, Section 230(c)(2)(A) must be struck as unconstitutional. The proper (*i.e.*, constitutionally sufficient) legislative rewrite of Section 230(c)(2)(A) should read as follows: "No provider or user of an interactive computer service shall be held liable on account of — (A) any action voluntarily undertaken in good faith by the provider or user to restrict access to or availability of material that the provider or user reasonably considers

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[108] The legislature is at an impasse in regards to repealing or amending Section 230. Some legislators want Section 230 gone, while others want to keep it in place, giving them a formidable censorship and competitive weapon. The votes needed to repeal the statute, through the legislative process, are unattainable. This Court's actions could finally break the impasse (through the judicial process) and force the legislature to go back to the table and get it right by way of, among other things, setting up an impartial official regulatory commission tasked with setting up ("filling up the details") universal contemporary community standards and regulatory guidelines for all United States Internet companies to follow.

objectionable pursuant to universal contemporary community standards defined by the regulatory commission's prohibitions."[109]

(d) Section 230(c)(2)(B) (which expressly relates back to Section 230(c)(1) because it is the same kind of inaction situation in a slightly different context) immunizes an ICS when the ICS takes no action with respect to the content of another ICP #2/user #2 but provides the tools/services to an ICP 1/user 1 to take action on the content of ICP #2/user #2 — it makes sense that an ICS would not be subject to any liability for giving a parent/user/ICP (ICP #l) the tools needed to protect a child in eradication of pornography, for example, posted on the Internet by another user/ICP (ICP #2). Section 230(c)(2)(B), however, does include an exploitable flaw — an ICS could potentially provide the tools to ICP #1, with the instructions or directive to act upon ICP #*2*, thus laundering the ICS' own actions through a proxy ICP, analogous to Section 230(c)(2)(A). In its present form, Section 230(c)(2)(B) must be struck as unconstitutional. The proper (*i.e.*, constitutionally sufficient) legislative rewrite of Section 230 (c)(2)(B) should read as follows; "(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material

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[109] Rather than "regulatory commission," the actual name of the "regulatory commission" would be inserted here, like the FCC, for example.

> described by the (regulatory commission) is subject to the definitional protection of paragraph 230(c)(1)."

330. In sum, Section 230(c)(1) could stand alone, if the word "the" in "the publisher" is given proper (*i.e.*, literal) effect and the definitional protection of Section 230(c)(l) only relates to the inaction of the ICS. Under no circumstance, however, can Section 230(c)(2)(A) or Section 230(c)(2)(B) be constitutionally rectified.

331. Fyk respectfully requests from this Court the striking of all of the CDA (the most realistic route) or, alternatively, the striking of a portion of the CDA (Section 230(c)(2)) the less realistic, but theoretically conceivable route.[110]

Count I – Declaratory Judgment as to CDA Unconstitutionality

Plaintiff, Jason Fyk, re-alleges Paragraphs 1-331 above as if fully set forth herein and further alleges as follows.

332. Fyk was harmed by the application of the CDA (*see* Facebook Lawsuit, summarized in Ex. B) which had the effect of violating his Fifth Amendment

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[110] It is important to note that, under the current broken CDA landscape, no normal person has the realistic ability to challenge Big Tech and their ongoing abuses, partly because most courts dismiss actions (under illogical and/or unintelligible) without ever considering the merits. It takes a man like Elon Musk (one of the richest human beings on the planet), who is trying to acquire Twitter in an attempt to restore some semblance of free speech online. For just about everybody else (*i.e.*, folks not as rich as Elon Musk), the justice system is the last resort; hence, this constitutional challenge.

due process rights and/or suppressing his First Amendment rights.

333. Fyk has a bona fide, actual, and present need for declarations as to his rights, status, and privileges under the CDA, as to the constitutionality of the CDA, and/or as to the construction of the CDA.

334. Fyk respectfully requests a declaration from this Court that Section 230 is violative of the Non-Delegation Doctrine (*see*, *e.g.*, ¶¶ 3, 28-30, 36, 38, 49, 52, 63-103, 328, *supra*) and, thus, unconstitutional. As a result of Section 230's unconstitutionality, Fyk respectfully requests further declaration from this Court that Section 230 is hereby struck.

335. Fyk respectfully requests a declaration from this Court that Section 230 is violative of the Major Questions Doctrine (*see, e.g.*, ¶¶ 3, 31, 34-38, 48-49, 52, 63-103, 114, 270, 328, n. 29, *supra*) and, thus, unconstitutional. As a result of Section 230's unconstitutionality, Fyk respectfully requests further declaration from this Court that Section 230 is hereby struck.

336. Fyk respectfully requests a declaration from this Court that Section 230 is violative of the Void-for-Vagueness Doctrine (*see, e.g.*, ¶¶ 3, 39, 50, 52, 104-120, 206, 235-236, 328, *supra*) and, thus, unconstitutional. As a result of Section 230's unconstitutionality, Fyk respectfully requests further declaration from this Court that Section 230 is hereby struck.

337. Fyk respectfully requests a declaration from this Court that Section 230 is violative of the Substantial Overbreadth Doctrine (*see, e.g.*, ¶¶ 3, 51-52, 121-260, 289, 328, *supra*) and, thus, unconstitutional. As a

result of Section 230's unconstitutionality, Fyk respectfully requests further declaration from this Court that Section 230 is hereby struck.

338. Fyk respectfully requests a declaration from this Court that Section 230 is violative of the Harmonious-Reading Canon (*see, e.g.*, ¶¶ 3, 23-25, 262-304, 328, *supra*) and, thus, legally untenable. As a result of Section 230 being legally untenable under this canon of statutory construction (as well as unconstitutional under the above doctrines), Fyk respectfully requests further declaration from this Court that Section 230 is hereby struck.

339. Fyk respectfully requests a declaration from this Court that Section 230 is violative of the Irreconcilability Canon (*see, e.g.*, ¶¶ 3, 23, 26-27, 269, 287-288, 293, 295-296, 305-326, 328, *supra*) and, thus, legally untenable. As a result of Section 230 being legally untenable under this canon of statutory construction (as well as unconstitutional under the above doctrines), Fyk respectfully requests further declaration from this Court that Section 230 is hereby struck.

340. Fyk respectfully requests a declaration from this Court that Section 230 is violative of the Whole-Text Canon (*see, e.g.*, ¶¶ 3, 24-25, 262-304, 328, *supra*) and, thus, legally untenable. As a result of Section 230 being legally untenable under this canon of statutory construction (as well as unconstitutional under the above doctrines), Fyk respectfully requests further declaration from this Court that Section 230 is hereby struck.

341. Fyk respectfully requests a declaration from this Court that Section 230 is violative of the Surplusage Canon (*see, e.g.*, ¶¶ 3, 25, 262-304, 328, *supra*) and,

thus, legally untenable. As a result of Section 230 being legally untenable under this canon of statutory construction (as well as unconstitutional under the above doctrines), Fyk respectfully requests further declaration from this Court that Section 230 is hereby struck.

342. Fyk respectfully requests a declaration from this Court that Section 230 is violative of the Absurdity Canon (*see, e.g.*, ¶¶ 3, 71, 75, 109, 127, 132, 152, 212, 243, 248-249, 252, 256, 258, 262-304, 328, *supra*) and, thus, legally untenable. As a result of Section 230 being legally untenable under this canon of statutory construction (as well as unconstitutional under the above doctrines), Fyk respectfully requests further declaration from this Court that Section 230 is hereby struck.

343. In the alternative to the declarations Fyk seeks in Paragraphs 334-342 above (which, again, such primary declarations are likely the only realistic declarations here given the pervasive, multi-dimensional brokenness of the CDA), Fyk seeks an alternative declaration from this Court that Section 230 immunity follows the precise analysis set forth in Paragraph 329-330 and footnote 107 above.

344. As a direct, foreseeable, and proximate result of the unconstitutionality and/or illegality of Section 230 (and/or Defendant's enacting and/or maintaining an unconstitutional/illegal law), Fyk has suffered and continues to suffer harm along with millions of others.

345. Fyk has no other remedy to receive the aforementioned declarations other than this lawsuit.

346. As a further result of the unconstitutionality/ illegality of Section 230 (and/or Defendant's enacting

and/or maintaining an unconstitutional/illegal law), Fyk has been forced to retain legal counsel (who stand prepared to represent him in this matter pending District Court admission) and would accordingly entitled to recover his reasonable attorneys' fees and costs pursuant to Title 28, United States Code, Section 2412 or as otherwise awardable.

WHEREFORE, Plaintiff, Jason Fyk, respectfully requests that this Court declare and construe the CDA and enter declaratory judgment, as follows: declare the CDA unconstitutional, accordingly inoperative, and hereby struck. *See* ¶¶334-342, *supra*.[111] In conjunction with same, Fyk further respectfully requests (a) the Court's entry of declaratory judgment in his favor, for all declaratory and supplemental relief within the declaratory jurisdiction of this Court; (b) the Court's taxation of costs and/or award of reasonable attorneys' fees (ultimately) in favor of Fyk pursuant to Title 28, United States Code, Section 2412 or as otherwise taxable/awardable; and (c) the Court's awarding Fyk any other relief deemed equitable, just, or proper.[112]

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[111] Alternatively, *see* ¶¶ 4, 329-330 and 343, and n. 107, *supra.*

[112] Finally, in the spirit of full transparency, we advise the Court that it is likely Fyk will file (in the not-so-distant future) a motion for nationwide injunction as to the (non-)application of Section 230(c), which such injunction would/should remain in effect until this constitutional challenge is resolved.

Respectfully Submitted,

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Dated: May 2, 2022

ORDER OF THE SUPREME COURT OF THE UNITED STATES DENYING PETITION FOR A WRIT OF CERTIORARI [DE 46-1] (OCTOBER 13, 2020)

SUPREME COURT OF THE UNITED STATES

MALWAREBYTES, INC.

v.

ENIGMA SOFTWARE GROUP USA, LLC

No. 19-1284

The petition for a writ of certiorari is denied.

Statement of JUSTICE THOMAS respecting the denial of certiorari.

This petition asks us to interpret a provision commonly called § 230, a federal law enacted in 1996 that gives Internet platforms immunity from some civil and criminal claims. 47 U.S.C. § 230. When Congress enacted the statute, most of today's major Internet platforms did not exist. And in the 24 years since, we have never interpreted this provision. But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world.

This case involves Enigma Software Group USA and Malwarebytes, two competitors that provide software to enable individuals to filter unwanted content, such as content posing security risks. Enigma

sued Malwarebytes, alleging that Malwarebytes engaged in anticompetitive conduct by reconfiguring its products to make it difficult for consumers to download and use Enigma products. In its defense, Malwarebytes invoked a provision of § 230 that states that a computer service provider cannot be held liable for providing tools "to restrict access to material" that it "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." § 230(c)(2). The Ninth Circuit relied heavily on the "policy" and "purpose" of § 230 to conclude that immunity is unavailable when a plaintiff alleges anticompetitive conduct.

The decision is one of the few where courts have relied on purpose and policy to *deny* immunity under § 230. But the court's decision to stress purpose and policy is familiar. Courts have long emphasized nontextual arguments when interpreting § 230, leaving questionable precedent in their wake.

I agree with the Court's decision not to take up this case. I write to explain why, in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms.

I

Enacted at the dawn of the dot-com era, § 230 contains two subsections that protect computer service providers from some civil and criminal claims. The first is definitional. It states, "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." § 230(c)(1). This provision ensures that a company (like an e-mail

provider) can host and transmit third-party content without subjecting itself to the liability that sometimes attaches to the publisher or speaker of unlawful content. The second subsection provides direct immunity from some civil liability. It states that no computer service provider "shall be held liable" for (A) good-faith acts to restrict access to, or remove, certain types of objectionable content; or (B) giving consumers tools to filter the same types of content. § 230(c)(2). This limited protection enables companies to create community guidelines and remove harmful content without worrying about legal reprisal.

Congress enacted this statute against specific background legal principles. *See Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005) (interpreting a law by looking to the "backdrop against which Congress" acted). Traditionally, laws governing illegal content distinguished between publishers or speakers (like newspapers) and distributors (like newsstands and libraries). Publishers or speakers were subjected to a higher standard because they exercised editorial control. They could be strictly liable for transmitting illegal content. But distributors were different. They acted as a mere conduit without exercising editorial control, and they often transmitted far more content than they could be expected to review. Distributors were thus liable only when they knew (or constructively knew) that content was illegal. *See*, *e.g., Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, *3 (Sup. Ct. NY, May 24, 1995); Restatement (Second) of Torts § 581 (1976); *cf. Smith v. California*, 361 U.S. 147, 153 (1959) (applying a similar principle outside the defamation context).

The year before Congress enacted § 230, one court blurred this distinction. An early Internet company was sued for failing to take down defamatory content posted by an unidentified commenter on a message board. The company contended that it merely distributed the defamatory statement. But the company had also held itself out as a family-friendly service provider that moderated and took down offensive content. The court determined that the company's decision to exercise editorial control over some content "render[ed] it a publisher" even for content it merely distributed. *Stratton Oakmont*, 1995 WL 323710, *3–*4.

Taken at face value, § 230(c) alters the *Stratton Oakmont* rule in two respects. First, § 230(c)(1) indicates that an Internet provider does not become the publisher of a piece of third-party content—and thus subjected to strict liability simply by hosting or distributing that content. Second, § 230(c)(2)(A) provides an additional degree of immunity when companies take down or restrict access to objectionable content, so long as the company acts in good faith. In short, the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A).

This modest understanding is a far cry from what has prevailed in court. Adopting the too-common practice of reading extra immunity into statutes where it does not belong, *see Baxter v. Bracey*, 590 U.S. ___ (2020) (THOMAS, J., dissenting from denial of certiorari), courts have relied on policy and purpose arguments to grant sweeping protection to Internet

platforms. *E.g.,* 1 R. Smolla, Law of Defamation § 4:86, p. 4–380 (2d ed. 2019) ("[C]ourts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress); accord, Rustad & Koenig, Rebooting Cybertort Law, 80 Wash. L. Rev. 335, 342–343 (2005) (similar). I address several areas of concern.

A

Courts have discarded the longstanding distinction between "publisher" liability and "distributor" liability. Although the text of § 230(c)(1) grants immunity only from "publisher" or "speaker" liability, the first appellate court to consider the statute held that it eliminates distributor liability too—that is, § 230 confers immunity even when a company distributes content that it *knows* is illegal. *Zeran v. America Online, Inc.,* 129 F.3d 327, 331–334 (CA4 1997). In reaching this conclusion, the court stressed that permitting distributor liability "would defeat the two primary purposes of the statute," namely, "immuniz[ing] service providers" and encouraging "selfregulation." *Id.,* at 331, 334. And subsequent decisions, citing *Zeran*, have adopted this holding as a categorical rule across all contexts. *See*, *e.g., Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (CA1 2007); *Shiamili v. Real Estate Group of NY, Inc.*, 17 N.Y.3d 281, 288–289, 952 N.E.2d 1011, 1017 (2011); *Doe v. Bates*, 2006 WL 3813758, *18 (ED Tex., Dec. 27, 2006).

To be sure, recognizing some overlap between publishers and distributors is not unheard of. Sources sometimes use language that arguably blurs the distinction between publishers and distributors. One source respectively refers to them as "primary

publishers" and "secondary publishers or disseminators," explaining that distributors can be "charged with publication." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 799, 803 (5th ed. 1984).

Yet there are good reasons to question this interpretation.

First, Congress expressly imposed distributor liability in the very same Act that included § 230. Section 502 of the Communications Decency Act makes it a crime to "knowingly . . . display" obscene material to children, even if a third party created that content. 110 Stat. 133–134 (codified at 47 U.S.C. § 223(d)). This section is enforceable by civil remedy. 47 U.S.C. § 207. It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability in the very Act in which Congress explicitly imposed it.

Second, Congress enacted § 230 just one year after *Stratton Oakmont* used the terms "publisher" and "distributor," instead of "primary publisher" and "secondary publisher." If, as courts suggest, *Stratton Oakmont* was the legal backdrop on which Congress legislated, *e.g., FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (CA10 2009), one might expect Congress to use the same terms *Stratton Oakmont* used.

Third, had Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in § 230(c)(1): No provider "shall be held liable" for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content. § 230(c)(2). Where Congress uses a particular phrase in one subsection

and a different phrase in another, we ordinarily presume that the difference is meaningful. *Russello v. United States*, 464 U.S. 16, 23 (1983); *cf. Doe v. America Online, Inc.*, 783 So.2d 1010, 1025 (Fla. 2001) (Lewis, J., dissenting) (relying on this rule to reject the interpretation that § 230 eliminated distributor liability).

B

Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content. Section 230(c)(1) protects a company from publisher liability only when content is "provided by *another* information content provider." (Emphasis added.) Nowhere does this provision protect a company that is itself the information content provider. *See Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1165 (CA9 2008). And an information content provider is not just the primary author or creator; it is anyone "responsible, *in whole or in part*, for the creation or development" of the content. § 230(f)(3) (emphasis added).

But from the beginning, courts have held that § 230(c)(1) protects the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or *alter* content." *E.g., Zeran*, 129 F.3d, at 330 (emphasis added); *cf. id.,* at 332 (stating also that § 230(c)(1) protects the decision to "edit"). Only later did courts wrestle with the language in § 230(f)(3) suggesting providers are liable for content they help develop "in part." To harmonize that text with the interpretation that § 230(c)(1) protects "traditional editorial functions," courts relied on policy arguments to narrowly construe

§ 230(f)(3) to cover only substantial or material edits and additions. *E.g., Batzel v. Smith*, 333 F.3d 1018, 1031, and n. 18 (CA9 2003) ("[A] central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted").

Under this interpretation, a company can solicit thousands of potentially defamatory statements, "selec[t] and edi[t] . . . for publication" several of those statements, add commentary, and then feature the final product prominently over other submissions—all while enjoying immunity. *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 403, 410, 416 (CA6 2014) (interpreting "development" narrowly to "preserv[e] the broad immunity th[at § 230] provides for website operators' exercise of traditional publisher functions"). To say that editing a statement and adding commentary in this context does not "creat[e] or develo[p]" the final product, even in part, is dubious.

C

The decisions that broadly interpret § 230(c)(1) to protect traditional publisher functions also eviscerated the narrower liability shield Congress included in the statute. Section 230(c)(2)(A) encourages companies to create content guidelines and protects those companies that "in good faith . . . restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Taken together, both provisions in § 230(c) most naturally read to protect companies when they unknowingly *decline* to exercise editorial functions to edit or

remove third-party content, § 230(c)(1), and when they *decide* to exercise those editorial functions in good faith, § 230(c)(2)(A).

But by construing § 230(c)(1) to protect *any* decision to edit or remove content, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (CA9 2009), courts have curtailed the limits Congress placed on decisions to remove content, *see e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, *3 (MD Fla., Feb. 8, 2017) (rejecting the interpretation that § 230(c)(1) protects removal decisions because it would "swallo[w] the more specific immunity in (c)(2)"). With no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (CA9 2017), aff'g 144 F. Supp. 3d 1088, 1094 (ND Cal. 2015) (concluding that "'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(c)(1)).

D

Courts also have extended § 230 to protect companies from a broad array of traditional product-defect claims. In one case, for example, several victims of human trafficking alleged that an Internet company that allowed users to post classified ads for "Escorts" deliberately structured its web-site to facilitate illegal human trafficking. Among other things, the company "tailored its posting requirements to make sex trafficking easier," accepted anonymous payments, failed to verify e-mails, and stripped metadata from photographs to make crimes harder to track. *Jane Doe*

No. 1 v. Backpage.com, LLC, 817 F.3d 12, 16–21 (CA1 2016). Bound by precedent creating a "capacious conception of what it means to treat a website operator as the publisher or speaker," the court held that § 230 protected these web-site design decisions and thus barred these claims. *Id.,* at 19; *see also M. A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1048 (ED Mo. 2011).

Consider also a recent decision granting full immunity to a company for recommending content by terrorists. *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (CA2 2019), cert. denied, 590 U.S. ___ (2020). The court first pressed the policy argument that, to pursue "Congress's objectives, . . . the text of Section 230(c)(1) should be construed broadly in favor of immunity." 934 F.3d, at 64. It then granted immunity, reasoning that recommending content "is an essential result of publishing." *Id.,* at 66. Unconvinced, the dissent noted that, even if all publisher conduct is protected by § 230(c)(1), it "strains the English language to say that in targeting and recommending these writings to users . . . Facebook is acting as 'the *publisher* of . . . information provided by another information content provider.'" *Id.,* at 76– 77 (Katzmann, C. J., concurring in part and dissenting in part) (quoting § 230(c)(1)).

Other examples abound. One court granted immunity on a design-defect claim concerning a dating application that allegedly lacked basic safety features to prevent harassment and impersonation. *Herrick v. Grindr LLC*, 765 Fed. Appx. 586, 591 (CA2 2019), cert. denied, 589 U.S. ___ (2019). Another granted immunity on a claim that a social media company defectively designed its product by creating a

feature that encouraged reckless driving. *Lemmon v. Snap, Inc.*, 440 F. Supp. 3d 1103, 1107, 1113 (CD Cal. 2020).

A common thread through all these cases is that the plaintiffs were not necessarily trying to hold the defendants liable "as the publisher or speaker" of third-party content. § 230(c)(1). Nor did their claims seek to hold defendants liable for removing content in good faith. § 230(c)(2). Their claims rested instead on alleged product design flaws—that is, the defendant's own misconduct. *Cf. Accusearch*, 570 F.3d, at 1204 (Tymkovich, J., concurring) (stating that § 230 should not apply when the plaintiff sues over a defendant's "*conduct* rather than for the *content* of the information"). Yet courts, filtering their decisions through the policy argument that "Section 230(c)(1) should be construed broadly," *Force*, 934 F.3d, at 64, give defendants immunity.

II

Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail. Moreover, States and the Federal Government are free to update their liability laws to make them more appropriate for an Internet-driven society.

Extending § 230 immunity beyond the natural reading of the text can have serious consequences. Before giving companies immunity from civil claims for "knowingly host[ing] illegal child pornography," *Bates*, 2006 WL 3813758, *3, or for race discrimination,

Sikhs for Justice, 697 Fed. Appx., at 526, we should be certain that is what the law demands.

Without the benefit of briefing on the merits, we need not decide today the correct interpretation of § 230. But in an appropriate case, it behooves us to do so.

MOTION FOR RELIEF PURSUANT TO FED. R. CIV. P. 60(b) TO VACATE AND SET ASIDE ENTRY OF JUDGMENT [DE 46] (MARCH 22, 2021)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

No. 4:18-cv-05159-JSW

Before: Hon. Jeffrey S. WHITE, United States District Judge.

PRELIMINARY STATEMENT

Plaintiff, Jason Fyk ("Fyk"), was robbed of his day in Court because of the mistaken application of immunity principles which, as Justice Clarence Thomas recently stated, are based on "questionable precedent" under the Communications Decency Act ("CDA").[1]

[1] Besides new precedent arising from the October 13, 2020, United States Supreme Court decision, Justice Thomas provided key analysis/guidance regarding the proper interpretation and

Fyk's Complaint (filed in August 2018) asked " . . . whether Facebook can, without consequence, engage in brazen tortious, unfair and anticompetitive, extortionate, and/or fraudulent practices . . . ." [D.E. 1] at 1. In late-2019, the Ninth Circuit court determined that "*[t]he Good Samaritan provision of the Communications Decency Act does not immunize blocking and filtering decisions that are driven by anticompetitive animus*." *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. (Cal.) 2019) (emphasis added), cert. denied *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13 (2020). While this Court has previously rendered a decision on the immunity of Defendant, Facebook, Inc. ("Facebook"), this Court's decision is diametrically opposed to, and cannot be reconciled with, the new legal precedent of the Ninth Circuit, which was implicitly affirmed by the United States Supreme Court by denial of certiorari in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13 (2020), and Justice Clarence Thomas' accompanying Statement (Ex. A).

More specifically, after this Court granted Facebook's 12(b)(6) motion and after Fyk had filed his appeal in the Ninth Circuit, the Ninth Circuit issued its opinion in *Enigma* resulting in new precedent that was unavailable to Fyk, which, had it been applied to Fyk's case, would have resulted in a reversal of this Court's dismissal on the pleadings. While Fyk's Petition for Certiorari was denied by the Supreme

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application of Section 230 protections. *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13 (2020). Because Justice Thomas' *Enigma* Statement is a must read for this Court, in our opinion, we have attached same hereto as Exhibit A and fully incorporate same herein by reference.

Court, which is certainly not obligated to address inconsistent applications of law within this Circuit, this Court should re-examine the dismissal under the Ninth Circuit's controlling *Enigma* precedent rendered while Fyk's appeal was pending. *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019), cert. denied, 141 S. Ct. 13, 208 L. Ed. 2d 197 (2020). Because of the dismissal by this Court, which the Ninth Circuit's new legal precedent overturns (because, again, the analysis should not even get into treating an interactive computer service as "a publisher"/"the publisher," or not, where, as here and in *Enigma*, the interactive computer service's (here, Facebook's) anticompetitive animus renders it ineligible for any Section 230 "Good Samaritan" protection at the threshold), the merits of Fyk's case have never even been heard.

The decisions of the two higher courts answered an important question of legislative intent relating to immunity conferred upon commercial actors under the CDA–whether that immunity is absolute and protects anticompetitive actions (amongst other illegalities). The Ninth Circuit definitively ruled that immunity is not absolute in the context of anticompetitive actions, a determination directly at odds with this Court's prior decision. These decisions impact not only the instant matter, but billions of social media users just like Fyk. For example, and worth noting,[2] this Court's dismissal of this action–now demonstrated to be erroneous under Ninth Circuit

[2] "Worth noting" because we recognize this Court's primary focus in a 60(b) setting is to correct legal wrongs though this Court should weigh the public's interests when considering such a motion.

law–has massive implications on the entire nation due to the vagueness of Section 230's immunity language.

This Court should vacate the previous judgment because its decision regarding immunity is directly contradicted by the *Enigma* decision. This Court cannot disregard significant changes in law or facts if it is "satisfied that what it has been doing has been turned through chang[ed] circumstances into an instrument of wrong." *U.S. v. Swift & Co.,* 286 U.S. 106, 114-15 (1932). Such is the case here.

Not only has the legal precedent changed since this Court made its determinations, but equitable considerations necessitate vacating the judgment. If the Court does not vacate its judgment, it will be effectively allowing Facebook and other social media platforms to bully their users to prevent any sort of competition with their own algorithms predicated on their own "anticompetitive conduct" rather than "blocking and screening of offensive materials."

For the reasons set forth more fully herein, and the outcome in this case being plainly and obviously unjust, the previous judgment dismissing this case should be vacated by this Court.

STATEMENT OF FACTS

Fyk is the owner-publisher of WTF Magazine. For years, Fyk used social media to create and post humorous content on Facebook's purportedly "free" social media platform. Fyk's content was extremely popular and, ultimately, Fyk had more than 25,000,000 documented followers on his Facebook pages/businesses. According to some ratings, Fyk's Facebook

page (WTF Magazine) was ranked the fifth most popular page on Facebook, ahead of competitors like BuzzFeed, College Humor, Upworthy, and large media companies like CNN. This all changed when Facebook began fraudulently "policing" Fyk . . . not based on the substance of content, but, rather, purely "for monetary purposes;" *i.e.*, anticompetitive purposes.

On August 22, 2018, Fyk sued Facebook in the District Court, alleging fraud, unfair competition, extortion, and tortious interference with his economic advantage based on Facebook's anticompetitive animus. "This case asks whether Facebook can, without consequence, *engage in brazen tortious, unfair and anticompetitive, extortionate, and/or fraudulent practices* that caused the build-up (through years of hard work and entrepreneurship) and subsequent destruction of Fyk's multimillion dollar business with over 25,000,000 followers merely because Facebook "owns" its "free" social media platform." [D.E. 1] at 1 (emphasis added). Facebook filed a 12(b)(6) motion, based almost entirely on CDA Section 230(c)(1) immunity. The Court dismissed Fyk's case on June 18, 2018. *See* Exhibit B. Fyk then appealed. The Ninth Circuit Court denied the appeal on June 12, 2020. *See* Exhibit C. The Supreme Court denied Certiorari on January 11, 2021. *See* Exhibit D.

LEGAL STANDARD

Rule 60(b) motions allow the Court the opportunity to revisit cases and correct injustice. Rule 60(b) motions are addressed to the sound discretion of the District Court. *See, e.g., Martella v. Marine Cooks & Stewards Union,* 448 F.2d 729, 730 (9th Cir. 1971). When faced with a Rule 60(b) motion, a court should

balance the competing principles of finality and relief from unjust judgments giving a "liberal construction to (60b)." *Id.* quoting 7 Moore's Federal Practice P.60.18[8] P.60-138.

Federal Rule of Civil Procedure 60(b)(5) specifically provides parties with relief from a judgment or order when "a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." *See* Fed. R. Civ. P. 60(b)(5). It is well settled that relief under Rule 60(b) is appropriate where there has been a subsequent change in the law. *See, e.g., Milgard Tempering, Inc. v. Selas Corp. of America,* 902 F.2d 703, 715 (9th Cir. 1990) (A court "properly exercises its discretion to reconsider an issue previously decided" when "a change in the law has occurred"); *see also, e.g., Kirkbride v. Continental Cas. Co.,* 933 F.2d 729, 732 (9th Cir. 1991) ("[t]he district court was entitled to reconsider its position" in light of new law). Notably, the Ninth Circuit has expressly embraced the "flexible standard" for Rule 60(b)(5) adopted by the United States Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). *See, e.g., Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1255-56 (9th Cir. 1999); *Hook v. Arizona*, 120 F.3d 921, 924 (9th Cir. 1997). Under this standard, a party seeking a modification of a court order need only establish that a "significant change in facts or law warrants a revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 393; *SEC v. Coldicutt*, 258 F.3d 939, 942 (9th Cir. 2002).

Moreover, the United States Supreme Court has repeatedly confirmed that a district court always

possesses the inherent authority to modify a judgment in light of significant changed circumstances, including changes in law or fact. *See, e.g., System Federation v. Wright,* 364 U.S. 642, 647 (1961). "[T]he court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned through chang[ed] circumstances into an instrument of wrong.'" *Agostini v. Felton,* 521 U.S. 203, 215 (1997) (citing *System Federation*, 364 U.S. at 647, quoting *United States v. Swift & Co.,* 286 U.S. 106, 114-15 (1932)).

LEGAL ARGUMENT

I. This Court Should Vacate Its Previous Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(5) Because Enigma Changed the Law and Created a Precedent That Cannot Be Reconciled with This Court's Decision.

This Court should vacate or set aside its prior judgment dismissing this case because the *Enigma* decision rendered by the Ninth Circuit, and United States Supreme Court's Justice Thomas' approval of a narrower reading of Section 230 than applied by this Court, serve as new legal precedent undermining this Court's previous findings and conclusions.

On October 13, 2020, *Enigma*, a case deciding the very issue at the heart of this matter, successfully overcame a 12(b)(6) motion to dismiss. The case citations and related discussions found in Justice Thomas' *Enigma* Statement (Ex. A) make clear that federal courts across this country have been consistently inconsistent for many years. A few courts identified in

Justice Thomas' *Enigma* Statement have interpreted CDA immunity correctly 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); *e-ventures Worldwide, LLC v. Google, Inc.*, 214CV646FTMPAMC M, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017). But other courts, including this one, have mistakenly applied CDA immunity. *See, 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); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). As Justice Thomas expressed, Section 230(c)(1) immunity has been read so broadly that it renders Section 230(c)(2)(a) superfluous. "The decisions that broadly interpret § 230(c)(1) to protect traditional publisher functions also eviscerated the narrower liability shield Congress included in the statute." *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13 (2020), J. Thomas Statement at 7.

This is in line with the Ninth Circuit's now final decision in *Enigma*. By way of summary, "Enigma sued Malwarebytes, alleging that Malwarebytes engaged in anticompetitive conduct by reconfiguring its products [*i.e.*, acting as "a publisher"] to make it difficult for consumers to download and use Enigma products." *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13 (2020). The Ninth Circuit looked to the policy and purpose of Section 230 to conclude that immunity is unavailable when a plaintiff alleges anticompetitive conduct because that Court "recognize[d] that interpreting the statute to

give providers unbridled discretion to block online content would . . . enable and potentially motivate internet-service providers to act for their own, and not the public, benefit." *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1051 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13, 208 L. Ed. 2d 197 (2020). The *Enigma* decision establishes clear, new precedent confirming that immunity is unavailable when a plaintiff alleges anticompetitive conduct–a decision that directly contradicts (1) this Court's conclusion that "*any activity* that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." Ex. B at 4 (citing *Roommates*, 521 F.3d at 1170-71) (emphasis added); and (2) the Ninth Circuit's narrower conclusion that "nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service." Ex. C at 4.

The decisions made in this case cannot coexist with *Enigma*; they are diametrically opposed.

In fact, this Court's analysis falls victim to "the too-common practice of reading extra immunity into statutes where it does not belong." *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13 (2020), J. Thomas Statement at 4*; see also Baxter v. Bracey*, 140 S. Ct. 1862, 207 L. Ed. 2d 1069 (2020) (THOMAS, J., dissenting from denial of certiorari, noting that courts have relied on policy and purpose arguments to grant sweeping protection to Internet platforms); 1 R. Smolla, Law of Defamation § 4:86, p. 4–380 (2d ed. 2019) (stating that "courts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress");

accord *Rustad & Koenig, Rebooting Cybertort Law*, 80 Wash. L. Rev. 335, 342–343 (2005) (similar).

Simply put, under this clear law, either (1) one cannot be treated as "a publisher" and the motive to take "any action" is irrelevant, or (2) motive is relevant and being a publisher becomes irrelevant based on the motive for taking "any action." The *Enigma* decision clearly demonstrates that the motive matters. Again, the decisions made in this case cannot coexist with *Enigma*; again, they are diametrically opposed.

Fyk's 12(b)(6) dismissal cannot stand without undermining the entirety of the *Enigma* decision. While "actions [taken] for monetary purposes do[] not . . . transform Facebook into a content developer," Ex. C at 3-4, they do, however, disqualify Facebook's actions as that of a "Good Samaritan." Thus, Facebook's anticompetitive conduct fails to qualify for protection at the 230(c) threshold, making both 230(c)(1) and 230(c)(2) irrelevant. This Court correctly noted in its Order Granting Motion to Dismiss (Ex. B), that "immunity, 'like other forms of immunity, is generally accorded effect at *the first logical point* in the litigation process" because "immunity is an immunity from suit rather than a mere defense to liability.'" Ex. B at 2, citing, inter alia, *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (9th Cir. 2009) (emphasis added). Enigma's new 230(c) precedent "Good Samaritan" standard is *"the first logical point"* to determine 12(b)(6) immunity. The question the courts (including this Court in this 60(b) setting) must now ask at the 230(c) threshold is–*did the interactive computer service provider act as a "Good Samaritan" in its decisions to block or screen materials?*

Importantly, the Ninth Circuit's *Enigma* decision expressly recognized that the scope of claimed immunity is still an open legal question. Noting that district courts have differed on the scope of Section 230 immunity, the Ninth Circuit found that this issue was not yet resolved. "What is clear to us from the statutory language, history, and case law is that *providers do not have unfettered discretion* to declare online content 'objectionable' and *blocking and filtering decisions that are driven by anticompetitive animus are not entitled to immunity* under section 230(c)(2)." *Enigma*, 946 F.3d at 1047 (emphasis added).

Justice Thomas further illuminated the analysis that this Court should have conducted. *See Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13 (U.S. 2020), Ex. A. Justice Thomas highlighted many, *if not all*, of the same conflicts and concerns Fyk raised regarding improper textual interpretation and overly broad/vague application of Section 230 immunity where none should exist. *See id.* Again, because Justice Thomas' *Enigma* Statement is a must read for this Court, in our opinion, we have attached the same hereto as Exhibit A and fully incorporate same herein by reference as noted above in footnote 1.

Justice Thomas advised that "[c]ourts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content." *Id.*, J. Thomas Statement at 6. Moreover, " . . . [c]ourts have long emphasized nontextual arguments when interpreting § 230, leaving questionable precedent in their wake." *Id.*, J. Thomas Statement at 2. Justice Thomas went on to say, "[p]aring back the sweeping immunity courts have read into § 230 would

not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail." *Id.*, J. Thomas Statement at 9. This rings true in the instant matter; preventing this case from being heard on its merits on the basis of (overly broad/vague) immunity–which has been rejected by the Ninth Circuit–denies Fyk his Constitutional right to be heard, calling into question matters of due process (among other things).

As Justice Thomas recognized, there is a difference between a claim seeking to hold a service provider liable for the actions and/or conduct of another, rather than for holding a company liable for its own misconduct:

> *. . . plaintiffs were not necessarily trying to hold the defendants liable as the publisher or speaker of third-party content. § 230(c)(1).* Nor did their claims seek to hold defendants liable for removing content in good faith. § 230(c)(2). *Their claims rested instead on . . . defendant's own misconduct*.' [Emphasis Added] Cf. Accusearch, 570 F.3d, at 1204 (Tymkovich, J., concurring) (stating that § 230 should not apply when the plaintiff sues over a defendant's 'conduct rather than for the content of the information').

Id., J. Thomas Statement at 9 (emphasis added). The latter circumstances apply here. This Court mistakenly determined "Plaintiff's claims here seek to hold Facebook liable as the "publisher or speaker" of that third party content." Ex. B at 3. Whereas here, in actuality, Fyk seeks to hold Facebook liable for its own

misconduct for "*engag[ing] in brazen tortious, unfair and anticompetitive, extortionate, and/or fraudulent practices*," [D.E. 1] at 1 (emphasis added), not for the content or misconduct of third parties.

While, as this Court was already misled,[3] "the statute [Section 230] suggests that if a company *unknowingly* [no involvement/"no action"] leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by Section 230(c)(2)(A)." *Enigma*, 141 S. Ct. 13, J. Thomas Statement at 3-4. "Taken together, both provisions in

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[3] As to this Court being "misled" by Facebook, this Court's determination was predicated, in part, on Facebook's patently false 12(b)(6) motion representations to this Court about one of Fyk's pages/businesses purportedly being dedicated to featuring public urination (undoubtedly to steer this case towards "offensive" content and away from Facebook's own anticompetitive misconduct). This Court wrongly converted this Facebook lie into "fact" by referencing/relying on same at the very start of the dismissal order: "Plaintiff had used Facebook's free online platform to create a series of, among other amusing things, pages *dedicated to videos and pictures of people urinating*." Ex. B at 1 (emphasis added). This repugnant assertion by Facebook, and this Court's incorrect adoption of same, has perpetuated even more damage to Fyk as exemplified by defamatory headlines such as "Self-Made Millionaire Loses Lawsuit Over Facebook's Removal Of Videos Of People Urinating" and "Per Section 230, Facebook Can Tell This Plaintiff To Piss Off–*Fyk v. Facebook*." To be clear, Fyk did not at any time have pages dedicated to or publishing content of any nature "dedicated to urinating." To the contrary, Fyk reported similar such content published by others on Facebook to which Facebook hypocritically determined such urination in public content to "not violate [their] community standards." This deliberate fraud put forth by Facebook to mislead the Court brings into question whether this case should be vacated on 60(b)(3).

§ 230(c) most naturally read to protect companies when they unknowingly [no involvement/"no action"] *decline* to exercise editorial functions to edit or remove third-party content, § 230(c)(1), and when they *decide* to exercise those editorial functions in good faith, § 230(c)(2)(A)," *id.* at 7 (italicized emphasis in original, bold emphasis added); but, "[t]his modest understanding is a far cry from what has prevailed in court" as it adopts the "too-common practice of reading extra immunity into statutes where it does not belong, . . . far beyond anything that plausibly could have been intended by Congress." *Id.* at 4 (citing *Baxter v. Bracey*, 590 U.S.; Rustad & Koenig, Rebooting Cybertort Law, 80 Wash. L. Rev. 335, 342–343 (2005)).

Here, Facebook is *knowingly* soliciting content from higher paying participants like Fyk's competitor and removing lesser valuable content/participants like Fyk and fraudulently applying deliberately vague "Community Standards" for the purposes of Facebook's own "antitrust/anticompetitive animus." Justice Thomas noted, under the broad approach that courts have been erroneously taking (and which this Court took), "a company can solicit thousands of potentially defamatory statements (from more valuable participants like Fyk's competitor as is the case here), "selec[t] and edi[t] . . . for publication" several of those statements, add commentary, and then feature the final product prominently over other submissions (less valuable participants like Fyk's)–all while enjoying immunity. *See Enigma,* 141 S. Ct. 13, J. Thomas Statement at 6-7 (citing *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 403, 410, 416 (CA6 2014) (interpreting "development" narrowly to "preserv[e] the broad immunity th[at

Section 230] provides for website operators' exercise of traditional publisher functions")).

Here too, the Court construed Section 230(c)(1) broadly and 230(f)(3) narrowly, an approach at odds with the Ninth Circuit's *Enigma* decision and specifically rejected in Justice Thomas's *Enigma* Statement. The Court is once again "[a]dopting the too-common practice of reading extra immunity into statutes where it does not belong." *Enigma*, 141 S. Ct. 13, J. Thomas Statement at 4. Here, Fyk's allegations demonstrate how Facebook solicits content from higher valued "sponsored" participant content (like Fyk's competitor) and are prominently displayed by Facebook in the Newsfeed, displacing other less valuable participants content like Fyk's. As noted in Fyk's response in opposition to Facebook's motion to dismiss: "[m]oreover, in addition to indirectly interfering and competing with Fyk, Facebook is a direct competitor that is not entitled to CDA immunity." [D.E. 27] at 7 (emphasis in original). Accordingly, we respectfully request that the Court vacate the judgment entered against Fyk and remand the case for trial on the merits. Alternatively, we respectfully request that the Court grant Fyk the opportunity to amend his Complaint as it would no longer be "futile in this instance" (words wrongly employed by this Court in its dismissal order) based on the *Enigma* decisions and Justice Thomas' detailed Section 230 analysis.

II. Even if Federal Rule of Civil Procedure 60(b)(5) Was Inapplicable, This Court Should Nonetheless Utilize Its Equitable Powers Under 60(b)(6) to Prevent Injustice.

Even if this Court were to deny Fyk's request to vacate the judgment pursuant to Federal Rule of Civil Procedure 60(b)(5), it should still vacate the judgment to avoid a "manifest injustice."

Rule 60 offers equitable relief to a party seeking to vacate a judgment in order to avoid "manifest injustice." *Latshaw v. Trainer Wortham Comp. Inc.*, 452 F.3d 1097, 1103 (9th Cir. 2006); *U.S. v. Washington* 394 F.3d 1152, 1157(9th Cir. 2005), overruled on other grounds in *U.S. v. Washington* 593 F.3d 790 (9th Cir. 2010), *U.S. v. Alpine Land & Reservoir Co.* 984 F.2d 1047, 1049 (9th Cir. 1993)). Rule 60(b)(6) has been called "a grand reservoir of equitable power," and it affords courts the discretion and power "to vacate judgments whenever such action is appropriate to accomplish justice." *Phelps v. Alameida* 569 F.3d 1120, 1135 (9th Cir. 2009) (quoting *Gonzalez v. Crosby* 545 U.S. 524, 542 (2005), quoting *Liljeberg v. Health Servs. Acquisition Corp.* 486 U.S. 847, 864 (1988)). Under this standard, Rule 60 relief is not governed by any *per se* rule, but is to be granted on a case-by-case basis when the facts of a given case warrant such relief.

In *Phelps*, the Ninth Circuit set forth certain factors "designed to guide courts in determining whether . . . extraordinary circumstances [as required for Rule 60 relief] have been demonstrated by an individual seeking relief under the rule." *Phelps v. Alameida, supra,* 569 F.3d 1120. Courts should consider whether:

> (1) a litigant has diligently pursued relief that respects the strong public interest in timeliness and finality", "(2) whether granting relief would 'undo the past, executed effects of the judgment, thereby disturbing the parties' reliance interest in the finality of the case, as evidence, for example, by detrimental reliance or a change in position" and if "(3) given, in the court's opinion, that a central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard[;] [i]n such cases, this factor will cut in favor of granting Rule 60(b)(6) relief.

Phelps, 569 F.3d at 1137-1140. These factors all support Fyk's request for relief.

First, Fyk diligently pursued relief. The United States Supreme Court denied writ of certiorari on January 11, 2021. *See* Ex. D. Only about two months have passed. Therefore, Fyk has clearly been diligent. And, in this vein, it is worth mentioning that Fyk submitted his Petition to the Supreme Court a couple months earlier than such was due, which militates further towards the timeliness of this brief.

Second, no party has detrimentally relied on this Court's judgment where it would cause any harm for the case to actually be litigated. Facebook's conduct has not had to change in reliance upon the Court's order because the Court's order merely maintained the status quo that existed prior to the filing of this action.

Third, this Court must correct the previous judgment to prevent massive injustice from occurring. Issues surrounding broad CDA immunity are of national (potentially global) significance and federal courts' consistently inconsistent application of Section 230 protections have "serious consequences" (again borrowing words from Justice Thomas' *Enigma* Statement) for millions of users like Fyk. That the subject matter of this suit is of critical importance cannot be doubted, as illustrated by major coverage of the issue in the past year. The following articles are a small subset of examples: (1) Both Trump and Biden have criticized Big Tech's favorite law–here's what Section 230 says and why they want to change it, CNBC (May 28, 2020); (2) Section 230 under attack: Why Trump and Democrats want to rewrite it, USA Today (Oct. 15, 2020); (3) Biden wants to get rid of tech's legal shield Section 230, CNBC (Jan. 17, 2020); (4) Trump's Social Media Order Puts a Target on Communications Decency Act, law.com (Jun. 14, 2020). The heads of Facebook, Twitter, and Google were in front of Congress on October 28, 2020, to discuss some of the "serious consequences" flowing from unbridled CDA immunity–that is, from silencing voices among myriad other nefarious things. A decision on this matter is pivotal not just to Fyk–who has suffered harm at the hands of Facebook, namely by way of Facebook's legally repugnant anticompetitive conduct and subsequent defamatory content misrepresentations–but also to the billions of social media users globally. If this decision were to stand, it would allow Facebook and other social media platforms to make blocking and filtering decisions for their own benefit rather than for the benefit of others acting as a "Good Samaritan" and accordingly prevent any competition

with themselves, whatsoever; *i.e.*, it would allow Facebook to engage in anticompetitive conduct, which would be glaringly illegal had it not unfolded within the ether of the Internet.

By preventing a case like Fyk's from going forward, there will never be a resolution on the clearly open question of the scope of Section 230 immunity.

There is no question that this case deals with an issue of public harm. The Supreme Court, the President of the United States (both President Trump and President Biden), the Department of Justice, Congress, and the public have all recognized the need for the scope of Section 230 to be examined. Fyk has presented a case requiring that examination. This Court should no longer shy away from addressing the *massively* critical substance of these issues and must act to prevent a *manifest* injustice.

III. This Motion Has Been Filed Within a Reasonable Time.

Motions filed pursuant to Rule 60(b) "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). "What constitutes a reasonable time depends on the facts of each case." *In re Pac. Far E. Lines, Inc.*, 889 F.2d 242, 249 (9th Cir. 1989).

> What constitutes reasonable time depends on the facts of each case. *See Washington v. Penwell,* 700 F.2d 570, 572-73 (9th Cir. 1983) (four-year delay not unreasonable because of extraordinary circumstances); *Twentieth Century-Fox Film Corp. v. Dunnahoo,* 637 F.2d 1338, 1841 (9th Cir 1981) (six-year delay

> unreasonable in case of liquidated damages decree and no extraordinary circumstances); *Clarke v. Burkle,* 570 F.2d at 831-32 (six year delay not unreasonable).

U.S. v. Holtzman, 762 F.2d 720, 725 (9th Cir 1985).

When determining if a delay was reasonable, courts consider "the danger of prejudice to the petitioner; length of the delay and its potential impact on judicial proceedings; reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Inv. Servs. Co v. Brunswick Associates L.P.*, 507 U.S. 380, 392-97, 113 S. Ct. 1489, 1497-99 (1993). In the instant matter, Fyk acted with good faith. The United States Supreme Court denied writ of certiorari on January 11, 2021. *See* Ex. D. Thus, the "delay" was just about two months and could not by any stretch of reasoning be considered to be unreasonable. Moreover, no prejudice will be suffered by Facebook past having to defend its case. And, again, Fyk's Supreme Court Petition was filed a couple months ahead of schedule. Therefore, this Motion has been filed within a reasonable time pursuant to the Federal Rules of Civil Procedure.

CONCLUSION

New law that directly impacts the outcome of this case has been decided by the United States Supreme Court and the Ninth Circuit. Those decisions cannot be reconciled with this Court's previous decision. This reason alone justifies this Court's vacating the judgment under 60(b)(5) at the very least. Moreover, the Court was deliberately misled by Facebook's fraudulent 12(b)(6) representation about the nature of a

certain Fyk page/business, justifying this Court's vacating the judgment under 60(b)(3) at the very least. Moreover, a "manifest injustice" would occur in the absence of this Court's intervention, justifying vacating the judgment under 60(b)(6) at the very least. If this Court's previous decision were to stand, it would be devastating for billions of social media users globally because it would allow social media platforms to enjoy a broader sense of immunity than Congress ever intended, authorizing them to engage in anticompetitive penalization-oriented conduct, while enjoying *carte blanche*, sovereign-like immunity, which such function should not be conferred upon any entity including private entities under, as just one of many tenet-type examples, the non-delegation doctrine (in the vein of aforementioned penalization).

WHEREFORE, Plaintiff, Jason Fyk, respectfully requests entry of an order (1) granting Fyk's 60(b) motion; *i.e.*, vacating the Court's prior judgment, and/or (2) affording Fyk any other relief the Court deems equitable, just, or proper.

Respectfully Submitted,

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Dated: March 22, 2021.

ORDER OF THE SUPREME COURT OF THE UNITED STATES DENYING PETITION FOR A WRIT OF CERTIORARI [DE 46-1] (OCTOBER 13, 2020)

SUPREME COURT OF THE UNITED STATES

MALWAREBYTES, INC.

v.

ENIGMA SOFTWARE GROUP USA, LLC

No. 19-1284

The petition for a writ of certiorari is denied.

Statement of JUSTICE THOMAS respecting the denial of certiorari.

This petition asks us to interpret a provision commonly called § 230, a federal law enacted in 1996 that gives Internet platforms immunity from some civil and criminal claims. 47 U.S.C. § 230. When Congress enacted the statute, most of today's major Internet platforms did not exist. And in the 24 years since, we have never interpreted this provision. But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world.

This case involves Enigma Software Group USA and Malwarebytes, two competitors that provide software to enable individuals to filter unwanted content, such as content posing security risks. Enigma

sued Malwarebytes, alleging that Malwarebytes engaged in anticompetitive conduct by reconfiguring its products to make it difficult for consumers to download and use Enigma products. In its defense, Malwarebytes invoked a provision of § 230 that states that a computer service provider cannot be held liable for providing tools "to restrict access to material" that it "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." § 230(c)(2). The Ninth Circuit relied heavily on the "policy" and "purpose" of § 230 to conclude that immunity is unavailable when a plaintiff alleges anticompetitive conduct.

The decision is one of the few where courts have relied on purpose and policy to *deny* immunity under § 230. But the court's decision to stress purpose and policy is familiar. Courts have long emphasized non-textual arguments when interpreting § 230, leaving questionable precedent in their wake.

I agree with the Court's decision not to take up this case. I write to explain why, in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms.

I

Enacted at the dawn of the dot-com era, § 230 contains two subsections that protect computer service providers from some civil and criminal claims. The first is definitional. It states, "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." § 230(c)(1). This provision ensures that a company (like an e-mail

provider) can host and transmit third-party content without subjecting itself to the liability that sometimes attaches to the publisher or speaker of unlawful content. The second subsection provides direct immunity from some civil liability. It states that no computer service provider "shall be held liable" for (A) good-faith acts to restrict access to, or remove, certain types of objectionable content; or (B) giving consumers tools to filter the same types of content. § 230(c)(2). This limited protection enables companies to create community guidelines and remove harmful content without worrying about legal reprisal.

Congress enacted this statute against specific background legal principles. *See Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005) (interpreting a law by looking to the "backdrop against which Congress" acted). Traditionally, laws governing illegal content distinguished between publishers or speakers (like newspapers) and distributors (like newsstands and libraries). Publishers or speakers were subjected to a higher standard because they exercised editorial control. They could be strictly liable for transmitting illegal content. But distributors were different. They acted as a mere conduit without exercising editorial control, and they often transmitted far more content than they could be expected to review. Distributors were thus liable only when they knew (or constructively knew) that content was illegal. *See*, *e.g., Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, *3 (Sup. Ct. NY, May 24, 1995); Restatement (Second) of Torts § 581 (1976); *cf. Smith v. California*, 361 U.S. 147, 153 (1959) (applying a similar principle outside the defamation context).

The year before Congress enacted § 230, one court blurred this distinction. An early Internet company was sued for failing to take down defamatory content posted by an unidentified commenter on a message board. The company contended that it merely distributed the defamatory statement. But the company had also held itself out as a family-friendly service provider that moderated and took down offensive content. The court determined that the company's decision to exercise editorial control over some content "render[ed] it a publisher" even for content it merely distributed. *Stratton Oakmont*, 1995 WL 323710, *3–*4.

Taken at face value, § 230(c) alters the *Stratton Oakmont* rule in two respects. First, § 230(c)(1) indicates that an Internet provider does not become the publisher of a piece of third-party content—and thus subjected to strict liability simply by hosting or distributing that content. Second, § 230(c)(2)(A) provides an additional degree of immunity when companies take down or restrict access to objectionable content, so long as the company acts in good faith. In short, the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A).

This modest understanding is a far cry from what has prevailed in court. Adopting the too-common practice of reading extra immunity into statutes where it does not belong, *see Baxter v. Bracey*, 590 U.S. ___ (2020) (THOMAS, J., dissenting from denial of certiorari), courts have relied on policy and purpose arguments to grant sweeping protection to Internet

platforms. *E.g.,* 1 R. Smolla, Law of Defamation § 4:86, p. 4–380 (2d ed. 2019) ("[C]ourts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress); accord, Rustad & Koenig, Rebooting Cybertort Law, 80 Wash. L. Rev. 335, 342–343 (2005) (similar). I address several areas of concern.

A

Courts have discarded the longstanding distinction between "publisher" liability and "distributor" liability. Although the text of § 230(c)(1) grants immunity only from "publisher" or "speaker" liability, the first appellate court to consider the statute held that it eliminates distributor liability too—that is, § 230 confers immunity even when a company distributes content that it *knows* is illegal. *Zeran v. America Online, Inc.,* 129 F.3d 327, 331–334 (CA4 1997). In reaching this conclusion, the court stressed that permitting distributor liability "would defeat the two primary purposes of the statute," namely, "immuniz[ing] service providers" and encouraging "selfregulation." *Id.,* at 331, 334. And subsequent decisions, citing *Zeran*, have adopted this holding as a categorical rule across all contexts. *See*, *e.g., Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (CA1 2007); *Shiamili v. Real Estate Group of NY, Inc.*, 17 N.Y.3d 281, 288–289, 952 N.E.2d 1011, 1017 (2011); *Doe v. Bates*, 2006 WL 3813758, *18 (ED Tex., Dec. 27, 2006).

To be sure, recognizing some overlap between publishers and distributors is not unheard of. Sources sometimes use language that arguably blurs the distinction between publishers and distributors. One source respectively refers to them as "primary

publishers" and "secondary publishers or disseminators," explaining that distributors can be "charged with publication." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 799, 803 (5th ed. 1984).

Yet there are good reasons to question this interpretation.

First, Congress expressly imposed distributor liability in the very same Act that included § 230. Section 502 of the Communications Decency Act makes it a crime to "knowingly . . . display" obscene material to children, even if a third party created that content. 110 Stat. 133–134 (codified at 47 U.S.C. § 223(d)). This section is enforceable by civil remedy. 47 U.S.C. § 207. It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability in the very Act in which Congress explicitly imposed it.

Second, Congress enacted § 230 just one year after *Stratton Oakmont* used the terms "publisher" and "distributor," instead of "primary publisher" and "secondary publisher." If, as courts suggest, *Stratton Oakmont* was the legal backdrop on which Congress legislated, *e.g., FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (CA10 2009), one might expect Congress to use the same terms *Stratton Oakmont* used.

Third, had Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in § 230(c)(1): No provider "shall be held liable" for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content. § 230(c)(2). Where Congress uses a particular phrase in one subsection

and a different phrase in another, we ordinarily presume that the difference is meaningful. *Russello v. United States*, 464 U.S. 16, 23 (1983); *cf. Doe v. America Online, Inc.*, 783 So.2d 1010, 1025 (Fla. 2001) (Lewis, J., dissenting) (relying on this rule to reject the interpretation that § 230 eliminated distributor liability).

B

Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content. Section 230(c)(1) protects a company from publisher liability only when content is "provided by *another* information content provider." (Emphasis added.) Nowhere does this provision protect a company that is itself the information content provider. *See Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1165 (CA9 2008). And an information content provider is not just the primary author or creator; it is anyone "responsible, *in whole or in part*, for the creation or development" of the content. § 230(f)(3) (emphasis added).

But from the beginning, courts have held that § 230(c)(1) protects the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or *alter* content." *E.g., Zeran*, 129 F.3d, at 330 (emphasis added); *cf. id.,* at 332 (stating also that § 230(c)(1) protects the decision to "edit"). Only later did courts wrestle with the language in § 230(f)(3) suggesting providers are liable for content they help develop "in part." To harmonize that text with the interpretation that § 230(c)(1) protects "traditional editorial functions," courts relied on policy arguments to narrowly construe

§ 230(f)(3) to cover only substantial or material edits and additions. *E.g., Batzel v. Smith*, 333 F.3d 1018, 1031, and n. 18 (CA9 2003) ("[A] central purpose of the Act was to protect from liability service providers and users who take some affirmative steps to edit the material posted").

Under this interpretation, a company can solicit thousands of potentially defamatory statements, "selec[t] and edi[t] . . . for publication" several of those statements, add commentary, and then feature the final product prominently over other submissions—all while enjoying immunity. *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 403, 410, 416 (CA6 2014) (interpreting "development" narrowly to "preserv[e] the broad immunity th[at § 230] provides for website operators' exercise of traditional publisher functions"). To say that editing a statement and adding commentary in this context does not "creat[e] or develo[p]" the final product, even in part, is dubious.

C

The decisions that broadly interpret § 230(c)(1) to protect traditional publisher functions also eviscerated the narrower liability shield Congress included in the statute. Section 230(c)(2)(A) encourages companies to create content guidelines and protects those companies that "in good faith . . . restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Taken together, both provisions in § 230(c) most naturally read to protect companies when they unknowingly *decline* to exercise editorial functions to edit or

remove third-party content, § 230(c)(1), and when they *decide* to exercise those editorial functions in good faith, § 230(c)(2)(A).

But by construing § 230(c)(1) to protect *any* decision to edit or remove content, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (CA9 2009), courts have curtailed the limits Congress placed on decisions to remove content, *see e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, *3 (MD Fla., Feb. 8, 2017) (rejecting the interpretation that § 230(c)(1) protects removal decisions because it would "swallo[w] the more specific immunity in (c)(2)"). With no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (CA9 2017), aff'g 144 F. Supp. 3d 1088, 1094 (ND Cal. 2015) (concluding that "'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(c)(1)).

D

Courts also have extended § 230 to protect companies from a broad array of traditional product-defect claims. In one case, for example, several victims of human trafficking alleged that an Internet company that allowed users to post classified ads for "Escorts" deliberately structured its web-site to facilitate illegal human trafficking. Among other things, the company "tailored its posting requirements to make sex trafficking easier," accepted anonymous payments, failed to verify e-mails, and stripped metadata from photographs to make crimes harder to track. *Jane Doe*

No. 1 v. Backpage.com, LLC, 817 F.3d 12, 16–21 (CA1 2016). Bound by precedent creating a "capacious conception of what it means to treat a website operator as the publisher or speaker," the court held that § 230 protected these web-site design decisions and thus barred these claims. *Id.,* at 19; *see also M. A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1048 (ED Mo. 2011).

Consider also a recent decision granting full immunity to a company for recommending content by terrorists. *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (CA2 2019), cert. denied, 590 U.S. ___ (2020). The court first pressed the policy argument that, to pursue "Congress's objectives, . . . the text of Section 230(c)(1) should be construed broadly in favor of immunity." 934 F.3d, at 64. It then granted immunity, reasoning that recommending content "is an essential result of publishing." *Id.,* at 66. Unconvinced, the dissent noted that, even if all publisher conduct is protected by § 230(c)(1), it "strains the English language to say that in targeting and recommending these writings to users . . . Facebook is acting as 'the *publisher* of . . . information provided by another information content provider.'" *Id.,* at 76– 77 (Katzmann, C. J., concurring in part and dissenting in part) (quoting § 230(c)(1)).

Other examples abound. One court granted immunity on a design-defect claim concerning a dating application that allegedly lacked basic safety features to prevent harassment and impersonation. *Herrick v. Grindr LLC*, 765 Fed. Appx. 586, 591 (CA2 2019), cert. denied, 589 U.S. ___ (2019). Another granted immunity on a claim that a social media company defectively designed its product by creating a

feature that encouraged reckless driving. *Lemmon v. Snap, Inc.*, 440 F. Supp. 3d 1103, 1107, 1113 (CD Cal. 2020).

A common thread through all these cases is that the plaintiffs were not necessarily trying to hold the defendants liable "as the publisher or speaker" of third-party content. § 230(c)(1). Nor did their claims seek to hold defendants liable for removing content in good faith. § 230(c)(2). Their claims rested instead on alleged product design flaws—that is, the defendant's own misconduct. *Cf. Accusearch*, 570 F.3d, at 1204 (Tymkovich, J., concurring) (stating that § 230 should not apply when the plaintiff sues over a defendant's "*conduct* rather than for the *content* of the information"). Yet courts, filtering their decisions through the policy argument that "Section 230(c)(1) should be construed broadly," *Force*, 934 F.3d, at 64, give defendants immunity.

II

Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail. Moreover, States and the Federal Government are free to update their liability laws to make them more appropriate for an Internet-driven society.

Extending § 230 immunity beyond the natural reading of the text can have serious consequences. Before giving companies immunity from civil claims for "knowingly host[ing] illegal child pornography," *Bates*, 2006 WL 3813758, *3, or for race discrimination,

Sikhs for Justice, 697 Fed. Appx., at 526, we should be certain that is what the law demands.

Without the benefit of briefing on the merits, we need not decide today the correct interpretation of § 230. But in an appropriate case, it behooves us to do so.

MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT [DE 46-3] (JUNE 12, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

No. 19-16232

D.C. No. 4:18-cv-05159-JSW

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Submitted June 10, 2020**

Before: M. SMITH and HURWITZ, Circuit Judges,
and EZRA*** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

Jason Fyk appeals the district court's order and judgment dismissing with prejudice his state law claims against Facebook, Inc. (Facebook) as barred pursuant to the Communications Decency Act (CDA). We have jurisdiction pursuant to 28 U.S.C. § 1291. "We review de novo the district court's grant of a motion to dismiss under Rule 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016).[1] We affirm.

1. Pursuant to § 230(c)(1) of the CDA, 47 U.S.C. § 230(c)(1), "[i]mmunity from liability exists for '(1) a provider or user of an interactive computer service (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 information content provider.'" *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)). "When a plaintiff cannot allege enough facts to overcome Section 230 immunity, a plaintiff's claims should be dismissed." *Id.* The district court properly determined that Facebook has § 230(c)(1) immunity from Fyk's claims in this case.

[1] We reject Fyk's argument that the district court impermissibly converted the motion to dismiss into a motion for summary judgment. The district court did not deviate from the Rule 12(b)(6) standard by alluding to the allegation in Fyk's complaint that Facebook de-published one of his pages concerning urination, nor did that allusion affect the court's analysis.

The first and second requirements for § 230(c)(1) immunity are not in dispute.[2] Fyk focuses on the third requirement. He contends that Facebook is not entitled to § 230(c)(1) immunity because it acted as a content developer by allegedly de-publishing pages that he created and then re-publishing them for another third party after he sold them to a competitor. We disagree.

"[A] website may lose immunity under the CDA by making a material contribution to the creation or development of content." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016); *see also Fair Hous.*, 521 F.3d at 1166. Fyk, however, does not identify how Facebook materially contributed to the content of the pages. He concedes that the pages were the same after Facebook permitted their re-publication as when he created and owned them. We have made clear that republishing or disseminating third party content "in

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[2] Fyk concedes that Facebook is the provider of an "interactive computer service." 47 U.S.C. § 230(f)(2); *see also Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) (en banc) ("[T]the most common interactive services are websites[.]"). He has also not challenged the district court's determination that his claims seek to treat Facebook as a publisher and has therefore waived that issue. *See Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief."). 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. *See Barnes*, 570 F.3d at 1103 ("[R]emoving content is something publishers do. . . . It is because such conduct is *publishing conduct* that we have insisted that section 230 protects from liability any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." (emphasis in original) (citation and internal quotation marks omitted)).

essentially the same format" "does not equal creation or development of content." *Kimzey*, 836 F.3d at 1270, 1271.

That Facebook allegedly took its actions for monetary purposes does not somehow transform Facebook into a content developer. Unlike 47 U.S.C. § 230(c)(2)(A), nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service. We otherwise reject Fyk's argument that his case is like *Fair Housing* because Facebook allegedly "discriminated" against him by singling out his pages. Fyk mistakes the alleged illegality of the particular content at issue in *Fair Housing* with an antidiscrimination rule that we have never adopted to apply § 230(c)(1) immunity.

2. Contrary to Fyk's arguments here regarding a so-called "first party" and "third party" distinction between §§ 230(c)(1) and 230(c)(2)(A), the fact that he generated the content at issue does not make § 230(c)(1) inapplicable. We have explained that "[t]he reference to 'another information content provider' [in § 230(c)(1)] distinguishes the circumstance in which the interactive computer service itself meets the definition of 'information content provider' with respect to the information in question." *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003), *superseded in part by statute on other grounds as stated in Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766–67 (9th Cir. 2017). As to Facebook, Fyk is "another information content provider." *See Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094 (N.D. Cal. 2015), *aff'd*, 697 F. App'x 526, 526 (9th Cir. 2017).

3. We reject Fyk's argument that granting § 230(c)(1) immunity to Facebook renders § 230(c)(2)(A) mere surplusage. As we have explained, § 230(c)(2)(a) "provides an *additional shield* from liability." *Barnes*, 570 F.3d at 1105 (emphasis added). "[T]he persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but any provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue can take advantage of subsection (c)(2)." *Id.*

4. Finally, we reject Fyk's argument that Facebook is estopped from relying on § 230(c)(1) immunity based on its purported pre-suit reliance on § 230(c)(2)(A) immunity to justify its conduct. The CDA precludes the imposition of liability that is inconsistent with its provisions. 47 U.S.C. § 230(e)(3).

AFFIRMED.

FACEBOOK'S RESPONSE TO MOTION FOR RELIEF PURSUANT TO FED. R. CIV. P. 60(b) TO VACATE AND SET ASIDE ENTRY OF JUDGMENT [DE 47] (APRIL 5, 2021)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

No. 4:18-cv-05159-JSW

Date Filed: August 22, 2018
Date Closed: June 18, 2019

Before: Hon. Jeffrey S. WHITE,
United States District Judges.

Plaintiff Jason Fyk has had his day in court. On June 18, 2019, this Court properly dismissed his Complaint against Facebook without leave to amend on the ground that Mr. Fyk's claims are barred by Section 230(c)(1) of the Communications Decency Act ("CDA"). *See* Dkt. Nos. 38, 46-2 ("the Order"). The Ninth Circuit affirmed that Order on June 12, 2020

(Dkt. No. 46-3), and the U.S. Supreme Court denied Mr. Fyk's Petition for Writ of Certiorari on January 11, 2021. Dkt. No. 46-4.

Mr. Fyk now asks this Court to vacate and set aside its Order under Rule 60(b)(5) and (6)[1] on the purported basis that there has been an intervening change in the controlling law. Dkt. No. 46. Mr. Fyk is wrong and neither of the provisions upon which he relies has any application here.

Rule 60(b)(5) provides for relief from a final judgment only when "a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). This Court's judgment of dismissal is not based on any "prior judgment"; it was based on sound application of Ninth Circuit precedent. Nor does the Court's order of dismissal have "prospective application" within the meaning of the rule. A judgment has "prospective application" only if "it is executory or involves the supervision of changing conduct or conditions." *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995) (internal quotes omitted). This Court's dismissal order is not executory, nor does it require ongoing supervision. "That [Mr. Fyk] remains bound by the dismissal is not a 'prospective effect' within the meaning of rule 60(b)(5) any more than if [he] were continuing to feel the effects of a money judgment against him." *Id.* (quoting *Gibbs v. Maxwell House*, 738 F.2d 1153, 1155–56 (11th Cir.1984), and holding that a dismissal order did not have "prospective application").

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[1] Fed. R. Civ. P.

Rule 60(b)(6) is also inapplicable here. Contrary to Mr. Fyk's contentions, there has been no change in controlling precedent, much less has Mr. Fyk shown "extraordinary circumstances" sufficient to overcome the "strong public interest in [the] timeliness and finality of judgments." *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009); *In re Pac. Far E. Lines, Inc.,* 889 F.2d 242, 250 (9th Cir. 1989) ("The 'extraordinary circumstances' standard for assessing a Rule 60(b)(6) motion is intended to avoid a mere 'second bite at the apple.'").

The Ninth Circuit's *Enigma* decision, upon which Mr. Fyk relies, concerned application of Section 230(c)**(2)** of the CDA. *See Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1050 (9th Cir. 2019) ("The legal question before us is whether § 230(c)(2) immunizes blocking and filtering decisions that are driven by anticompetitive animus."), *cert. denied,* 141 S. Ct. 13 (2020). The *Enigma* decision never mentions CDA Section 230(c)**(1)**, upon which this Court's Order was based, nor does it discuss (much less overrule) controlling Ninth Circuit precedent. *See* Dkt. No. 38 at 2-4 (citing, *e.g., Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009)).

Mr. Fyk also asserts, without any legal basis, that Justice Thomas's "statement respecting the denial of certiorari" of the Ninth Circuit's *Enigma* decision represents a change in controlling precedent. Dkt. No. 46 at 4. But this "statement" does not constitute precedent of any sort, much less does it overrule controlling Ninth Circuit authority concerning the application of CDA Section CDA 230(c)(1). *Cf. Maryland v. Wilson,* 519 U.S. 408, 412–13 (1997) (holding that neither dictum statements nor statements in a

concurrence constitute precedent); *Duguid v. Facebook, Inc.,* 2017 WL 3128912, at *3 (N.D. Cal. July 24, 2017) (Ninth Circuit "memorandum disposition" was not precedent and did not change controlling law for purposes of Rule 60(b)(6)). That "statement" is not an opinion. At most, it constitutes *obiter dictum* concerning a petition for certiorari that the Court denied unanimously even before denying Mr. Fyk's petition.

Accordingly, Mr. Fyk's meritless Rule 60(b) motion should be denied.

KEKER, VAN NEST & PETERS LLP

By: /s/ William Hicks
PAVEN MALHOTRA MATAN
SHACHAM WILLIAM HICKS

Attorneys for Defendant
FACEBOOK, INC.

Dated: April 5, 2021

FYK'S REPLY TO FACEBOOK'S APRIL 5, 2021, RESPONSE [DE 48] (APRIL 12, 2021)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

No. 4:18-cv-05159-JSW

Before: Hon. Jeffrey S. WHITE, United States District Judges.

PRELIMINARY STATEMENT

Plaintiff, Jason Fyk ("Fyk"), filed his Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment [D.E. 46] (the "Motion") on March 22, 2021. On April 5, 2021, Defendant, Facebook, Inc. ("Facebook") filed its Response to Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Judgment [D.E. 47] (the "Response"). Fyk hereby replies to the Response. Distilled, the Response contends that (a) Rule 60(b)(5) is

procedurally inapplicable, (b) extraordinary circumstances are not present for Rule 60(b)(6) to apply, and (c) *Enigma* is inapplicable and/or represents mere obiter dictum.[1] Critically, the Response does not mention Rule 60(b)(3) at all. Facebook's purposeful omission of a rebuttal should be treated as a concession resulting, in and of itself, in judgment being vacated.

Although this brief will discuss all of these points, this Preliminary Statement will briefly address what matters the most–the *extraordinarily* important and germane change of law that occurred in the Ninth Circuit, while this case was on appeal, namely, the Ninth Circuit's holding in *Enigma*.

If this Court were to ignore *Enigma* and leave its dismissal/judgment against Fyk intact, this Court's dismissal would contravene Ninth Circuit law and effectively allow *Facebook to engage in anti-competitive misconduct* despite the Ninth Circuit Court having declared *that it cannot in Enigma*, thereby *leaving a prima facie conflict and "questionable precedent in [this Court's] wake."*

Although this Court previously came to the conclusion–which Fyk argued was erroneous–that treatment as "the publisher" (primary publisher) includes treatment as "a publisher" (secondary publisher), the Court did so without the benefit of *Enigma*. *Enigma* instructs that this Court's analysis was incomplete and, thus, incorrect, as it was "reading extra immunity into statutes where it does not belong" (Justice Thomas' words) and without properly considering the "policy"

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[1] *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. (Cal.) 2019), *cert. denied Malwarebytes, Inc. v Enigma Software Group USA, LLC*, 141 S. Ct. 13 (2020).

and "purpose" (Justice Thomas' words) of Section 230 or properly considering the underlying "Good Samaritan[ism]" (motivation). Said differently, while this Court (and, Fyk's Ninth Circuit panel) concurrently considered the very same question as the *Enigma* Ninth Circuit panel–whether Section 230 somehow immunizes illegal anti-competitive misconduct-the *Enigma* Ninth Circuit panel came to the *exact opposite* and legally appropriate conclusion that *Section 230 does not immunize anti-competitive misconduct*. This was affirmed on appeal, thus establishing the decision rendered in the case *sub judice* was incorrect, potentially erroneous, but certainly unjust at a minimum.

This is why Rule 60(b) relief is so appropriate here. The result of this decision unjustly converted Section 230(c)(1) into *carte blanche*/sovereign immunity from *all* liability for *any* of "a publisher's" own illegal activity including Facebook's own anti-competitive misconduct as alleged in the Complaint. As a result, this decision eviscerated the purpose of Section 230(c)(2) in direct contravention of cannons of statutory construction (surplusage), and misconstruing development "in part" (inconsequential) to mean "materially contributed to" (substantial) within Section 230(f)(3). The possibility of leaving Section 230 immunity analysis in this kind of conflicted flux by way of leaving the judgment (and dismissal order leading to that judgment) in this case in place when *Enigma* finally got the Section 230 immunity 12(b)(6) threshold analysis right, both at the Ninth Circuit level and United States Supreme Court level, establishes an "extraordinary circumstance" worthy of Rule 60(b)(6) examination at the very least.

To avoid creating the "extraordinary circumstance" of allowing Facebook to behave one way and making others similarly-situated to Facebook behave an opposite way under similarly-situated circumstances (which is by no means the kind of legal guesswork our justice system can tolerate, especially within the same Circuit), this Court can simply acknowledge and apply the Section 230 immunity 12(b)(6) threshold analysis mandated by *Enigma* at the Ninth Circuit level (and by the Supreme Court in denying certiorari with the benefit of Justice Thomas' reasoning). Put differently, where (as here) conflicting decisions are present, this Court should exercise the "grand reservoir of equitable power" that is Rule 60 discretionary review, especially where (as here) this Court (and Fyk) did not have the benefit (at the time this Court was making decisions–dismissal/judgment) of the new, good law (*Enigma*) that *diametrically* conflicts with the aforementioned decisions.

By contrast, if this Court were to leave its dismissal/judgment against Fyk intact, this Court would be ignoring the Ninth Circuit's *Enigma* decision (change of law) and ignoring ten pages of well thought out Justice Clarence Thomas Section 230 immunity analysis.[2] Facebook attempts to undermine these

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[2] This is especially important since Justice Thomas' *Enigma* Statement is already being cited as authority in at least one other case decided by the Supreme Court on April 5, 2021. *See Joseph R. Biden, Jr. v. Knight First Amendment Institute at Columbia Univ., et al*, 593 U.S. ___, n. 5 (2021) ("Threats directed at digital platforms can be especially problematic in the light of 47 U.S.C § 230, which some courts have misconstrued to give digital platforms immunity for bad-faith removal of third-party content. *Malwarebytes, Inc. v. Enigma Software Group USA, LLC,* 592 U.S. ___ (2020) (THOMAS, J., statement respecting

facts by summarily dismissing *Enigma* and the detailed Supreme Court Justice's Section 230 analysis as "obiter dictum." "Obiter dictum" is Latin for "something said in passing." Garner, Bryan A., *Black's Law Dictionary*, 490 (2d Pocket Ed. 2001). Ten pages of detailed analysis from a Supreme Court Justice as recently as October 13, 2020, which is now being cited in other Supreme Court decisions as recently as April 5, 2021, is inapposite of the blithe disregard that Facebook seeks to impose on Ninth Circuit precedent and Justice Thomas' analysis. It is sound and meaningful analysis this Court should strongly consider in vacating the dismissal/judgment entered here and allowing this case to finally proceed on the merits; *i.e.*, allowing Fyk his day in court, because, contrary to what the Response contends, we are far from Fyk having had his day in court.[3]

Finally, if this Court were to leave its dismissal/judgment against Fyk intact, Fyk would be deprived equal protections under the law. Wrongful deprivation of due process (a Constitutionally guaranteed right under the Fifth/Fourteenth Amendments) would constitute an "extraordinary circumstance."

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denial of certiorari) (slip op., at 7-8)").

[3] To remind this Court, Fyk was not allowed oral argument and not allowed to amend his Complaint. Fyk was wrongly shutout at the 12(b)(6) stage before anything concerning the merits of this matter could even come close to unfolding. The 12(b)(6) stage is the stage at which it is determined whether one is going to get his/her day in court. A dismissal (especially a dismissal with prejudice) precludes one from having his/her day in court. For Facebook to say in its Response that Fyk had his day in court by way of this Court's shutting down the case before it even got started is disingenuous at best.

We now turned to a more detailed discussion of the arguments raised by Facebook in its Response in the order in which the Response raises such arguments.

LEGAL ARGUMENT

I. Rule 60(b)(5) is Applicable Because It is "no Longer Equitable" to "prospectively" Crush Fyk's Livelihood

Federal Rule of Civil Procedure 60(b)(5) reads as follows: "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." *Id.* First, in this Court's dismissal/judgment decision-making, this Court relied on a plethora of decisions/judgments (*see* pretty much every case cited in the Court's dismissal order, if not every cited case, cutting against Fyk) *that Enigma* has upended, at least upended as it would pertain to a proper Section 230 12(b)(6) Good Samaritan threshold analysis (which, once more, such threshold analysis was not undertaken by this Court).

Second, the judgment entered here forever cripples Fyk's livelihood. Although there is no "supervision" associated with the subject judgment as the Response points out, the subject judgment is not "executory" in nature as the Response points out, and supervisory and executory judgments are two typical examples of when a judgment is subject to Rule 60(b)(5) as the Response points out, the express language of Rule 60(b)(5) is not so confined. "Generally, if there has been a change in facts, circumstances, or the law to the extent that it would no longer be equitable to give a judgment a prospective application, then the

court is authorized to relieve the parties from the effect of the judgment. [Rule 60(b)(5)] covers satisfaction or settlement of the judgment as well as a reversal of legal precedent." Brown, Hon. James J., Samuel, Hon. Linda, *Judgment Enforcement § 8.08 Changed Circumstances: Rule 60(b)(5)* (Westlaw, Aspen Publishers 3rd Ed. 2021-1 Supp.) (emphasis added).

Here, it would be inequitable to allow a judgment to stand that crushes Fyk's prospective economic advantage/business relations predicated on this Court's erroneous conclusions. Here, there has been a reversal of legal precedent, or, perhaps more actually but still in the 60(b)(5) vein, there has been a change in the law–*Enigma*. It is the epitome of inequitable to allow the judgment against Fyk to stand forever (*i.e.*, prospectively) where the law that came down after entry of judgment here (*Enigma*) would have resulted in Fyk surviving 12(b)(6) dismissal if applied to his case during this Court's 12(b)(6) decision-making.

While this situation might not be the "typical" executory or supervisory situation, it is by no means a situation that falls outside Rule 60(b)(5) as the law is actually written, and is certainly not a situation that falls outside the spirit of Rule 60(b)(5). Rule 60 is a "grand reservoir of equitable power" with emphasis on "equitable." There has been nothing equitable about the result of this case. Fyk is only asking for some equity to be afforded to him as an alleged victim, and not to the trillion-dollar company that has acted and continues to act in a manner that can best be described as anti-competitive, fraudulent, extortionate, and otherwise prolifically tortious. And all he is asking is that such equity be applied in accordance with the decisions related to the *Enigma* Ninth Circuit opinion

and the authoritative statements of a Supreme Court Justice. But, if the Court is somehow not inclined to apply Rule 60(b)(5) in the general sense of the Rule (*i.e.*, inclined to side with Facebook's narrow application of Rule 60(b)(5)), there is always the applicability of Rule 60(b)(6); Rule 60(b)(3), to which Facebook did not even respond; and, as discussed below, the Court could also *sua sponte* view the Motion under a Rule 60(b)(1) lens.

II. An Intervening Change in Law That Completely Unravels the Judgment (and Related Dismissal Order) Entered in This Case Most Certainly Constitutes a Rule 60(b)(6) "extraordinary Circumstance"

"The catchall residual clause in Rule 60(b)(6) empowers the courts to vacate judgments in the interest of justice. The case law reflects that reliance on Rule (b)(6) is sparingly used and limited to extraordinary circumstances. . . . Relief under Rule 60(b)(6) [h]as [been] granted for an intervening change in controlling law, notwithstanding that changes in the law could be addressed in Rule 60(b)(1)." Brown, Hon. James J., Samuel, Hon. Linda, *Judgment Enforcement § 8.09 Other Grounds: Rule 60(b)(6)* (Westlaw, Aspen Publishers 3rd Ed. 2021-1 Supp.) (citing to *Cincinnati Ins. Co. v. Byers*, 151 F.3d 574 (6th Cir. 1998) wherein the court found that an extraordinary circumstance is a significant change in the law, warranting 60(b)(6) relief).

> Thus, while we conclude that the change in the law factor is also applicable in non-habeas cases, we note that courts considering this factor should not in rote fashion rely on

> the conclusion from a different context that any particular change in the law favors or disfavors relief. Instead, a district court should weigh whether the specific nature of the change in the law in the case before it makes granting relief more or less justified under all the circumstances, and should support its conclusion with a reasoned explanation grounded in the equitable considerations raised by the case at bench.

Henson v. Fidelity Nat'l Financial, Inc., 943 F.3d 434, 446-447 (9th Cir. (Cal.) 2019) (assessing a Rule 60(b)(6) motion outside the habeas corpus context that was present in *Phelps v. Almeida*, 569 F.3d 1120 (9th Cir. 2009)). "Federal Rule of Civil Procedure 60(b)(6) is a grand reservoir of equitable power that allows courts to grant relief from a final judgment for 'any' reason that 'justifies' relief." *Id.* at 439. Here, "the specific nature of the change in the law [*Enigma*] in the case before [this Court] makes granting [Rule 60(b)(6)] relief more . . . justified under all the circumstances." *Id.*

Again, in no way, shape, or form can the dismissal/judgment entered in this case stand in the face of *Enigma*. The decision in this case is diametrically opposed to the decision in *Enigma*. Had this Court (and Fyk) had the benefit of *Enigma* at the time judgment was entered in this case (or when 12(b)(6) motion practice was unfolding), this case would have easily moved along on the merits. Once more, the Ninth Circuit made clear in *Enigma* that where (as here) an anti-competitive animus is alleged, the case is not to be thrown out at the 12(b)(6) stage under the guise of 230(c)(1) or 230(c)(2)

immunity because the anti-competitive animus allegation is to be considered *at the first logical point*– which is the 230(c) "Good Samaritan" threshold provision. If there is an allegation that a "Good Samaritan" motivation is not afoot, and since Section 230(c) is only available to "Good Samaritan[s]" in the first place, then a court is to not go deeper into Section 230(c)(1) or 230(c)(2) . . . at least at the 12(b)(6) stage. But if a court were to venture too far into Section 230 at the dismissal stage in a case where anti-competitive animus is alleged in contravention of *Enigma* (as this Court did, albeit, to be fair to the Court, before having the benefit of *Enigma*; hence, the "change of law" thrust behind Fyk's Rule 60 effort), then there is Justice Clarence Thomas' *Enigma* Statement that explains how Section 230(c)(1) and 230(c)(2) immunity should be interpreted and applied, and this Court's dismissal/judgment was amiss in that regard as well (although, again, this Court did not have the benefit of Justice Thomas' *Enigma* Statement at the time judgment was entered in this case; hence, the "change of law" thrust behind Fyk's Rule 60 effort). Either way (whether viewed through the Ninth Circuit *Enigma* decision lens or the Justice Thomas *Enigma* Statement lens), this Court should exercise its "grand reservoir of equitable power" to avoid completely inconsistent legal results to Fyk's detriment in the present and to the detriment of all similarly-situated litigants moving forward. This Court should apply *Enigma* to this case in vacating judgment, lest the manifest injustice Fyk has experienced continue.

III. Enigma is Anything but Obiter Dictum–enigma is Now the Law

Enigma is not a mere Section 230(c)(2) case, as Facebook's Response contends in trying to render *Enigma* inapposite to this case where the Court's dismissal/judgment sounded in Section 230(c)(1). Facebook's contention is a red-herring. It is neither here nor there if *Enigma* started off as a (c)(2) case or (c)(1) case or both or something else because ultimately the Ninth Circuit (and Supreme Court *via* affirmation) came to the conclusion that the "Good Samaritan" 230(c) provision does not immunize anti-competitive behavior. Both Sections 230(c)(1) and 230(c)(2) are irrelevant because the Ninth Circuit court in *Enigma* finally got the Section 230 immunity 12(b)(6) threshold analysis right–that is, the motivation behind an interactive computer service provider's actions does, in fact, matter under the Internet's Good Samaritan law (the Communications Decency Act, "CDA," 47 U.S.C. § 230), and motivation is to be assessed at the first logical point in the 12(b)(6) dismissal setting.

That *first* step of the analysis ended the 12(b)(6) Section 230 immunity analysis in *Enigma*; *i.e.*, resulted in the Ninth Circuit Court not venturing into trying to sort out the parties' (c)(2) spat. Had that *first* step of the analysis (whether or not alleged motivations underlying alleged conduct by a party could possibly allow for that party to be classified as a Good Samaritan at the pleading stage to have any possibility of arguing (c)(1) or (c)(2) immunity at the pleading stage) properly transpired here, this Court would have determined that Fyk's anti-competitive conduct allegations (which the Complaint is entirely predicated upon) stopped the Section 230 immunity assessment

at the Good Samaritan threshold at the 12(b)(6) stage; *i.e.*, this Court would not have considered Facebook's make-believe (c)(1) immunity ideations. Equipped with the proper Section 230 immunity 12(b)(6) threshold analysis afforded by *Enigma* (a case that was apparently running concurrently to Fyk's case), this Court can now utilize its grand reservoir of Rule 60 equitable powers to ensure that the manifest injustice already experienced by Fyk does not continue and to make sure that diametrically opposed law does not remain in place within this Circuit; *i.e.*, this Court must vacate its dismissal/judgment and let this case move forward on the merits, just like in *Enigma* where identical anti-competitive animus allegations were afoot and Enigma was allowed past the pleading stage.

More specifically, *Enigma* determined that one does not even get into an analysis of Section 230(c)'s subsections (*i.e.*, whether or not 230(c)(1) or 230(c)(2) immunity exists) if the interactive computer service provider cannot be deemed a Good Samaritan at the 230(c) threshold per the allegations of the service provider's litigation opponent. *See Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052 (9th Cir. (Cal) 2019) (declining to assess Malwarebyte's content-oriented/(c)(2) arguments because it was already determined that dismissal was not appropriate where anti-competitive conduct had been alleged–"[b]ecause we hold that § 230 does not provide immunity for blocking a competitor's program for anticompetitive reasons, and because Enigma has specifically alleged that the blocking here was anticompetitive, Enigma's claims survive the motion to dismiss"). Meaning, again, it does not matter if the

Enigma case initially presented itself as a 230(c)(1) or 230(c)(2) case . . . that case did not even get to 230(c)(1) or 230(c)(2) at the dismissal stage due to the alleged anti-competitive conduct precluding any kind of immunity at the 230(c) threshold. What matters here (just as what mattered in *Enigma*) is that where (as here) an interactive computer service provider (here, Facebook) has taken (or is alleged to have taken) action of an anticompetitive animus ilk (which is the antithesis of Good Samaritanism), then the Section 230 immunity analysis stops at the 230(c) first logical doorstep (at least at the 12(b)(6) pleading stage of litigation); *i.e.*, the 12(b)(6) Section 230 analysis does not go forward into the subsections of 230(c) that are (c)(1) and/or (c)(2).

Like Enigma alleged in regard to Malwarebytes, Fyk alleged Facebook's anti-competitive animus. Fyk's case should not have been dismissed, just like the *Enigma* case was not dismissed. This Court needs to reconcile this case with *Enigma*, lest the completely unjust result of one party (Fyk) experiencing an entirely different standard than another party enjoyed (*Enigma*) were to stand. Once more, the *Enigma* decision and the dismissal/judgment here are irreconcilable on identical issues. Once more, the *Enigma* decision was right, this Court's decision was wrong. This Court should exercise its Rule 60 discretionary review to reconcile dichotomous decisions within this Circuit, and, in the process, finally making things right for the victim (Fyk) by allowing Fyk to proceed on the merits. As Justice Thomas' *Enigma* statement makes clear, Fyk still needs to prevail on the merits; *i.e.*, allowing Fyk his true day in court (by vacating judgment and allowing this case to proceed on its

merits just like in *Enigma*) by no means results in Fyk's overall victory–he still has to prove his case.

IV. The Response Does Not Address Rule 60(b)(3) Relief

The Motion also addressed, in a Rule 60(b)(3) posture, the factual misrepresentations that Facebook made at the dismissal stage, which, this Court's dismissal order conspicuously endorsed. The Court's dismissal opinion recited the false and controverted statements proffered by Facebook, which ran afoul of hornbook legal standards surrounding the assessment of a 12(b)(6) dismissal motion–that is, "facts" are to be accepted as true and/or construed in a light most favorable to the Plaintiff, not the Defendant. In other words, this Court endorsed Facebook's false statements about the nature of Fyk's business and accepted Defendant's make-believe "facts" as true, in a legally repugnant fashion and to Fyk's detriment.

It is no wonder the Response did not address Rule 60(b)(3)–how could Facebook, after all, unravel its own lies? Hence, the Response's silence on the 60(b)(3) front in an apparent hope that this Court would just skip right past/gloss right over the 60(b)(3) discussion included in the Motion. The Response's silence on 60(b)(3) should result, in and of itself, in this Court's vacating judgment. Fyk's 60(b)(3) discussion was, for all legal intents and purposes, conceded by Facebook by Facebook's electing not to rebut same in its Response.

It is abundantly apparent that this Court relied on Facebook's lies, especially considering the Court's dismissal order elevated Facebook's lies to fact within the first few sentences of the dismissal order. *See*

[D.E. 38] at 1, *first substantive sentence* ("Plaintiff had used Facebook's free online platform to create a series of, among other amusing things, pages dedicated to videos and pictures of people urinating"). A dismissal order predicated, in whole or in part, on a Defendant's lies is just the type of circumstance that Rule 60(b)(3) contemplates is appropriate for granting relief from judgment or dismissal order.

CONCLUSION

The law is now *Enigma*, at the very least as it pertains to the proper Rule 12(b)(6) threshold Section 230 analysis. *Enigma* was not available to this Court or Fyk at all material times. A change in law of such relevance and significance cries out for Rule 60 relief. To leave the dismissal/judgment of this case in place leaves the manifest injustice Fyk has already experienced in place for the rest of Fyk's livelihood to his prospective economic disadvantage–that is wrong. To leave the dismissal/judgment of this case in place leaves Section 230 (at least the threshold 12(b)(6) Section 230 analysis) in conflicted flux, notwithstanding the Ninth Circuit having finally cleared things up (at least as it pertains to 12(b)(6) Good Samaritan/motive threshold analysis) with *Enigma*–that is wrong. To leave the dismissal/judgment of this case in place leaves this Court's endorsement of Facebook's lies in place–that is wrong. In sum, to leave the dismissal/judgment of this case in place crushes the victim here (Fyk), and leaves the door wide open for Facebook to continue its victimizing others.

Whether the Court relies on Rule 60(b)(5), Rule 60(b)(6), Rule 60(b)(3), or Rule 60(b)(1) according to

the above-cited treatise, leaving this dismissal/judgment in place, amidst change of law making crystal clear that the dismissal/judgment was based on an incorrect analysis would produce a manifest injustice. We ask this Court to embrace justice and vacate the judgment under the "grand reservoir of equitable power" that Rule 60 equips the Court with. Fyk implores this Court, not just for himself, but for the entirety of the social media world, to let him have his day in Court and to stop Facebook's anti-competitive misconduct. We ask this Court to see the wisdom of such action in light of the guidance by the Ninth Circuit (as affirmed by the Supreme Court) through *Enigma* and the guidance Justice Thomas gave this Court with his *Enigma* Statement.

WHEREFORE, Plaintiff, Jason Fyk, respectfully requests entry of an order (1) granting Fyk's 60(b) motion; *i.e.*, vacating the Court's prior judgment, and/or (2) affording Fyk any other relief the Court deems equitable, just, or proper.

Respectfully Submitted,

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Michael J. Smikun, Esq.
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Counsel for Plaintiff

Dated: April 12, 2021.

PLAINTIFF'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY IN FURTHER SUPPORT OF PLAINTIFF'S MARCH 22, 2021, MOTION FOR RELIEF PURSUANT TO FED. R. CIV. P. 60(b) TO VACATE AND SET ASIDE ENTRY OF JUDGMENT [DE 49] (JUNE 4, 2021)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

No. 4:18-cv-05159-JSW

Before: Hon. Jeffrey S. WHITE, United States District Judges.

Plaintiff, Jason Fyk, by and through undersigned counsel, files this Notice of Filing Supplemental Authority in Further Support of Plaintiffs March 22, 2021, Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment [D.E 46] ("Rule 60 Motion").

1. On March 22, 2021, Plaintiff filed his Rule 60 Motion, which is currently fully briefed. Oral argument is scheduled to take place (presumably virtually) on July 23, 2021. *See* [D.E. 46].

2. Plaintiff respectfully submits the following case law (which post-dated the March 22, 2021, Rule 60 Motion and Plaintiff's April 12, 2021, Reply to Facebook's April 5, 2021, Response, *see* [D.E. 48]) as supplemental authority in further support of his pending Rule 60 Motion: *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. May 4, 2021), attached hereto for the Court's ease of reference.

Respectfully Submitted,

/s/ Michael J. Smikun, Esq.
Michael J. Smikun, Esq.
Sean R. Callagy, Esq.
Jeffrey L. Greyber, Esq.
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Constance J. Yu, Esq.
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Counsel for Plaintiff

Dated: June 4, 2021.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *CARLY LEMMON v. SNAP, INC.* [DE 49A] (MAY 4, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARLY LEMMON; MICHAEL MORBY, AS SURVIVING PARENTS OF HUNTER MORBY (DECEASED); SAMANTHA BROWN; MARLO BROWN, AS SURVIVING PARENTS OF LANDEN BROWN (DECEASED),

Plaintiffs-Appellants,

v.

SNAP, INC., DOING BUSINESS IN CALIFORNIA AS SNAPCHAT, Inc.,

Defendant-Appellee.

No. 20-55295

D.C. No. 2:19-cv-04504-MWF-KS

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Argued and Submitted February 11, 2021
San Francisco, California

Before: Kim MCLANE WARDLAW and
Carlos T. BEA, Circuit Judges, and
James DAVID CAIN, Jr.,* District Judge.

OPINION

WARDLAW, Circuit Judge:

Carly Lemmon, Michael Morby, Samantha Brown, and Marlo Brown ("the Parents") are the surviving parents of two boys who died in a tragic, high-speed car accident. They sued Snap, Inc. ("Snap"), a social media provider, alleging that it encouraged their sons to drive at dangerous speeds and thus caused the boys' deaths through its negligent design of its smartphone application Snapchat. We must decide whether the district court correctly dismissed that action when it concluded that the Communications Decency Act ("CDA") barred the Parents' claim because it sought to treat Snap "as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

We conclude that, because the Parents' claim neither treats Snap as a "publisher or speaker" nor relies on "information provided by another information content provider," Snap does not enjoy immunity from this suit under § 230(c)(1). We therefore reverse the district court's Rule 12(b)(6) dismissal of the Parents' lawsuit and remand for further proceedings.

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* The Honorable James David Cain, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

I.

Because the district court dismissed this action pursuant to Federal Rule of Civil Procedure 12(b)(6), we accept as true the allegations contained in the Parents' amended complaint and view them in the light most favorable to the Parents. *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096 (9th Cir. 2019).

A.

According to the Parents' amended complaint, Jason Davis (age 17), Hunter Morby (age 17), and Landen Brown (age 20) were driving down Cranberry Road in Walworth County, Wisconsin at around 7:00 p.m. on May 28, 2017. Jason sat behind the wheel, Landen occupied the front passenger seat, and Hunter rode in the back seat. At some point during their drive, the boys' car began to speed as fast as 123 MPH. They sped along at these high speeds for several minutes, before they eventually ran off the road at approximately 113 MPH and crashed into a tree. Tragically, their car burst into flames, and all three boys died.

Shortly before the crash, Landen opened Snapchat, a smartphone application, to document how fast the boys were going. Snapchat is a social media platform that allows its users to take photos or videos (colloquially known as "snaps") and share them with other Snapchat users. To keep its users engaged, Snapchat rewards them with "trophies, streaks, and social recognitions" based on the snaps they send. Snapchat, however, does not tell its users how to earn these various achievements.

The app also permits its users to superimpose a "filter" over the photos or videos that they capture through Snapchat at the moment they take that photo or video. Landen used one of these filters—the "Speed Filter"—minutes before the fatal accident on May 28, 2017. The Speed Filter enables Snapchat users to "record their real-life speed." An example of the digital content that a Snapchat user might create with this filter is portrayed below.

A Snapchat user could also "overlay" the above information onto a mobile photo or video that they previously captured.

Many of Snapchat's users suspect, if not actually "believe," that Snapchat will reward them for "recording a 100-MPH or faster [s]nap" using the Speed Filter. According to plaintiffs, "[t]his is a game for Snap and many of its users" with the goal being to reach 100 MPH, take a photo or video with the Speed Filter, "and then share the 100-MPH-Snap on Snapchat."

Snapchat allegedly knew or should have known, before May 28, 2017, that its users believed that such a reward system existed and that the Speed Filter was therefore incentivizing young drivers to drive at dangerous speeds. Indeed, the Parents allege that there had been: a series of news articles about this phenomenon; an online petition that "called on Snapchat to address its role in encouraging dangerous speeding"; at least three accidents linked to Snapchat users' pursuit of high-speed snaps; and at least one other lawsuit against Snap based on these practices. While Snapchat warned its users against using the Speed Filter while driving, these warnings allegedly proved ineffective. And, despite all this, "Snap did not remove or restrict access to Snapchat while traveling at dangerous speeds or otherwise properly address the danger it created."

B.

On May 23, 2019, Hunter's and Landen's parents filed this negligent design lawsuit against Snap. Snap moved to dismiss the Parents' initial complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), contending that the Parents had failed to allege a plausible negligence claim and that the Communications Decency Act immunized it from

liability. The district court agreed and dismissed the Parents' first complaint for failure to allege "a causal connection between Defendant's Speed Filter and the car accident" and because it was "not clear whether their claim is barred under the [CDA]." However, it granted leave to amend so that the Parents could cure these deficiencies.

On November 18, 2019, the Parents filed an amended complaint, which Snap moved to dismiss on the same grounds as before. This time, the district court granted the motion to dismiss solely on the basis of immunity under 47 U.S.C. § 230(c)(1). Because it concluded that the CDA rendered Snap immune from the Parents' claim, it did not address Snap's argument that the Parents had again failed to plead causation adequately. The district court denied further leave to amend, and entered a final judgment on February 25, 2020. The Parents then filed this timely appeal.

II.

We review de novo both the district court's order dismissing the Parents' claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and any questions of statutory interpretation that informed that decision. *Dyroff*, 934 F.3d at 1096. The Parents' amended complaint will survive at this stage if it states "a plausible claim for relief," *i.e.*, if it permits "the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). This standard requires determining whether the CDA bars the Parents' claim as pleaded in the amended complaint. *See id.*

III.

In 1996, when the internet was young and few of us understood how it would transform American society, Congress passed the CDA. *See* 47 U.S.C. § 230. That act "provide[d] internet companies with immunity from certain claims" in order "'to promote the continued development of the Internet and other interactive computer services.'" *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 681 (9th Cir. 2019) (quoting 47 U.S.C. § 230(b)(1)). Specifically, Congress commanded that "[n]o 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."[1] 47 U.S.C. § 230(c)(1); *see also id.* § 230(e)(3) (explicitly preempting any state or local law inconsistent with this section). Though somewhat jargony, this provision shields from liability those individuals or entities that operate internet platforms, to the extent their platforms publish third-party content.

To determine whether § 230(c)(1) applies here—and thus immunizes Snap from the Parents' claim—we apply the three-prong test set forth in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009). Snap thus enjoys CDA immunity only if it is "(1) a provider or

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[1] The statute defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet. . . ." 47 U.S.C. § 230(f)(2). Meanwhile, an "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3).

user of an interactive computer service (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 information content provider." *Dyroff*, 934 F.3d at 1097 (quoting *Barnes*, 570 F.3d at 1100–01). We examine each of these questions in turn.

A.

The parties do not dispute that Snap is a provider of an "interactive computer service," and we agree that Snap qualifies as one given the CDA's "expansive" definition of that term. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016) (citation omitted); *see also Barnes*, 570 F.3d at 1101. According to the amended complaint, the Snapchat application permits its users to share photos and videos through Snap's servers and the internet. Snapchat thus necessarily "enables computer access by multiple users to a computer server," 47 U.S.C. § 230(f)(2), and Snap, as the creator, owner, and operator of Snapchat, is therefore a "provider" of an interactive computer service. *Id.* § 230(f)(3).

B.

The second *Barnes* question asks whether a cause of action seeks to treat a defendant as a "publisher or speaker" of third-party content.[2] *Dyroff*, 934 F.3d at

[2] The district court and the parties have, at various times, suggested that this aspect of the *Barnes* test is undisputed. Having parsed the Parents' arguments and citations before both our court and the district court, we do not agree. Though those arguments could have benefited from greater analytic exposition, the Parents have sufficiently preserved this issue for our review. In any event, it is within our discretion to reach this issue. *See In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 992

1097; *Barnes*, 570 F.3d at 1100. We conclude that here the answer is no, because the Parents' claim turns on Snap's design of Snapchat.

In this particular context, "publication" generally "involve[s] reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *HomeAway*, 918 F.3d at 681 (citation omitted). A defamation claim is perhaps the most obvious example of a claim that seeks to treat a website or smartphone application provider as a publisher or speaker, but it is by no means the only type of claim that does so. *Barnes*, 570 F.3d at 1101–02; *see also Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016). Thus, regardless of the type of claim brought, we focus on whether "the duty the plaintiff alleges" stems "from the defendant's status or conduct as a publisher or speaker." *Barnes*, 570 F.3d at 1107.

Here, the Parents seek to hold Snap liable for its allegedly "unreasonable and negligent" design decisions regarding Snapchat. They allege that Snap created: (1) Snapchat; (2) Snapchat's Speed Filter; and (3) an incentive system within Snapchat that encouraged its users to pursue certain unknown achievements and rewards. The Speed Filter and the incentive system then supposedly worked in tandem to entice young Snapchat users to drive at speeds exceeding 100 MPH.

(9th Cir. 2010) (noting we may exercise our discretion in this regard when "the issue presented is purely one of law and . . . does not depend on the factual record developed below" (citation omitted)). We exercise that discretion here, given that Snap addressed this issue both in its answering brief and before the district court.

The Parents thus allege a cause of action for negligent design—a common products liability tort. This type of claim rests on the premise that manufacturers have a "duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public." Lewis Bass, *Prods. Liab.: Design & Mfg. Defects* § 2.5 (2d ed., Sept. 2020 Update). Thus, a negligent design action asks whether a reasonable person would conclude that "the reasonably foreseeable harm" of a product, manufactured in accordance with its design, "outweigh[s] the utility of the product." *Merrill v. Navegar, Inc.*, 28 P.3d 116, 125 (Cal. 2001) (citation omitted); *see also Morden v. Cont'l AG*, 611 N.W.2d 659, 674 (Wis. 2000) (explaining that the relevant "duty of care requires manufacturers to foresee all reasonable uses and misuses and the consequent foreseeable dangers" of their products "and to act accordingly" (citation omitted)).[3]

The duty underlying such a claim differs markedly from the duties of publishers as defined in the CDA. Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers. *See* Dan B. Dobbs et al., *Dobbs' Law of Torts* § 478 (2d ed., June 2020 Update). Meanwhile, entities acting solely as publishers —*i.e.*, those that "review[] material submitted for

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[3] The parties have agreed that the tort law of either California or Wisconsin governs in this case. *See generally* Restatement (Second) of Torts § 398 (1965) ("A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.").

publication, perhaps edit[] it for style or technical fluency, and then decide[] whether to publish it," *Barnes*, 570 F.3d at 1102—generally have no similar duty. *See Dobbs' Law of Torts* § 478.

It is thus apparent that the Parents' amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker. Their negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and the Speed Filter). Thus, the duty that Snap allegedly violated "springs from" its distinct capacity as a product designer. *Barnes*, 570 F.3d at 1107. This is further evidenced by the fact that Snap could have satisfied its "alleged obligation"—to take reasonable measures to design a product more useful than it was foreseeably dangerous —without altering the content that Snapchat's users generate. *Internet Brands*, 824 F.3d at 851. Snap's alleged duty in this case thus "has nothing to do with" its editing, monitoring, or removing of the content that its users generate through Snapchat. *Id.* at 852.

To the extent Snap maintains that CDA immunity is appropriate because the Parents' claim depends on the ability of Snapchat's users to use Snapchat to communicate their speed to others, it disregards our decision in *Internet Brands*. That Snap allows its users to transmit user-generated content to one another does not detract from the fact that the Parents seek to hold Snap liable for its role in violating its distinct duty to design a reasonably safe product. As in *Internet Brands*, Snap "acted as the 'publisher or speaker' of user content by" transmitting Landen's snap, "and that action could be described as a 'but-for' cause of

[the boys'] injuries." 824 F.3d at 853. This is unsurprising: Snap "is an internet publishing business. Without publishing user content, it would not exist." *Id.* But though publishing content is "a but-for cause of just about everything" Snap is involved in, that does not mean that the Parents' claim, specifically, seeks to hold Snap responsible in its capacity as a "publisher or speaker." *Id.* The duty to design a reasonably safe product is fully independent of Snap's role in monitoring or publishing third-party content.[4]

Because the Parents' claim does not seek to hold Snap responsible as a publisher or speaker, but merely "seek[s] to hold Snapchat liable for its own conduct, principally for *the creation* of the Speed Filter," § 230(c)(1) immunity is unavailable. *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 81 (Ga. Ct. App. 2018) (emphasis added).

C.

CDA immunity is also unavailable in this case because the Parents' negligent design claim does not

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[4] Nor would proving causation through the snap that Landen sent shortly before his death implicate § 230(c)(1) immunity, because the Parents do not fault Snap for publishing that photo message. Instead, that snap merely suggests, as circumstantial evidence, that the alleged negligent design of Snapchat had the very causal effect that the Parents' otherwise allege. By contrast, we note that the Parents would not be permitted under § 230(c)(1) to fault Snap for publishing other Snapchat-user content (*e.g.*, snaps of friends speeding dangerously) that may have incentivized the boys to engage in dangerous behavior. For attempting to hold Snap liable using such evidence would treat Snap as a publisher of third-party content, contrary to our holding here. *See* Section III.C. *infra*.

turn on "information provided by another information content provider." *Barnes*, 570 F.3d at 1101.

By its plain terms, and as the last part of the *Barnes* test recognizes, § 230(c)(1) cuts off liability only when a plaintiff's claim faults the defendant for information provided by third parties. 47 U.S.C. § 230(c)(1). Thus, internet companies remain on the hook when they create or develop their own internet content. *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). And they also may face liability to the extent they are "'responsible . . . in part, for the creation or the development of' the offending content" on the internet. *Id.* at 1162 (quoting 47 U.S.C. § 230(f)(3)); *see also Kimzey*, 836 F.3d at 1269 (asking whether a defendant "ma[de] a material contribution to the creation or development of [the] content" underlying a given claim).

This case presents a clear example of a claim that simply does not rest on third-party content. Snap indisputably designed Snapchat's reward system and Speed Filter and made those aspects of Snapchat available to users through the internet. *See Roommates*, 521 F.3d at 1168 (noting that the word "develop" in the CDA connotes "making usable or available"). And the Parents' negligent design claim faults Snap solely for Snapchat's architecture, contending that the app's Speed Filter and reward system worked together to encourage users to drive at dangerous speeds.

Notably, the Parents do not fault Snap in the least for publishing Landen's snap. Indeed, their amended complaint fully disclaims such a reading of their claim: "The danger is not the Snap [message using the Speed Filter] itself. Obviously, no one is

harmed by the post. Rather, the danger is the speeding." AC ¶ 14. While we need not accept conclusory allegations contained in a complaint, we must nonetheless read the complaint in the light most favorable to the Parents. *See Dyroff*, 934 F.3d at 1096. And this statement reinforces our own reading of the Parents' negligent design claim as standing independently of the content that Snapchat's users create with the Speed Filter.

To sum up, even if Snap is acting as a publisher in releasing Snapchat and its various features to the public, the Parents' claim still rests on nothing more than Snap's "own acts." *Roommates*, 521 F.3d 1165. The Parents' claim thus is not predicated on "information provided by another information content provider." *Barnes*, 570 F.3d at 1101.

Each of Snap's novel attempts to expand CDA immunity beyond these straightforward principles is to no avail. To start, while providing content-neutral tools does not render an internet company a "creator or developer" of the downstream content that its users produce with those tools, our case law has never suggested that internet companies enjoy absolute immunity from all claims related to their content-neutral tools. *See Dyroff*, 934 F.3d at 1099; *Kimzey*, 836 F.3d at 1269–70; *Roommates*, 521 F.3d at 1175. To the contrary, "[t]he [CDA] was not meant to create a lawless no man's-land on the Internet." *Roommates*, 521 F.3d at 1164. Those who use the internet thus continue to face the prospect of liability, even for their "neutral tools," so long as plaintiffs' claims do not blame them for the content that third parties generate with those tools.

Next, the Parents' allegations concerning the Speed Filter and Snapchat's reward system are not a creative attempt to plead around the CDA. In the cases where such creative pleading has posed a concern, the plaintiff's claims, at bottom, depended on a third party's content, without which no liability could have existed. *See Dyroff*, 934 F.3d at 1096 (alleging defendant developed content because its website's "recommendation and notification functions were 'specifically designed to make subjective, editorial decisions about users based on their posts'"); *Kimzey*, 836 F.3d at 1269 (alleging defendant developed content when it integrated a third party's defamatory review "into its own 'advertisement' or 'promotion' on Google" using its "unique star-rating system"). However, as already explained, the Parents' claim does not depend on what messages, if any, a Snapchat user employing the Speed Filter actually sends. This is thus not a case of creative pleading designed to circumvent CDA immunity.

Last, Snap misunderstands the import of our statement in *Dyroff* that a website's "tools meant to facilitate the communication and content of others" were "not content in and of themselves." 934 F.3d at 1098. For even accepting that statement at face value, it does nothing to advance Snap's argument. It is by now clear that the Parents' negligent design claim does not turn on the content of Landen's particular snap. Thus, if Snapchat's Speed Filter and award system were not content for purposes of the CDA, then the Parents' negligence or negligent design claim would rest on no CDA "content" whatsoever, and Snap would still receive no immunity. After all, CDA

immunity is available only to the extent a plaintiff's claim implicates third-party content. *See* 47 U.S.C. § 230(c)(1).

* * *

In short, Snap "is being sued for the predictable consequences of" designing Snapchat in such a way that it allegedly encourages dangerous behavior. *Roommates*, 521 F.3d at 1170. The CDA does not shield Snap from liability for such claims. *See Internet Brands*, 824 F.3d at 853 ("Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses.").

IV.

Snap has also urged us to affirm the district court's decision on the alternative ground that the Parents have failed to plead adequately in their amended complaint the causation element of their negligent design claim. Though we may affirm on any ground supported by law, we decline to exercise that discretion here for three reasons. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018).

First, the district court dismissed the Parents' amended complaint based "entirely on the CDA and we refrain from deciding an issue that the district court has not had the opportunity to evaluate." *Roommates*, 521 F.3d at 1175 n.40. Second, the district court stated when it dismissed the Parents' amended complaint that it would ordinarily have granted leave to amend, but it declined to do so based on its belief that the Parents could not surmount the

issue of CDA immunity. It thus appears the district court would have granted further leave to amend if the sole defect in the Parents' amended complaint was a mere failure to plead legal causation. Third, the district court has yet to decide whether there exists a conflict between Wisconsin and California law on the issue of legal causation. Nor has it decided, in the event there is such a conflict, which state's law governs that claim. *See generally Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 559 (9th Cir. 2020) (laying out the relevant analytic framework), *cert. denied sub nom. Cooper v. TEPCO*, No. 20-730, 2021 WL 1163742 (U.S. Mar. 29, 2021).

V.

For these reasons, we REVERSE the district court's dismissal of the Parents' amended complaint on the ground of immunity under 47 U.S.C. § 230(c)(1) and REMAND this matter for further proceedings consistent with this opinion.

NOTICE REGARDING DOCKETING OF AFFIDAVIT OF CONSTITUTIONAL RIGHTS DEPRIVATION [DE 56] (DECEMBER 7, 2022)

CLERK, U.S. DISTRICT COURT NORTH DISTRICT OF CALIFORNIA

From: Jason M. Fyk of *Fyk v. Facebook* and *Fyk v. USA*

To: Chief Judge Seeborg, Judge White, Divisional Managers Hansen and Perie, and Districtwide Clerks Busby and Evans

Re: Fyk Six-Page Notarized Affidavit re: Deprivation of Constitutional Rights and Recipients' Necessary Declaration & Redress, *Etc. re: Fyk v. Facebook*, No. 4:18-cv-05159-JSW (N.D. Cal.); No. 19-16232 (9th Cir. Ct.); No. 20-632 (SCOTUS); No. 21-16997 (9th Cir. Ct.); and *Fyk v. USA*, No. 1:22-cv-01144-RC (D.D.C.)

Dear Recipient:

Please be advised that on December 6, 2022, the *original* of this six-page notarized affidavit was sent (*via* FedEx overnight trackable delivery) to Districtwide Clerks Mark B. Busby and Elizabeth Evans at their 450 Golden Gate Avenue, Box 36060, San Francisco, CA, 94102-3489 address, along with other methods of transmission of a *copy* of this affidavit to Mr. Busby and Ms. Evans (such as email and facsimile). Please also be advised that *copies* of the six-page affidavit you are receiving were sent *(via* FedEx overnight

trackable delivery and/ or email), on December 6, 2022, to the following: Chief Judge Richard G. Seeborg in San Francisco, CA; Judge Jeffrey S. White in Oakland, CA; and Divisional Managers Odile Hansen and Nichole Perie in Oakland, CA. Finally, the only email address I could locate online was jswcrd@cand.uscourts.gov, so a copy of this six-page notarized affidavit was sent there as well. As for the rest of you, I took a reasoned guess as to email addresses, so a copy of this affidavit was also sent to the following email addresses:

rscrd@cand.uscourts.gov
rgs@cand.uscourts.gov
rs@cand.uscourts.gov
rseeborg@cand.uscourts.gov
rgseeborg@cand.uscourts.gov
jwhite@cand.uscourts.gov
jswhite@cand.us courts.gov
jsw@cand.uscourts.gov
jw@cand.uscourts.gov
ohansen@cand.uscourts.gov
nperic@cand.uscourts.gov
oh@cand.uscourts.gov
np@cand.uscourts.gov
mbusby@cand.uscourts.gov
ms@cand.uscourts.gov
msb@cand.uscourts.gov
eevans@cand.uscourts.gov
ee@cand.us courts. gov

Finally, please be advised that similar affidavits have been sent to Congress, the President of the United States of America, the Supreme Court of the United States of America, the Ninth Circuit Court of

Appeals, the United States District Court for the District of Columbia, and the Attorney General/ Department of Justice.

I thank you in advance for your anticipated careful consideration of this affidavit and your related subsequent prompt rectification/stoppage of the several years of deprivation of my constitutional rights and justice (largely, thus far, at the hands of California district and appellate courts) that I have suffered in relation to the *Fyk v. Facebook* matter.

Sincerely,

/s/ Jason M. Fyk
50 Gibble Rd.
Cochranville, PA 19330
(610) 470-5099
jfyk@socialmediafreedom.org

Affidavit of Notice of Awareness in Administrative Non- Judicial Hearings and Demand for Remedy by Necessity for Government Servants Who Use Authorized Agents to Block Protected Rights.

(Notice to Agent is Notice to Principal and Notice to Principal is Notice to Agent)

To: The United States Congress
The President of the United States
The Supreme Court of the United States
The Ninth Circuit Court of Appeals
The United States District Court for the Northern District of California
The United States District Court for the District of Columbia
The Attorney General/Department of Justice

Affiant, Jason M. Fyk, one of the People of the 50 American States (Republic in form), *sui Juris* in all respects, in this court of record, does present you with this Affidavit that you and your agents may provide due care, by necessity and demand of one of the People, based on the following claims:

Claim 1: Legislative Tribunals/Agency hearings are not the same as Judicial Tribunals, moving by the common law as seen in the Black's Law Dictionary (4th ed.), which explains qualifications of that type of Court. The People have assembled for their common good and are aware that the definitions in Black's Law Dictionary (5th ed.) have been diminished. I, therefore, put you on notice that *We the People* are no longer ignorant to a person, not sitting as a proper

Judge, making nullified or void unconstitutional or untenable orders;

Maxim:

"A judge should keep his jurisdiction within the limits of his commission."

Claim 2: No judge has the power to neglect, ignore, or circumvent the constitutionally required free speech and/or due process rights of We the People both in general and in particularly in order to help adversarial agents have their will;

Maxim:

"A judgment given by one who is not the proper judge is of no force and should not harm anyone."

Claim 3: Government servants/Trustees have used statutory programs, in order to create an unconstitutional pathway for corporate entities (*i.e.,* statutorily authorized government agents), to suppress lawful speech, restrict personal liberties, take property, and/or deny full use and accommodation from entities engaged in commerce in the states. Furthermore, Government workers deny People of their right to redress their grievances and to regulate their government through online information sharing, who have a guaranteed right to free speech and due process in the State and Federal Constitutions;

Claim 4: All public officers (including legislative, judiciary, executive, and/or any authorized agent) are the trustees and servants of the People and, at all material times, are amenable/obligated to the People;

***E.g.,* Virginia Constitution Bill of Rights (Section 2) People the Source of Power**

> *"That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them."*

Claim 5: The People have a guaranteed right to frequently bring their government to adhere to fundamental principles;

***E.g.,* Arizona Constitution (Article 2 Section 1) Fundamental Principles; Recurrence to**

> *"A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."*

Claim 6: Congress cannot immunize *(i.e.,* protect), through authorized agents, any action that defies constitutional right, as it would allow for an entity to abrogate rights guaranteed in the Constitutions;

Maxim:

> *"He who commands* a *thing to be done* is *held to have done it himself"* (*e.g.*, Title 47, United States Code, Section 230(c) to "block or screen offensive material"):

Maxim:

> *"What I cannot do myself, I cannot by another." (e.g.,* Section 230(c)(2)(A) "any action . . . taken . . . to restrict . . . material . . . consider[ed]. . . objectionable *(i.e.,* lawful),

whether or not such material is constitutionally protected").

Miranda v. Arizona, 384 U.S. 436, 491 (1966):

> *"Where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them."*

Claim 7: Corporate entities regularly held open to the public, doing commerce across state lines, are not "private" (see Title 2 of Public Accommodation law) and are bound to provide full accommodation to the People in observance of the Constitutions and Statutes of any given State and all applicable federal law;

42 U.S.C. ch. 21 II § 2000a(a):

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.

42 U.S.C. ch. 21 II § 2000a(b):

Each of the following establishments is a place of public accommodation within this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: . . . (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; . . .

42 U.S.C. ch. 21 II § 2000a(c):

. . . (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions,

or other sources of entertainment which move in commerce, and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any state or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

42 U.S.C. ch. 21 II § 2000a(e):

The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

Please Take Notice: "Private" entities are entities *not engaged in commerce* and *I* or are *not regularly held open to the public.* Social media companies *(e.g.,* Google, Facebook, Twitter) are both regularly held open to the public and are engaged in interstate commerce *(i.e.,* places of "exhibitions" or "entertainment," "which move in commerce," engaged in "communication among several states"); thus, Social Media companies are *public accommodations* doing business by the permission of the People who *must respect* the rights of the People;

Please Take Notice: The Legislature's statutory "protection" to deny personal rights *(i.e.,* Section 230-authorization), the executive's manipulation of same *(i.e.,* collusion between corporate agent and government servant-manipulation), and the Courts'/ judiciary's endorsement of same *(i.e.,* denial of personal Due Process rights-immunization) are testament to the failures of this government's adherence to the Constitution and the People's rights. Any law that abridges the People's power to protect the People's rights is a Trespass against the People;

Please Take Notice: The People have discussed and understand that corporations are public accommodations that operate by the authority and will of the People. When using our power and authority to create corporate entities, we require they follow the Constitutions and laws of the State, which derive from the People. Corporate agents, therefore, cannot be ordered, coerced, and/or influenced by government servants to abrogate the People's rights under statutory *"immunity"* granted by our servants, as there has never been (and can never be) a grant of that magnitude;

Please Take Notice: The ability to deal with evil is not at issue here. Government servants are utilizing statutorily authorized (*i.e.,* "protected") corporate agents (*i.e.,* entities engaged in public commerce across state lines; *e.g.*, Google, Facebook, Twitter) to abrogate the rights of the People. Government servants are misleading the People to believe that corporations, acting under the will of the People, are purportedly acting in the private domain and are accordingly not bound to accommodate the People or their rights;

Please Take Notice: As one of the People, I recognize and understand that you, as a Trustee of the

People, must have been granted the authority by the People to delegate and endorse such authority to corporate agents that are acting as public accommodations, by the will of the People, to block the rights of the People. If you, the Trustee of the People, have the Constitutional Authority to grant such authority, please respond with such evidence of such power and / or authority *within 10 days,* sworn under penalty of perjury, and by affidavit;

Maxim:

"If a man grant that which is not his, the grant is void."

Please Take Notice: The People, in the Constitutions of the United States of America (State and Federal), never agreed to endure long and abusive denials of remedy (*e.g.*, *Fyk v. Facebook,* N.D. Cal. and 9th Cir. Ct.) to have what you, as trustees, already swore to give and protect, as a condition for your election, appointment, and/or employment. If you have, or are aware of any grant, to bypass or abrogate the People's constitutional rights, it is my respectful wish, my demand, and my order to respond under penalty of perjury, by sworn affidavit within 10 days, with a point-by-point rebuttal of the maxims and common law stated in this notice. If you fail to respond to the aforementioned and in the fashion demanded, within 10 days, and/or you continue to deny the People's right (*e.g.*, my rights), you agree that you are willfully committing a Trespass on the People, with full knowledge, malice, intent, and in contravention to the Constitutional rights you have sworn to protect and that the claims and notice in this Affidavit shall stand as truth and that it shall be accepted as such by all courts. The

People, as the creators of your seats and offices, are the real regulators of all governments and demand remedy without delay, price, and / or denial. If you cannot find a remedy for the People, it is my respectful wish, my demand, and my order that you create remedy to serve the People by necessity.

Mann v. Mann, 172 P.2d 369, 375 (Cal. App. Ct. 1st Dist. Div. 2 1946):

"Judicial notice is a *form of evidence."*

Please Take Notice: Government servants and / or agents, pursuing their own interests, have fallen into *maladministration.* Some examples of such maladministration (voluntarily taken by government actors and/or authorized agents) include, but are not limited to, the following: suppression of free speech and preventing the redress (*i.e.*, due process) of the People's grievances (*e.g.*, *Fyk v. Facebook),* inducing, but not limited to, extraordinary remedy, election interference, blocking evidence of malfeasance, and the manipulation of body politics. All the aforementioned illustrative aggressions violate Federal and/or State Constitutions and/or Trust Indentures and constitute *a national emergency.* Furthermore, as one of the People, with (and by way of) the right to make government servants (all branches and/or agents) duly aware of the wrongdoings being done upon the People and the right to demand for the strict observance of the protections you swore to give the People, I hereby respectfully *demand and order* this body and / or all government agents listed above to immediately allow for special remedies by necessity, under the common law and customs and usage in law, based on the historical principles following the American Revolution.

Maxim:

"Where the ordinary remedy fails, we must have recourse to that which is extraordinary."

As one of the People who has assembled to declare a national emergency by necessity, it is accordingly my respectful wish, my demand, and my order that all government servants and authorized agents of government openly declare that all government servants and/or authorized administrative agent(s) listed above, including this body, were never granted true authority over the rights of the People. Furthermore, the failure of any government servant or authorized agent to misconstrue or misapply their administrative authority, in light of the Constitution, does not change what is the highest law (the Constitution) and it does not change their oath to protect the rights of the People;

It is accordingly my respectful wish, my demand, and my order that all government servants and authorized agents of government, provide immediate remedy to the People, immediately cease and desist all programs and/or agreements between any government entity, agency, or instrumentalities, and any corporate entity who is engaged in public commerce, or holding any government *"protection" for blocking a right* (*e.g.*, Section 230), security, or authorization, and cease and desist any actions taken to restrict the lawful free speech and / or due process rights of the People.

Maxim:

"To take away all remedy for the enforcement of a right is to take away the right itself."

We the People, have the power to create, alter, reform, or abolish government by right. The People have assembled, understand, and are informing that you, as a Trustee, are acting by our power, permission, and at our will, and that you, as a public servant, have absolutely no power to withhold remedy from the People. Nor may you deny, charge for, and/or delay said remedy. It is now the will of the People that you hear the People, as a necessity for the People.

Maxim:

"Remedies for the rights are ever favorably extended." (*i.e.,* Constitutional rights are never time-barred; *i.e.,* never untimely to exercise).

Therefore, pursuant to my Constitutional rights, I, Jason M. Fyk, do hereby respectfully demand that you, as a Trustee of the People, sworn to uphold the Constitution, forthwith respect my right to redress my grievances, and immediately hear my case for the illegal taking of my property and for the denial of my liberties (*e.g.*, deprivation of constitutionally protected due process and/or free speech rights) by an authorized (*i.e.,* Section 230-statutorily protected) agent of government (*i.e.,* Facebook).

Moreover, I hereby demand that, within the next 10 days, the United States District Court for the Northern District of California hereby, so as to stop the ongoing deprivation of my constitutional rights, withdraw/recall its November 1, 2021, Order [D.E. 51] and replace same with an Amended Order granting my March 22, 2021, Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment [D.E. 46] and accordingly allowing my case (No.

4:18-cv-05159-JSW) to finally move forward towards trial on the merits.

Maxim:

> *"[W]e hold the general rule to be that, where a federal court of Appeals sua sponte recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence."*

VERIFICATION

I, Jason M. Fyk, hereby declare, certify, and state, pursuant to the penalties of perjury under the laws of the United States of America, and by the provisions of 28 USC § 17 46, that all of the above and foregoing representations are true and correct to the best of my knowledge, information, and belief.

Executed in Lancaster, Pennsylvania on this 5th day of December in the year of Our Lord Two Thousand and Twenty-Two.

/s/ Jason M. Fyk
Autograph of Affiant

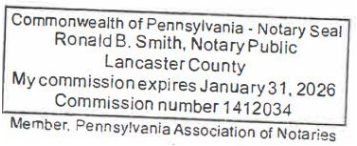
NOTARY AS JURAT CERTIFICATE

On this 5th day of December, 2022 (date) before me, Ronald B. Smith a Notary Public, personally appeared affiant, Jason M. Fyk, who proved to me on the basis of satisfactory evidence (driver's license) to be the man whose name is subscribed to within this instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his autograph(s) on the instrument the man executed, the instrument in my presence. I certify, under penalty of perjury and under the lawful laws of the State of Pennsylvania, that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary / Jurat: /s/ Ronald B. Smith

Seal:



/s/ Jason M. Fyk
Date: December 2, 2022

APPELLANT FYK DECLARATION CONCERNING TIMING OF *ENIGMA* KNOWLEDGE (NOVEMBER 2, 2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC,

Defendant-Appellee.

Appeal No. 21-16997

On Appeal from Denial of Motion for Relief Pursuant to Fed.R.Civ.P. 60(b) to Vacate and Set Aside Entry of Judgment of the United States District Court for the Northern District of California, 4:18-cv-05159 (Hon. Jeffrey S. White)

I, Jason M. Fyk, hereby declare as follows:

1. My full name is Jason Michael Fyk and I am *sui juris* in all respects.

2. My home address (and place of residency / domicile) is 50 Gibble Road, Cochranville, PA, 19330.

3. I, Jason M. Fyk, do hereby swear and affirm that I had no prior knowledge of the N.D. Cal./Ninth

Circuit case in question (*Enigma Software Group USA, LLC v. Malwarebytes, Inc.*), around which my District Court reconsideration efforts (that are the subject of this appeal) revolved, until October 14, 2020, when a friend, who knew I was engaged in active litigation with Facebook, sent me a .pdf link to the *Malwarebytes v. Enigma*, Supreme Court denial of Malwarebytes petition for writ of certiorari.

4. After reading the Supreme Court's determination, I immediately notified my counsel of the conflict created between my District Court determination and Enigma's determination. Upon becoming aware of the conflicting case law, I instructed my counsel to include the *Enigma* case law in our imminent Supreme Court petition and to stand ready to return the Northern District Court if the Supreme Court did not hear my case.

5. At no time during any of my proceedings (District Court, this Court, Supreme Court, District Court again, and this Court again) have I "wait[ed]" to bring forward any knowledge of any case law that would help support my case. The assumption that I would "wait" in any capacity given the extent of our efforts to right the wrongs thrust upon me contravenes reality and logic.

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

Executed in Cochranville, Pennsylvania, this 2nd day of November, 2022.

/s/ Jason M. Fyk
Plaintiff/Appellant

FYK AND *ENIGMA* COMPARATIVE TIMELINE[1]

10-07-2016 – Enigma files complaint against Malwarebytes in the N.D. Cal. Court.

11-07-2017 – N.D. Cal. Court dismisses Enigma's complaint.

11-21-2017 – Enigma appeals dismissal to the Ninth Circuit.

08-22-2018 – Fyk files complaint against Facebook in the N.D. Cal. Court.

04-02-2019 - Enigma files its opening brief in the Ninth Circuit.

06-18-2019 – N.D. Cal Court dismisses Fyk's Verified Complaint.

06-19-2019 – Fyk notices appeal in the Ninth Circuit.

09-12-2019 – Ninth Circuit overturns the N.D. Cal. Court's dismissal of the *Enigma* case.

09-13-2019 – Malwarebytes files motion to enlarge *en banc* petition deadline.

09-18-2019 – Fyk files opening brief in the Ninth Circuit.

10-28-2019 – Malwarebytes files *en banc* petition in Ninth Circuit.

12-31-2019 – Ninth Circuit issues amended *Enigma* decision denying Malwarebytes *en banc* petition.

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[1] *Enigma* events are distinguished in bold from *Fyk* filings.

12-31-2019 – Fyk files his reply brief in Ninth Circuit.

01-03-2020 – Fyk files (corrected) reply brief in Ninth Circuit.

03-06-2020 – Malwarebytes files application to enlarge SCOTUS Cert to 05-11-20 (granted), placing the Ninth Circuit's *Enigma* decision in flux.

05-11-2020 – Malwarebytes files Petition for Writ of Certiorari with SCOTUS. *Enigma* went to SCOTUS after Fyk's Ninth Circuit briefing had been completed.

05-13-2020 – *Enigma* SCOTUS docketed.

06-12-2020 – Ninth Circuit denies Fyk's appeal; *i.e.*, affirms the N.D. Cal. Court's dismissal of Fyk's Verified Complaint without leave to amend.

06-26-2020 – Fyk timely files *en banc* petition with the Ninth Circuit.

07-21-2020 – Fyk *en banc* petition docketed.

07-30-2020 – Ninth Circuit denies Fyk's *en banc* petition.

10-13-2020 – SCOTUS denied Malwarebytes' petition for writ of certiorari, accompanied by a ten-page Statement from Justice Clarence Thomas expounding on what exactly CDA immunity is supposed to be; with SCOTUS' denial of Malwarebytes' petition, the Ninth Circuit's *Enigma* decision becomes settled law.

10-14-2020 – In reality (whether or not SCOTUS lends any credence to this truth), Fyk and undersigned counsel learn of *Enigma* for the first time. *See* Fyk Affidavit, App'x ##00___.

11-02-2020 – Fyk files Petition for Writ of Certiorari in SCOTUS, incorporating the new *Enigma* affirmation (and Justice Thomas Statement) into such Petition.

11-10-2020 – Fyk's SCOTUS Petition docketed.

01-11-2021 – SCOTUS decides to not consider Fyk's Petition (SCOTUS denial entered 01-13-2021).

03-22-2021 – Fyk files 60(b) motion in N.D. Cal. Court, citing the now newly settled Ninth Circuit *Enigma* case law.

11-01-2021 – N.D. Cal Court, seven months later, denies Fyk's 3-22-2021 60(b) Motion.

12-01-2021 – Fyk timely notices appeal with Ninth Circuit.

12-21-2021 – Notice of appeal docketed.

03-03-2022 – Fyk timely files opening brief in this second Ninth Circuit appeal, and in following weeks Fyk timely files supplemental case law, *see* "List of Proceedings" Section.

04-26-2022 – Fyk files Constitutional Challenge of the CDA in the D.D.C. Court.

10-19-2022 – Over seven months after the filing of Fyk's opening brief, Ninth Circuit denies Fyk's appeal on the grounds of "untimeliness."

IS ADMINISTRATIVE LAW UNLAWFUL? BY PHILIP HAMBURGER — BOOK REVIEW BY ADRIAN VERMEULE OF THE TEXAS LAW REVIEW ASSOCIATION [A1]

IS ADMINISTRATIVE LAW UNLAWFUL? BY PHILIP HAMBURGER. CHICAGO, ILLINOIS: THE UNIVERSITY OF CHICAGO PRESS, 2014. 648 PAGES. $55.00.

INTRODUCTION

Philip Hamburger has had a vision, a dark vision of lawless and unchecked power.[1] He wants us to see that American administrative law is "unlawful" root and branch, indeed that it is tyrannous-that we have recreated, in another guise, the world of executive "prerogative" that would have obtained if James II had prevailed, and the Glorious Revolution never occurred.

Administrative agencies, crouched around the President's throne, enjoy extralegal or supralegal power;[2] the Environmental Protection Agency, with

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a1 John H. Watson, Jr., Professor of Law, Harvard Law School. Thanks to Ron Levin, Eric Posner, and Cass Sunstein for helpful comments, and Chris Hampson for excellent research assistance.

1 PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

2 *See id.* at 31 ("Just as English monarchs once claimed a prerogative power to make law outside acts of Parliament, so too the American executive now claims an administrative power to make law outside acts of Congress."); *id.* at 51 ("These days, administrative agencies have revived the imposition of extralegal interpretation, regulation, and taxing.").

its administrative rule making and combined legislative, executive, and judicial functions, is a modern

Star Chamber;[3] and *Chevron*[4] is a craven form of judicially licensed executive tyranny,[5] a descendant of the Bloody Assizes. The administrative state stands outside, and above, the law.

But before criticism, there must first come understanding. There is too much in this book about Charles I and Chief Justice Coke, about the High Commission and the dispensing power. There is not enough about the Administrative Procedure Act; about administrative law judges; about the statutes, cases, and arguments that rank beginners in the subject are expected to learn and know. The book makes crippling mistakes about the administrative law of the United States; it misunderstands what that body of law actually holds and how it actually works. As a result the legal critique, launched by five-hundred-odd pages of text, falls well wide of the target.

In the first Part, I'll try to reconstruct Hamburger's critique, whose basic ambiguity arises from the fact that Hamburger is impenetrably obscure about what

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[3] The book is studded with sentences like these: "Although the Star Chamber's issuance of regulations came to an end with the court itself, administrative regulations have come back to life. Not merely one administrative body, but dozens now issue regulations that constrain the public." *Id.* at 57.

[4] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[5] *See id.* at 316 ("[T]he deference to interpretation is an abandonment of judicial office. . . . [T]hey thereby deliberately deny the benefit of judicial power to private parties and abandon the central feature of their office as judges.").

he means by "lawful" and "unlawful." Those terms are only loosely related to the ordinary lawyers' sense. In my view, the best reconstruction is that Hamburger thinks that there are deep, unwritten principles of Anglo-American constitutional order, derived from the views of English common law judges; departures from those principles are "unlawful." In the second Part, I'll try to show that the book's arguments are premised on simple, material, and fatal misunderstandings of what is being criticized and never do engage the common and central arguments offered in defense of the administrative state. In the conclusion, I'll consider a suggestion[6] that the book is only masquerading as legal theory and should instead be understood as a different genre altogether-something like dystopian constitutional fiction. Although the suggestion is illuminating, and tempting, I don't think it applies here.

I. Reconstruction

Let me very briefly summarize the surface content of the book in subpart A and then, in subpart B, try to reconstruct what Hamburger means when he calls administrative law "unlawful."

A. On the Surface

The book's modus operandi, which gives it a visionary atmosphere, is its relentless raising of the stakes about the administrative state and administrative law. If Hamburger is correct, it's not just that this or that decision is wrong, or that the "nondelegation

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6 Offered by my colleague Charles Fried at a conference on the book manuscript at Columbia Law School.

doctrine" should be revived, or that the combination of functions in agencies should receive renewed judicial scrutiny. The usual debates of constitutional lawyers are small bore, fiddling around the edges of the problem—a far greater and darker problem.[7] If Hamburger is correct, the administrative state is a political abomination, an engine of tyranny: "At stake is nothing less than liberty under law."[8]

Modern administrative law is a soft form of "absolutism," Hamburger tells us over and over again.[9] Indeed it is a specifically continental absolutism, a betrayal of the Anglo-American rule of law and legal liberty that was rooted in the constitutionalism of the common law judges developed in the 16th and 17th centuries. In passages reminiscent of Albert Venn

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[7] According to Hamburger, "The dark possibilities for America were evident already in the nineteenth century." HAMBURGER, *supra* note 1, at 450.

[8] *Id.* at 496. Other dangers of administrative law, according to Hamburger, are the risk of "overwhelm[ing] the Constitution," *id.* at 493; "evad[[[ing] a wide range of regular law, adjudication, institutions, processes, and rights," *id.* at 494; giving rein to the "lust for power outside the law," *id.* at 495; generating feelings of alienation from government, *id.* at 498; and allowing the "knowledge class" to "enlarge[] its own power," *id.* at 503. Most ominously, Hamburger writes that "the longer this coercion persists, the more one must fear that the remedy also will be forceful." *Id.* at 489.

[9] *E.g.*, *id.* at 6-7, 25-26; *id.* at 411-17 (discussing the "serious charge" of claiming that "administrative law is a form of absolute power"); *id.* at 508 ("Although it would be an exaggeration to denounce administrative power as mere tyranny or despotism, this power is profoundly worrisome. Even soft absolutism or despotism is dangerous.").

Dicey's alarmism over *droit administratif*,[10] Hamburger traces the origins of administrative law to both French[11] and German[12] legal theory, most importantly Prussian *Ordnung* or bureaucratic ordering of an absolutist cast.[13] Administrative law represents the "Prussification" of our society.[14]

In England, absolutism was the road not taken, the path urged by civilian lawyers influenced by Roman imperial law.[15] On that path lay "prerogative"—not merely the "ordinary" prerogative within the common law, namely the various royal powers themselves recognized by common law judges, but instead a far more sweeping "extraordinary" prerogative outside and above the law.[16] The heroes

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10 *See, e.g.*, A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 370-71 (10th ed. 1960) (comparing *droit administratif* to the tyranny of Star Chamber).

11 *See* HAMBURGER, *supra* note 1, at 444 (discussing Jean Bodin).

12 *See id.* at 447-50 (discussing von Treitschke, von Jhering, Lorenz von Stein, Rudolph von Gneist, and especially Hegel).

13 *See id.* at 445-47 (discussing how anxieties about order justified broad general powers in the Prussian code).

14 *Id.* at 505.

15 *See id.* at 34 ("[T]he English self-consciously rejected civilian jurisprudence . . . [which] became a vehicle for justifying absolute power."); *id.* at 443 (arguing that the source of absolute power was an academic focus on "Roman-derived canon and civil law" that "threatened English law" but was checked, *inter alia*, by King Stephen, who "declared Roman law should have no place or at least no authority in England").

16 *Id.* at 26-29.

of the resistance to the imperial prerogative, the Jedi Knights of the story, are first and foremost the English common law judges.[17] Hamburger also credits the statesmen who opposed James II, invited the invasion of a foreign king, William III, and brought about the Glorious Revolution,[18] but he does not adore them the way he adores Chief Justice Coke.[19]

What has all this to do with us? Our present embodies the very fate the English common law judges, and the Parliamentary statesmen of 1689, thought they had averted. As of 2014, we have recreated the absolutist rule of imperial prerogative, perhaps in a somewhat softer form (Hamburger equivocates about this[20]) or in a milder disguise, but

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17 *See id.* at 45-47 (describing how *The Case of Proclamations* came before the judges).

18 *See id.* at 48 (explaining that after the Revolution of 1688, "there was a substantial body of opinion that Parliament could not transfer its lawmaking power").

19 *See, e.g.*, *id.* at 46 ("Coke, however, refused to be bullied."); *id.* at 47 ("[King James' maneuvering] could only have given greater resolve to Coke and his colleagues. The next month they reported back what the king did not want to hear."); *id.* at 319-20 ("James I expected his judges literally to bow before him. But even when Chief Justice Coke had to get down on his knees before his king, he refused to defer. He kept on speaking his mind, exercising his independent judgment. . . . Eventually Coke was dismissed for his temerity, but his common law understanding of judicial office survived. . . . ").

20 *Compare id.* at 493 (calling administrative law a "revival of absolute power" and a "consolidated governmental power outside and above the law" that "threatens to overwhelm the Constitution"), *with id.* at 508 (suggesting that administrative law may more prudently be deemed only "soft absolutism or despotism," although nonetheless dangerous).

with essentially the same results.[21] Liberty is at the mercy of extralegal bureaucratic *Ordnung*, lightly cloaked in various constitutional and legal fictions about delegation and authorization but substantively the same.[22]

The hallmarks of extralegal absolutism are everywhere to be seen in the system of administrative law created since the Progressive Era. Agencies engage in "extralegal legislation," meaning the issuance of binding general rules,[23] and "extralegal adjudication," meaning the issuance of binding orders.[24] Procedurally, agencies wield combined powers and functions. In contrast to a system of separated powers and specialized functions, their decisions are "unspecialized,"[25] "undivided,"[26] and "unrepresentative,"[27] among other failings. The judges, cravenly, have created an "entire jurisprudence of deference"[28] that provides a sinister twist on the ideal of rule "through the law and its

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[21] *Id.* at 494 ("[P]rerogative power has crawled back out of its constitutional grave and come back to life in administrative form.").

[22] *See id.* at 508 (discussing the German system of *Ordnung* and the "familiar dangers" of "the order imposed by an administrative class").

[23] *Id.* at 31-32.

[24] *Id.* at 129-31.

[25] *Id.* at 325.

[26] *Id.* at 347.

[27] *Id.* at 355.

[28] *Id.* at 319.

courts."[29] The jurisprudence of deference amounts to "an abandonment of judicial office."[30]

What then is to be done? In a few cursory final sections, Hamburger offers some brief suggestions, vague and ill defined. The main one is that judges should engage in an "incremental approach to administrative law," meaning "[s]tep-by-step corrections" that will "bring judicial opinions back into line with the law."[31] (In a moment, I will suggest that by "law" here, Hamburger necessarily means law in a substantive and unwritten sense—"law" as the deep principles of a common law Anglo-American constitutional order.) The resulting pragmatic problems are dismissed in the most cursory fashion imaginable; Hamburger merely says that "[u]ndoubtedly, in some areas of law, concerns about reliance, the living constitution, precedent, and judicial practicalities can be very serious. It is far from clear, however, that they are substantial enough to justify absolute power. . . ."[32] Hamburger's interest obviously flags in this section; his passion lies in articulating his dark vision, in the diagnosis of our ills, rather than in prescribing remedies.[33]

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[29] *Id.* at 280.

[30] *Id.* at 316.

[31] *Id.* at 491.

[32] *Id.* at 492.

[33] *Compare id.* at 491-92, 509-11 (describing some practical responses), *with id.* at 1-491, 493-509 (describing the problem).

B. "Unlawful"?

What exactly does Hamburger's title mean? Patently, he must be using the word law in two different senses to say that a body of "law" is "unlawful." Others have noted that Hamburger never makes clear what exactly he intends[34]—in a book over six-hundred-pages long.

Given his historical interests, the most obvious possibility is that Hamburger means to advance an originalist claim: that administrative law is inconsistent with the original understanding of the Constitution of 1789. But this has already been done as well as it can be,[35] and in any event I don't believe that's what Hamburger is getting at.[36] If Hamburger were an originalist in the conventional American sense, he would spend far more time on the ordinary meaning of the text as of 1789 and on the ratification debates, and far less time on subterranean connections between the Stuart monarchs and German legal theory.[37] His

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34 See, e.g., Gary Lawson, The Return of the King: The Unsavory Origins of Administrative Law, 93 TEXAS L. REV. 1521, 1527-32 (2015) (book review).

35 *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231-32 (1994) ("[T]he modern administrative state, without serious opposition, contravenes the Constitution's design.").

36 Nor does Gary Lawson. *See* Lawson, *supra* note 34, at 1529 (expressing belief that Hamburger's argument is not "reducible to strictly constitutional terms").

37 *See id.* at 1530 ("[Hamburger's] point seems to be that there is something lawless about administrative governance that goes above and beyond inconsistency with the governmental scheme embodied by the federal Constitution.").

main interest, his intellectual center of gravity, is elsewhere.

I think I perceive, through a glass darkly, what Hamburger means by "unlawful." I think-although the ambiguities and obscurities of the tome make it irreducibly unclear—that the key to understanding Hamburger is that he isn't an ordinary constitutional positivist. The main point, for him, isn't that administrative law is inconsistent with this or that constitutional clause or even the best overall interpretation of the Constitution. Hamburger is emphatic that "popular and scholarly debates" get off on the wrong foot by addressing the problem of administrative law "as if it were merely a flat legal question about compliance with the Constitution."[38] Passages like this one abound: "[T]he legal critique of administrative law focuses on the flat question of unconstitutionality, and . . . this is not enough. Such an approach reduces administrative law to an issue of law divorced from the underlying historical experience and thus separated from empirical evidence about the dangers."[39] Hamburger has, in other words, a historically grounded but entirely substantive and ironically extra-constitutional vision of the true Anglo-American constitutional order, emphatically with a small-c.[40] That

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[38] HAMBURGER, *supra* note 1, at 5.

[39] *Id.* at 15; *see also id.* at 493 ("The danger of prerogative or administrative power . . . arises not simply from its unconstitutionality, but more generally from its revival of absolute power.").

[40] Lawson seems to agree. *See* Lawson, *supra* note 34, at 1530 (noting Hamburger uses "constitutionalism" to refer to "a very broad set of principles that are part of the Anglo-American legal and political tradition").

vision is rooted in the historical experience of the common law judges who resisted (or did not—I will explain the qualifier later) the prerogative despotism of the Stuarts. Hamburger's deepest commitment is to this common law version of Anglo-American constitutionalism. It is of secondary interest to him whether the written constitutional rules of the United States, as of 1789, correspond to that substantive vision.

Or rather he assumes that they do, quite casually. What makes the book blurry, and what makes my reconstruction tentative, is that the book typically elaborates an English constitutional principle at some length and then offers a few brief pages and perhaps a few citations to connect up that principle with the American Constitution and its original understanding.[41] So it is necessarily an exercise of judgment on my part to say that the English materials are where the book's heart lies, as it were. It would not be crazy, although I think it would be misleading, to see Hamburger as a conventional originalist who just goes very deeply into the English background and who tends to assume, typically without much proof, that the English background transposes directly to the American case.

In the reconstruction I suggest, Hamburger offers a highly stylized constitutional vision derived from the English experience, interestingly crossbred with American high-school civics-and also premised on a desperately shaky understanding of administrative law,

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41 Take, for example, Hamburger's discussion of deference. *Compare* HAMBURGER, *supra* note 1, at 285-91 (discussing English background), *with id.* at 291-92 (discussing the American Constitution and its immediate context).

or so I will argue. In this vision, legislatures hold the exclusive power to "legislate," while judges exercise all "judicial" power and exercise independent judgment in the sense that they decide all legal questions for themselves without "deference." As for the executive, its only power is to "execute" the laws, understood very narrowly—basically the power to bring prosecutions and other court proceedings to ask judges to enforce statutes. The thing to avoid at all costs is that the executive should issue "binding" orders or rules; where that occurs, the executive is necessarily exercising "legislative" power and has arrogated to itself "extralegal" or "supralegal" prerogative of the sort claimed by James II in his most extravagant moments.

When Hamburger says administrative law is "unlawful," this, I think, is the way to understand him. He means, in other words, that American administrative law is out of step with the deep substantive principles of the small-c constitutional order of the Anglo-American legal culture. Administrative law allows the executive to exercise "legislative" power by allowing agencies and the President to issue "binding" orders and rules, and in that sense allows the agencies a prerogative to act extralegally or supralegally, like the Court of Star Chamber. I will call this "the reconstructed thesis."

II. Administrative Law Is Lawful

A. Responses

Now, the reconstructed thesis could fail in one of several ways. One way would be that the thesis is simply wrong about what the deep principles of Anglo-

American constitutional history actually are (assuming *arguendo* that such principles exist). I'm not qualified to judge whether the book offers a fair reading of English constitutional history, although I suspect that the story is far more nuanced than Hamburger lets on. On Adam Tomkins' lucid account, the common law judges failed altogether in their resistance to royal prerogative.[42] When in 1637, nine of twelve judges allowed Charles I to levy "ship-money" taxes in peacetime and without statutory authorization,[43] the game was essentially over. Royal pretensions were eventually curbed, but by civil war, Parliamentary resistance, and William III, not by common law judges. Distilled to its essence, "the reality of the common law constitution-and the reason for its failure-was that, as Coke himself explained it in the House of Commons in 1628, 'in a doubtful thing, interpretation goes always for the king.'"[44] *Chevron avant la lettre*. A second way the thesis might fail is that it might have no pragmatic implications whatsoever. It would be the easiest thing in the world to dismiss Hamburger's book with the glib observation that it will change nothing. If one means by this that the administrative state will be essentially unchanged in its large institutional outlines for the foreseeable future and that administrative law will also, the observation is certainly correct. Hamburger's main

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[42] *See* ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION 69-87 (2005) (challenging the period's characterization as "the moment at which the common law courts stood up to the power of the Crown's government").

[43] *See id.* at 83-85.

[44] *Id.* at 87.

proposal for rolling back the administrative state, step-by-step judicial correction,[45] verges on self-refutation. Weren't the American judges who decided cases like *Chevron* the ones who helped get us into this mess in the first place, in Hamburger's view? If they are a large part of the problem, why does he think they are also the source of the solution? Hamburger hasn't thought through the relationship between his diagnosis and his prescription, which are patently in tension with one another.[46]

Yet I don't think that the pragmatic dismissal is a fair response to Hamburger. That the administrative state is going nowhere does not mean that books like Hamburger's have no effect or that they can be ignored on pragmatic grounds. The effect of such books, if accepted, is to quietly delegitimate the administrative state, to tear out its intellectual struts and props while leaving the building itself teetering in place—a dangerous game.[47] The indirect and long-run effect of Hamburger's thesis on the intellectual culture of the legal profession, and perhaps even of the broader public, might be pernicious and worth opposing, even if there are no direct and short-run effects.

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45 HAMBURGER, *supra* note 1, at 491.

46 *Cf.* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1788-90 (2013) (pointing out the problems that arise due to tension between external and internal perspectives).

47 *See, e.g.*, HAMBURGER, *supra* note 1, at 509-11 (advocating for changes in legal and absolutist vocabulary under the title "Candor").

So I will not take either the route of disputing Hamburger's account of "lawfulness" or the route of dismissing his book as ineffectual. However, there is yet another, simpler way that the book's reconstructed thesis might go wrong. It might go wrong not in the major premise, about what the deep principles of the (putative) Anglo-American constitutional order are, but in the minor premise—about whether American administrative law violates those principles, or at least whether Hamburger has shown that it violates those principles. That's the avenue I will follow. The book is light on knowledge of administrative law, fatally so.

B. Why Administrative Law Is "Lawful" or Not Proven To Be "Unlawful"

So let me accept Hamburger's premises, as I've tried to reconstruct them, and show that even given those premises, administrative law is lawful. Or, at a minimum, I hope to show that the book hasn't come close to showing that administrative law is "unlawful," for the simple reason that it hasn't understood what administrative law says; the book veers off target because it doesn't know where the target actually is. I'll sort the discussion into three main topics: delegation, the taxing power, and the separation of powers, including the separation of functions in agencies.

1. Delegation

The delegation issue hangs over the whole book. Hamburger's basic charge, recall, is that administrative law rests on "prerogative" and is thus "extralegal." Whatever that means exactly, it would become a far more difficult claim to defend to the extent that

administrative law enjoys valid statutory authorization. If administrative agencies exercise whatever powers they possess under the authority of valid statutory grants, then they act lawfully in the ordinary sense. Now of course agencies may go wrong in other ways—for example, they may happen to exercise their delegated powers in an arbitrary and capricious manner—but that is not a wholesale problem with the administrative state, and it's not the sort of wholesale critique of the administrative state's lawfulness that Hamburger wants to offer.

So Hamburger will have to deny that the statutory authorizations are indeed otherwise "lawful," in his special sense. He will have to say that even if the authorizing statutes are valid in the ordinary legal sense, they violate the deep principles of Anglo-American constitutionalism. As we will see, he does say that—on the basis of an argument that it is predicated on a straightforward mistake about American administrative law.

Let me start with a critical example of the delegation problem: Hamburger's treatment of *Chevron*. In Chapter 4, the main point is that administrative "interpretation" is a form of "extralegal lawmaking."[48] Hamburger contrasts two approaches, one in which judges decide what the law means in the course of deciding cases, and one—putatively imperialistic, derived from Roman law—in which the king or executive assumes a kind of "prerogative" or "extralegal" power to fill in gaps in the law. Hamburger's target here is *Chevron* deference to agency interpretations; he wants to draw an analogy

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[48] HAMBURGER, *supra* note 1, at 51-55.

between *Chevron* and the more luridly imperialistic pronouncements of James II and his servants about the king's gap-filling authority: "[B]ecause the office of judgment belonged to the judges, the king could not interpret with judicial authority, and they could not defer to his views."[49]

In Chapter 16, his central treatment of "deference," Hamburger makes the target explicit. I will quote some passages from his discussion, in part to give the reader a taste of the panoramic, conceptual, and largely question-begging flavor of Hamburger's prose:

> The most basic judicial deference is the deference to binding administrative rules. When James I attempted to impose legal duties through his proclamations, the [English common law] judges held this void without showing any deference. . . . The English thereby rejected extralegal lawmaking, and in the next century the American people echoed the English constitutional response by placing all legislative power in Congress. Nonetheless, the courts nowadays defer to the executive's extralegal lawmaking. . . .
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> . . . .
>
> This deference to the executive is incompatible with the judicial duty to follow the law.[50]

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[49] *Id.* at 54.

[50] *Id.* at 313-14.

But what if validly enacted statutes themselves instruct the courts to defer? Legislative delegation of interpretive authority to agencies, if otherwise valid, would square the circle, reconciling the two approaches that Hamburger wants to contrast. If the law itself includes a valid delegation of law-interpreting authority to the agencies, then faithful judges, independently applying all relevant law in the case at hand, would conclude that the agency's interpretive authority is not extralegal but securely intralegal. This is of course the delegation theory of *Chevron*, now reigning as the official theory after its adoption by the Supreme Court more than a decade ago.[51]

I hasten to add that I think that the delegation theory is an erroneous and insufficient justification for *Chevron*, both because it is rankly fictional[52]—

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[51] *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."). For precursors, see, for example, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-41 (1996).

[52] *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) ("*Chevron* is rooted in a background presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" (quoting *Smiley*, 512 U.S at 740-41)); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("In the vast majority of cases I expect that Congress . . . didn't think about the matter at all. If I am correct in that, then any

there just is no general delegation of that sort to administrative agencies—and because the *Chevron* opinion itself is irreducibly ambiguous, or ambivalent, on the topic of delegation. At some points it endorses a version of the delegation theory.[53] At others it explicitly disavows that theory[54] and instead rests deference on the benefits of political accountability and expertise.[55]

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rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate.").

53 *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (stating that statutory gaps rest on explicit or implicit delegations of law-interpreting power to agencies).

54 *See id.* at 865. As the *Chevron* majority explains:

> Congress intended to accommodate both [environmental and economic] interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.
>
> Judges are not experts in the field, and are not part of either political branch of the Government.

Id. (emphasis added).

55 *See id.* at 865-66 (stressing the political accountability and expertise of administrative agencies in the Executive Branch).

But the issue of the correct justification for *Chevron* is irrelevant for present purposes. All that matters here and now is that the official delegation theory is critical for Hamburger because, if correct, it scrambles his categories. Indeed the very point of the delegation theory of *Chevron* is precisely to refute the charge that *Chevron* is lawless. The point of the theory, right or wrong, is to reconcile the traditional lawyer's conscience with deference to administrative agencies on questions of law. All this is intended to illustrate the centrality of the delegation issue. What then does Hamburger say about delegation? How does he attempt to show that the authorizing statutes are themselves "unlawful"? With an argument, it turns out, that rests on a simple misunderstanding of American administrative law. Hamburger's major charge is that administrative law permits "subdelegation" or "re-delegation" of legislative power from Congress to agencies.[56] With the exception of a few asides, to which I will return, Hamburger relentlessly, repetitively urges that when the people have delegated legislative power to a certain body (Congress) in the Constitution, subdelegation or re-delegation of legislative power by that body to another is forbidden under the old maxim: *delegata potestas*

Thanks to Ron Levin for clarifying my thinking about the issues in this paragraph (although the views expressed here are mine alone).

56 *E.g.*, HAMBURGER, *supra* note 1, at 377.

non potest delegare.[57] The whole of Chapter 20 is devoted to elaborating this argument.[58]

Unfortunately there is no one, or almost no one, on the other side of the argument. Administrative law is in near-complete agreement with Hamburger on this point.[59] The official theory in administrative law is precisely the one Hamburger thinks he is offering as a critique of administrative law: namely, that Congress is constitutionally barred from subdelegating or re-delegating legislative power to agencies. Very oddly, Hamburger never cites the mainline of delegation cases that say exactly this, including most centrally *Loving v. United States*,[60] which doesn't appear in Hamburger's index.[61] *Loving* is explicit about all this: the official theory is that "the lawmaking function belongs to Congress . . . and may

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[57] *Id.* at 386.

[58] *Id.* at 377-402.

[59] I said that administrative law is in near-complete agreement about the official theory of delegation. The qualifier is necessary only because of a few judges here and there, most notably Justice John Paul Stevens, who have advanced a different, nonstandard theory: that some delegations of legislative power are valid, while some are not (with the "intelligible principle" test sorting between the two). *E.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 488-90 (2001) (Stevens, J.., concurring). But this has never been the mainstream of American legal theory, as Justice Stevens himself very candidly showed with a long string citation. *Id.* at 488 & n.1. For a defense of Justice Stevens' view, *see generally* Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003 (2015).

[60] *Loving v. United States*, 517 U.S. 748 (1996).

[61] HAMBURGER, *supra* note 1, at 626.

not be conveyed to another branch or entity."[62] More recently, in *City of Arlington v. FCC*, the Court emphatically reaffirmed that legislative power is "vested exclusively in Congress."[63] Hamburger's elaborate proof that subdelegation of legislative power is forbidden amounts to pounding on an open door.

The difference between Hamburger and the official theory is that administrative law denies that there *is* any delegation of legislative power at all so long as the legislature has supplied an "intelligible principle" to guide the exercise of delegated discretion.[64] Where there is such a principle, the delegatee is exercising executive power, not legislative power. As the Court put it in *City of Arlington*:

> Agencies make rules ("Private cattle may be grazed on public lands *X*, *Y*, and *Z* subject to certain conditions") and conduct adjudications ("This rancher's grazing permit is revoked for violation of the conditions") and have done so since the beginning of the Republic. These activities take "legislative" and "judicial" forms, but they are exercises of—indeed, under our constitutional structure they must

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62 *Loving*, 517 U.S. at 758 (citation omitted) (citing U.S. Const. art. I, § 1).

63 *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 n.4 (2013).

64 *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

be exercises of—the "executive Power."[65]

One might think this distinction merely semantic. Nothing could be farther from the truth. The distinction results from a serious, substantive view of the nature of executive power, a view worked out in a line of cases beginning, at the latest, with *Field v. Clark* in 1892,[66] and continuing with *United States v. Grimaud* [67] in 1911 and *J.W. Hampton v. United States* in 1928.[68] On that view, the whole problem of delegation is to navigate between Scylla and Charybdis.

On the one hand, if the only requirement were that the delegatee must act within the bounds of the statutory authorization—the *Youngstown*[69]

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65 *City of Arlington*, 133 S. Ct. at 1873 n.4.

66 *See Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act [in question] is not inconsistent with that principle. It does not, in any real sense, invest the president with the power of legislation."); *id.* at 694 ("'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government.'" (quoting Locke's Appeal, 72 Pa. 491, 498-99 (1873))).

67 *See* 220 U.S. 506, 516 (1911) (holding that a delegation to the Secretary of Agriculture to manage public lands was not a delegation of legislative power but a conferring of "administrative functions").

68 *See supra* note 64.

69 *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

constraint[70]-the legislature could in effect delegate legislative power to the executive by means of an excessively broad or open-ended authorization. On this view, requiring the agency to act within the bounds of the statutory authorization is not enough. *Youngstown* must be supplemented by an additional standard-in the rules and standards sense—that courts use as a backstop to police overly broad or vague statutory authorizations. Excessive breadth or vagueness means that the authorization in effect amounts to a delegation of legislative power *de facto*, even if not *de jure*. On the other hand, the dilemma continues, it would itself be a misunderstanding of the constitutional scheme to require the legislature to fill in every detail necessary to carry its chosen policies into execution and to adjust those details as circumstances change over time.[71] To require that would equally confound legislative power with executive power,

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[70] *See id.* at 585 (explaining that the Executive must derive authority to act either from an act of Congress or directly from the Constitution).

[71] *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 424 (1944). As the *Yakus* Court clarifies:

> The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations. . . . The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. . . .

Id.

just in the opposite direction. In order to prevent legislative abdication to the executive, it would in effect force the legislature to act as the executive itself. The "intelligible principle" doctrine steers between these perils, attempting to sort executive power to "fill in the details" from legislative power to set the overall direction for policy.

At this point critics of the administrative state, Hamburger very much included, tend to go wrong by assuming that the argument in favor of allowing the executive to fill in the details and against requiring legislatures to handle all the details themselves is all just an argument from practicality, expediency, or necessity. It is not; it is emphatically an internal legal and constitutional argument, just as much as any of the arguments against delegation. The internal legal argument is that the power to fill in the details is an indispensable element of what executive power means; that to execute a law inevitably entails giving it additional specification, in the course of applying it to real problems and cases.

To be clear, the official theory of delegation in American administrative law is not a view that I agree with.[72] The better theory, and indeed the one with

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72 *See generally* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). There are a number of excellent responses to and critiques of this paper, by Larry Alexander and Sai Prakash, Gary Lawson, and others; the citations are collected in Hamburger's book, in the notes to Chapter 20. HAMBURGER, *supra* note 1, at 594-602.

better Founding era credentials,[73] is that so long as an agency acts within the boundaries of the statutory authorization, obeying the *Youngstown* constraint, the agency is necessarily exercising executive rather than legislative power, intelligible principle or no.[74] But right or wrong, the merits of that nonstandard view are not relevant here, and the official theory of American administrative law is by no means trivially or obviously flawed. Before one discards it, one must first understand and respond to it. Hamburger's main, exhaustive argument about delegation simply fails to come to grips with the official theory.

So Hamburger seems largely unaware of the true grounds of his central disagreement with American administrative law. The true issue in controversy is not whether legislative power can be delegated (all concerned agree that it can't); the issue is whether administrative issuance of "binding" commands under statutory authority always and necessarily counts as an exercise of "legislative" power. Hamburger would have to say that it does; the main line of American administrative law says that it doesn't, at least not necessarily. So long as agencies are guided by an "intelligible principle," they are exercising executive power, not legislative power, even when they issue

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73 *See* Posner & Vermeule, *supra* note 72, at 1732-40 (arguing that the nondelegation doctrine is unsupported by originalist evidence, including original understanding, early legislation and legislative history, and early judicial decisions).

74 *See id.* at 1725-26 (arguing that *any* rule making engaged in by the Executive pursuant to congressional authorization is a simple case of Executive power).

binding commands. In various unfocused remarks,[75] Hamburger seems to recognize the problem implicitly and seems to say that officials exercise "legislative" power whenever, and just so long as, they issue "binding" commands.[76] This is the argument he needs, and it is woefully underdeveloped. And in any event, as the Supreme Court has always recognized, the argument simply can't be correct. There are several ways to put the problem, which end up at the same place, and have the same cash value.

One way is in terms of the distinction between "interpretation" and "lawmaking." Hamburger seems to concede, as anyone must, that agencies can interpret statutes in the course of their work; he just assumes that in the proper scheme of things, judges will review those interpretations without deference, setting them aside freely if they are incorrect, in the judges' independent view. But as others have pointed out, the line between "interpretation" and "lawmaking" is hardly

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75 *See, e.g.*, HAMBURGER, *supra* note 1, at 378 ("The subdelegation problem thus arises primarily where Congress authorizes others to make legally binding rules, for this binding rulemaking, by its nature and by constitutional grant, is legislative." (emphasis added)). There are remarks of this sort scattered through the book.

76 For simplicity's sake, I focus here on rule-making commands issued by an agency acting as a minilegislature, as distinguished from adjudicative commands issued by an agency acting as a minicourt. Hamburger considers the latter "unlawful" also. *See* HAMBURGER, *supra* note 1, at 227. That conclusion is susceptible to objections that are parallel to the arguments that I make in the text regarding agencies' exercises of "legislative" power in rulemaking. (Thanks to Ron Levin for clarifying my thinking here and for suggesting the formulation in this note.)

self-evident.[77] Are agencies confined to parroting the exact language of the statute, or can they add specification? Hamburger gives no account of how to distinguish the two.

Furthermore, such interpretations are themselves "binding" in one straightforward sense. Executive officials necessarily and inescapably issue "binding" interpretations, just so long as the statute they are charged with applying is binding. Every time a taxing authority or customs officer interprets a statute and applies it to a person or firm, the interpretation is "binding" in the sense that it provides law for the addressee unless and until overturned by a higher administrative tribunal or by a judge. Metaphysically speaking, it is the underlying statute rather than the administrative interpretation that "binds"; but the interpretation will inevitably add specification to the statute, even if only by applying it to a new case. Speaking practically rather than metaphysically, the agency interpretation is binding in the sense that it determines the legal position for the time being.

Finally, the Supreme Court has never—not once, not in 1935, not ever—accepted Hamburger's position that every "binding" rule made by an administrative agency necessarily represents an exercise of "legislative" power. The Court specifically denied this in *Grimaud* in 1911 and described administrative rulemaking power as a longstanding principle of American constitutionalism. It is worth quoting the key passages:

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77 *See, e.g.*, Lawson, *supra* note 34, at 1541-45 (discussing the difficulties of distinguishing cleanly between lawmaking and interpretation).

> From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations. . . .
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> . . . .
>
> That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." . . . But the authority to make administrative rules is not a delegation of legislative power. . . . [78]

The point of *Grimaud*, the theory it embodies, is not to be waved aside. The theory is that it is an indispensably executive task to "fill in the details" of statutes with binding regulations. That sort of regulation does not compete with legislative power, or displace it, but complements and completes it[79]—

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[78] United States v. Grimaud, 220 U.S. 506, 517, 521 (1911) (emphasis added) (citation omitted) (quoting Field v. Clark, 143 U.S. 649, 692 (1892)).

[79] *See generally* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006) (discussing "the President's authority to prescribe incidental details needed to carry into execution a legislative scheme, even

fulfilling, not compromising, the system of separated powers. Moreover, *Grimaud* claims that the theory has been adopted in American constitutional law from the beginning, as evidenced by unbroken legislative and executive practice. It just is part and parcel of the American system of separated powers, whatever Chief Justice Coke might have said about it.

Hamburger may disagree with that theory or with the historical claim, but shouldn't he address them squarely? It isn't enough to just repeat, and repeat, the claim specifically disputed and denied in *Grimaud* and other leading cases—the claim that "[w]hen Congress authorizes administrative lawmaking, it shifts legislative power to the executive. . . . "[80] The whole question, again, is *whether* authorized administrative rule-making amounts to "lawmaking" or "legislative power." In a note, Hamburger says that *Grimaud* should be read narrowly, as a case about regulation on public lands.[81] Of course the rationale of the decision is not so confined, but that's not even the point. Where is the positive evidence, in American legal sources, for the view that Hamburger wants to describe as a deep constitutional principle—the view that any and all binding administrative regulations promulgated under statutory authority count as forbidden exercises of legislative power? There is none.

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in the absence of any congressional authorization to complete that scheme").

80 HAMBURGER, *supra* note 1, at 428.

81 *Id.* at 596 n.3 ("[T]he Court [in *United States v. Grimaud*] was speaking about the rules governing the use of public property, and whether it meant more than this [is] far from clear.").

2. Delegation and the Taxing Power

The same basic problem cripples the book's treatment of delegation and the taxing power. Hamburger's discussion illustrates the sheer strangeness of the book's analysis, its remoteness from American constitutional and administrative law. Hamburger acknowledges that "[n]owadays, the question about extralegal taxation is not whether there is a prerogative or administrative power to tax without statutory authorization, but rather whether the executive can tax with such authorization."[82] But he insists that "in placing the power to tax in the legislature, constitutional law barred it from relinquishing this power."[83] By "constitutional law," here, Hamburger seems to mean constitutional law in his own sense, the small-c constitutionalism propounded by English common law judges of the 17th century.[84]

The same mistake appears here as in the delegation discussion more generally: the theory of administrative law isn't that Congress delegates its legislative power to tax to the executive; the theory is that there has been no such delegation of legislative power at all, so long as an intelligible principle exists. But Hamburger clearly appears to think that there is

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[82] *Id.* at 62.

[83] *Id.*

[84] *See id.* at 63 ("To repeat the words of Chief Justice Holt, taxes were legislative, and therefore under 'the original frame and constitution of the government,' they 'must be by an act made by the whole legislative authority.'" (quoting *Brewster v. Kidgell*, (1698) 90 Eng. Rep. 1270 (K.B.) 1270; Holt, K.B. 669, 670)).

some special problem about statutory authorizations of the power to impose taxes. The United States Supreme Court, however, addressed this very question in 1989 in *Skinner v. Mid-America Pipeline Co*.[85] Rejecting a claim that statutory authorization of the taxing power is subject to special heightened scrutiny, *Skinner* examined the text and structure of Article I, and the history of legislation from "[Congress's] earliest days to the present,"[86] and found no reason to treat taxation differently.[87]

Skinner doesn't appear in Hamburger's index; one searches the book in vain for any trace of it (although I cannot swear it is not lying around somewhere in the vast expanse of the book).[88] Hamburger seems to think he can discuss American administrative law without reading the cases. But knowing what Chief Justice Holt said in 1698 doesn't necessarily entitle one to pronounce on the administrative law of the United States. The system of American administrative law is complex, and there is much to be read, considered, and discussed by anyone who would venture large-scale opinions about it.

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85 490 U.S. 212 (1988).

86 *Id.* at 220-22.

87 *Id.* at 222-23 ("We find no support, then, for Mid-America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.").

88 HAMBURGER, *supra* note 1, at 626-27.

3. The Separation of Powers and of Functions

Hamburger sees the main virtue of the separation of powers as institutional specialization of functions, which in turn limits arbitrary decision making. The separation of powers underlying the Anglo-American constitutional order "forc[es] the government to work through specialized institutions with specialized powers[,] . . . forcing it to work in a sequence of legislative, executive, and judicial power."[89] (Here Hamburger echoes a recent wholesale critique of the administrative state by Jeremy Waldron, who also emphasizes the importance of sequencing.)[90] The administrative state blatantly violates this principle: "Rather than follow the Constitution's orderly stages of decisionmaking, an agency can blend these specialized elements together-as when it legislates through formal adjudication [sic], or secures compliance with its adjudicatory demands by threatening severe inspections or regulation."[91]

There are at least two independently fatal problems with this treatment. One is the delegation problem in a different form. The problem is that the

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89 *Id.* at 334.

90 *See* Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 441 (2013) (describing how the separation of powers may be conceived of as giving the legislature an "initiating place on the assembly line"); *id.* at 456 (describing the tripartite division of powers as "phases" in a "process"). For a critique of Waldron's view, *see generally* Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. (forthcoming 2015) (manuscript at 18-23) (on file with author).

91 HAMBURGER, *supra* note 1, at 334.

institutionally specialized process of lawmaking that Hamburger likes, with its sequence of legislative, executive, and judicial action, is itself the source of the combined functions that Hamburger abhors.[92] Agencies exercise combined functions when, and only when, an institutionally specialized decision, an exercise of lawmaking through sequenced and separated powers, has concluded that they should and enacted a statute to that effect. The following sequence has occurred many times: Congress enacts, the President approves, and the Court sustains against constitutional challenge a statute that delegates sweeping powers to agencies and allows combination of functions—with important limitations and qualifications I will come to in a moment. Where on earth does Hamburger think combined agency functions come from? The combination of functions in agencies results from the operation of the system of separated legislative, executive, and judicial powers. Does Hamburger think agencies have awarded such powers to themselves on the basis of some sort of "prerogative"? The second problem is that administrative law does not actually allow "agencies" to exercise "combined powers." Hamburger's repeated implicit claim to that effect is the sort of claim that is partly right, partly wrong, and entirely simplistic. What administrative law does is to allow sometimes, in certain ways and through certain carefully specified procedures, agencies to exercise combined powers. But from reading this book, one would never

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92 *See* Vermeule, *supra* note 90 (manuscript at 21) ("If the delegating statute has itself been deliberated by the legislature, approved by the executive, and reviewed for constitutionality by the judiciary, why hasn't the force of the separation-of-powers principle at the constitutional level been entirely exhausted?").

guess that administrative law spends as much time limiting the combination of functions as enabling it.

The scheme of the Administrative Procedure Act (APA) is complex and reticulated. Very roughly, it requires strict separation of adjudicative functions from prosecutorial and investigative ones, in formal on-the-record adjudication before an administrative law judge, but not in rule making, and not at the top level of the agency.[93] There are separate rules against ex parte contacts in formal adjudication; those rules *do* apply at the top level of the agency. And at any level, due process remains a fallback constraint that allows courts to police prejudgment of adjudicative facts, conflicts of interest, or other forms of bias. The overall scheme, as Justice Jackson observed in *Wong Yang Sung v. McGrath*,[94] represents a hard-fought compromise.[95] The APA's approach to combination of

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[93] *See, e.g.*, 5 U.S.C. § 554(d) (2012). Hamburger's treatment of administrative law judges accuses them of pervasive institutional bias-principally on the basis of a discussion of Montesquieu (!) and citations to works from 1903, 1914, and 1927. HAMBURGER, *supra* note 1, at 337-39, 588 nn.23, 25-26. (He does briefly cite a 2011 textbook.) *Id.* at 588 n.27. All these were written well before the enactment of the APA in 1946 and are thus more or less irrelevant to the incentives and possible biases of the modern administrative law judge. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). The vast literature on the (putative) biases of administrative law judges is nowhere to be found.

[94] 339 U.S. 33 (1950).

[95] *See id.* at 39-40 (describing the tangled legislative history leading up to the APA). As Justice Jackson put it: "The Act . . . represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have

functions recognizes and trades off both the common law vision that animates Hamburger and also the value of competing goods, such as the activity level of agencies, their expertise, and the benefits of a unitary policymaker.[96]

Presumably Hamburger thinks that all this trading off is a covenant with Hell-that the decisions, judicial, legislative, and executive, upholding the combination of functions as a constitutional matter represent a betrayal of the Anglo-American constitutional order. (Here too, of course, all three branches, exercising their separated and specialized powers, have cooperated in setting up the current scheme of partially combined functions. Is this a betrayal of the separation of powers, or instead its offspring and fulfillment?) On this view, both the organic statutes that combine functions and even the APA to the extent that it allows and endorses combined functions are unconstitutional in a small-c sense and probably also a large-C sense.

Of course I think that isn't so. But anyone who does think so should at least consider and discuss-shouldn't they?-the arguments offered by the architects of the combination of functions: by the generations of politicians, officials, lawyers, and law professors who constructed the system and by the cases that both uphold it and, in various ways, constrain it. Here too, however, one searches in vain for any evidence that

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come to rest. It contains many compromises and generalities. . . . "

Id. at 40.

96 Vermeule, *supra* note 90 (manuscript at 10).

Hamburger even knows what he is attacking. Where are *Chenery II*,[97] *FTC v. Cement Institute*,[98] *Wong Yang Sung*,[99] *Marcello v. Bonds*,[100] *Withrow v. Larkin*?[101] All of these offer *arguments* (some of great plausibility and sophistication) about the administrative combination of functions, its justification, scope, and limits, both under the Constitution and under the APA. Bizarrely, none of these are to be found in the index to the book. It's as though one tried to launch a deep critique of American-style constitutional judicial review without happening to mention the line of cases stemming from *Marbury v. Madison*.[102]

Conclusion

One reaction to Hamburger's book might be that it is interestingly wrong in an unbalanced sort of way. On that view, the book could be seen as offering a kind of constitutional fiction, an oddly skewed but engagingly dystopian vision of the administrative state[103]—one that illuminates through its very errors and distortions, like a caricature or the works of Philip K. Dick. The book might then be located in the stream of legalist-libertarian critique of the administrative

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97 *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194 (1947).

98 333 U.S. 683 (1948).

99 339 U.S. 33 (1950).

100 349 U.S. 302 (1955).

101 421 U.S. 35 (1975).

102 5 U.S. (1 Cranch) 137 (1803).

103 As mentioned above, I owe this idea to Charles Fried, who offered it at the Columbia conference on the book manuscript.

state, the line running from Dicey, through Hewart and Pound and Hayek, to Richard Epstein. That work is nothing if not interesting, if only because it is so hagridden by anxiety about administrative law.

On further inspection, though, this book is merely disheartening. No, the Federal Trade Commission isn't much like the Star Chamber, after all. It's irresponsible to go about making or necessarily implying such lurid comparisons, which tend to feed the "tyrannophobia" that bubbles unhealthily around the margins of popular culture and that surfaces in disturbing forms on extremist blogs in the darker corners of the Internet.[104]

It's especially irresponsible to go around saying that the administrative state is "unlawful," whatever that may mean, without understanding what administrative law says, and seemingly with little idea about what exactly is being attacked-little idea about the intellectual architecture that underpins administrative law and that many generations of the legal profession have labored to build up. Trying to tear down the intellectual props of the administrative state, without understanding exactly what one is tearing down or what the consequences of doing so would really be, is an act of practical interest but no theoretical interest, like a child wrecking a sculpture by Jeff Koons. Some admire Koons's work, some detest it, but the child isn't in a position to understand why it might be detestable, and the act is purely destructive with no illuminating import. It's a sign of the times, a

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104 *See generally* Eric Posner & Adrian Vermeule, *Tyrannophobia*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 317 (Tom Ginsburg ed., 2012).

portent of the dimming of the legal mind, that this book is described in some quarters as "brilliant" and "path-breaking."[105] It isn't, and the only sensible response to Hamburger's question, as far as I can see, is "no."

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105 Lawson, *supra* note 34, at 1522.

FYK 2020 PETITION FOR WRIT OF CERTIORARI, SUP. CT. NO. 20-632 (NOVEMBER 2, 2020)

No. 20-632

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the breadth of Communications Decency Act ("CDA") immunity that "if a[n] [interactive computer service provider, "ICSP"] unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)"? SCJ Thomas' Statement in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, No. 19-1284, at 3-4 (Oct. 13, 2020), App.315a.

2. Is an ICSP (Facebook, Inc., "Facebook") CDA immune where someone (Jason Fyk, "Fyk") seeks to hold the ICSP liable for its "own misconduct," rather than for acting "'as the publisher or speaker' of [his] content . . . [or] for removing content in [bad] faith?" *Id.* at 9, App.322a (emphasis added); *see also id.* at 4-6, App.317a-318a.

3. Does the CDA text require an ICSP's "in whole or in part" development of "the publisher's" content to be "substantial" / "material" to render the ICSP a (f)(3) information content provider ("ICP") ineligible for CDA immunity? *Id.* at 6, App.319a.

4. Does (c)(1) "protect any decision to edit or remove content," "eviscerat[ing] the narrower [(c)(2)(A)] liability shield Congress included in the statute"? *Id.* at 7-8 (emphasis in original), App.319a-320a.

5. If an ICSP develops, even in part, "the" publisher's content with an anti-competitive animus, is the ICSP acting as a "Good Samaritan" eligible for CDA immunity?

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 19-16232

Jason Fyk, *Plaintiff-Appellant*, v.
Facebook, Inc., *Defendant-Appellee*.

Date of Final Opinion: June 12, 2020

Date of Rehearing Denial: July 21, 2020

United States District Court
for the Northern District of California

No. C 18-05159 JSW

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

Date of Final Order: June 18, 2019

Pursuant to Supreme Court Rule 14.1(b)(iii), undersigned counsel hereby attests that there is no "proceeding … aris[ing] from the same trial court case as the case in this Court." *Id.*

{ Internal Tables of Contents/Authorities Omitted }

OPINIONS BELOW

The opinion of the United States Ninth Circuit Court of Appeals, dated June 12, 2020 is included in the appendix below at App.1a. The order of the United States District Court for the Northern District of California, dated granting a motion to dismiss, dated June 18, 2019, is included below at App.6a, 7a-12a.

JURISDICTION

The Ninth Circuit issued its Memorandum (affirming the District Court's decision in favor of Facebook) on June 12, 2020. *See* App.1a-5a. On June 26, 2020, Fyk sought rehearing *en banc*. *See* App. 131a-151a. The Ninth Circuit denied Fyk's rehearing *en banc* request on July 21, 2020. *See* App.13a. On July 30, 2020, the Ninth Circuit entered its Mandate (advising, in part, that the Ninth Circuit's June 12, 2020, judgment took effect on July 30, 2020). *See id*., App.14a.

The basis for jurisdiction in the District Court was Title 28, United States Code, Section 1332. The basis for jurisdiction in the Circuit Court was Title 28, United States Code, Section 1291. The basis for this Court's jurisdiction is Title 28, United States Code, Section 1254(1), and this Petition is timely advanced pursuant to this Court's March 19, 2020, Standing Order (" . . . the deadline to file any petition for writ of

certiorari due on or after the date of this order is extended to 150 days . . . ").

STATUTORY PROVISIONS AND EXECUTIVE ORDERS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of the following statutory provisions and executive orders are reproduced in the appendix:

- **47 U.S.C. § 230, Communications Decency Act (CDA)**[1] (App.16a)
- **Executive Order on Preventing Online Censorship 13925** (App.22a)

INTRODUCTION

The Ninth Circuit decided an important question of legislative intent relating to immunity conferred upon commercial actors under the CDA. Issues surrounding broad CDA immunity are of national

[1] Hereafter, germane subsections 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") are drafted in shortest form; *e.g.*, (c)(1) will refer to Title 47, United States Code, Section 230(c)(1).

(potentially global) significance and federal courts' inconsistent application of 230 protections have "serious consequences" for millions of users like Fyk.[2]

The Executive and Legislative branches have weighed in on the boundaries of CDA immunity, but the breadth of CDA immunity (the threshold issue of this case) has never been addressed by this Court. An urgent need exists for this Court's review.

Some district and circuit courts have adopted a broad, sweeping interpretation of CDA "immunity" that is not found in the statute or legislative history. SCJ Thomas espoused concerns over the expansive interpretation of 230 protections in his recent *Enigma* Statement respecting denial of certiorari, *see* App. 312a-323a—concerns at the heart of Fyk's case. SCJ Thomas explained, "in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity

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[2] The breadth of CDA immunity is a bipartisan issue. For example, when one Googles "Biden / Trump communications decency act," top search results include:

(1) *Both Trump and Biden Have Criticized Big Tech's Favorite Law–Here's What Section 230 Says and Why They Want to Change It*, CNBC (May 28, 2020);

(2) *Section 230 Under Attack: Why Trump and Democrats Want to Rewrite It*, USA Today (Oct. 15, 2020);

(3) *Biden Wants to Get Rid of Tech's Legal Shield Section 230*, CNBC (Jan. 17, 2020);

(4) *Trump's Social Media Order Puts a Target on Communications Decency Act*, law.com (Jun. 14, 2020).

The heads of Facebook, Twitter, and Google were in front of Congress on October 28, 2020, to discuss some of the "serious consequences" flowing from unbridled CDA immunity; *e.g.*, silencing of voices (at fever pitch during an election cycle).

enjoyed by Internet platforms." *Id.* at 2, App.313a. Fyk's case is the "appropriate case" for this Court to interpret the application and scope of CDA immunity (for the first time in its approximate twenty-four-year history), Technology and Internet platforms have evolved exponentially while the absence of Supreme Court jurisprudence governing the CDA's application has allowed private commercial actors to usurp Government agencies (*e.g.*, Federal Communications Commission, "FCC") in enforcing the CDA without transparency or accountability,[3] which at least one judge presciently warned would problematically permit CDA immunity to advance an anti-competitive agenda. *See, e.g., Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1178 (9th Cir. 2009) (Judge Fisher concurring).

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[3] The original purpose of the CDA was protection of children from inappropriate material on the Internet. After initial efforts by prosecutors to use the CDA, and in response to this Court's opinion that it was overbroad as to the proscribed content, *see Reno v. American Civil Liberties Union, et al.*, 521 U.S. 844 (1997) (finding the CDA ran afoul of the First Amendment in its regulation of indecent transmissions and the display of patently offensive material), legislators enacted the Child Online Protection Act of 1998 ("COPA"), Title 47, United States Code, Section 231, to accomplish one of the Government's prosecutorial objectives of the CDA. Attorney generals / prosecutors now rely on COPA (*i.e.*, instead of the CDA) for child protection from indecency on the Internet. COPA has been litigated and considered by this Court. *See, e.g., Ashcroft v. American Civil Liberties Union, et al.*, 535 U.S. 564 (2002) (COPA's reference to contemporary community standards did not render COPA unconstitutionally overbroad under the First Amendment); *Ashcroft v. American Civil Liberties Union, et al.*, 542 U.S. 656 (2004) (commercially available filtering systems were less restrictive means to accomplish the purpose of COPA). Left unfettered by any governmental oversight for years, the CDA is now privately "policed."

SCJ Thomas emphasized that "if a[n] [interactive computer service provider, "ICSP"] unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)." SCJ Thomas' *Enigma* Statement at 3-4, App.315a (emphasis added). If (c)(1) immunity continues to be wrongly applied more broadly, such would continue to "eviscerate[] the narrower [(c)(2)(A)] liability shield Congress included in the statute." *Id.* at 7, App.319a. SCJ Thomas further emphasized that (c)(2) immunity from some civil liability is not absolute—it requires good-faith acts and it is a "limited protection." *Id.*, App.314a. Against this background, Fyk petitions this Court to examine the issues set forth in the Questions Presented section above.

Here, in affording Facebook sweeping (c)(1) immunity, the District Court held, in pertinent part, as follows in a four-page order: "Because the CDA bars all claims that seek to hold an ICSP liable as a publisher of third party content, the Court finds that the CDA precludes Plaintiff's claims." *Jason Fyk v. Facebook, Inc.*, No. C18-05159 JSW (N.D. Cal. Jun. 18, 2019), [D.E. 38] at 4 (emphasis added), App.11a. In dismissing Fyk's Verified Complaint and entering judgment, the District Court relied heavily on cases where courts read sweeping immunity into the CDA far beyond an ordinary read of the CDA's text, *e.g.*, *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009) and *Sikhs for Justice, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088 (N.D. Cal. 2015), while cursorily citing to cases with more substantive analyses, *e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157 (9th Cir. 2008), and

completely ignoring other relevant cases cited in Fyk's briefing, *e.g.*, *e-ventures Worldwide, LLC v. Google, Inc.*, 214CV646FTMPAMCM, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017). The District Court's dismissal order endorsed a sweeping, *carte blanche* (c)(1) immunity in favor of Facebook.[4]

On September 18, 2019, Fyk appealed to the Ninth Circuit.[5] In reviewing the competing (c)(1) and (c)(2) clauses of the CDA, the Ninth Circuit held, in pertinent part, as follows:

1. "Pursuant to § 230(c)(1) of the CDA . . .'immunity from liability exists for (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider.'"

Jason Fyk v. Facebook, Inc., No. 19-16232 (9th Cir. Jun. 12, 2020), [D.E. 40-1] at 2, App.2a (emphasis added) (citing to another case quoting *Barnes*).[6] Critically, (c)(1) *prima facie* does not insulate Facebook (or any other ICSP) in the active role of "a" publisher (secondary publisher /distributor, at issue here), it

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[4] The District Court's Order and associated Judgment are attached as composite at App.6a-12. Fyk's Verified Complaint and the parties' dismissal motion practice advanced in the District Court are included in the Excerpt of Record attached to the Opening Brief that Fyk filed in the Ninth Circuit, which such Opening Brief is noted below and also included in the Appendix.

[5] Fyk's Ninth Circuit Opening Brief is attached at App.37a-79a. Facebook's Answering Brief is attached at App.80a-103a. On January 1, 2020, Fyk filed his Reply Brief, which is attached at App.104a-130a.

[6] The Ninth Circuit's Memorandum is attached at App.1a-5a.

conditionally insulates the ICSP when it is not "the" publisher (primary publisher, not at issue here). Critically, the Ninth Circuit adopted the false reframe of Fyk's allegations (initially promulgated by Facebook and then accepted by the District Court), despite being required to construe as true the allegations in Fyk's Verified Complaint and grant all reasonable inferences in the favor of Fyk on a 12(b)(6) motion.

Simply put, Fyk has never claimed that Facebook undertook actions as "the" publisher of his content. This one-word distinction ("the" versus "a") is a difference that expressly defines the conditional nature of an ICSP's entitlement to statutory immunity. The Ninth Circuit either missed the distinction entirely or misinterpreted the statute. One explanation is that the Ninth Circuit cited to and relied on another court's inaccurate paraphrasing of CDA language rather than citing to actual CDA language. *Id.* at 2, App.2a (citing *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019), quoting *Barnes* at 1100-1101).

2. "Fyk, however, does not identify how Facebook materially contributed to the content of the pages. . . . We have made clear that republishing and disseminating third party content 'in essentially the same format' 'does not equal creation or development of content."

Fyk, No. 19-16232, [D.E. 40-1] at 3, App.3a. First, the CDA itself does not require a measure of "material[] contribut[ion]" to the creation or development of information. In fact, material contribution is the antithesis of "responsible . . . in part," in (f)(3), and is an example "of reading extra immunity into statutes where it does not belong," SCJ Thomas' *Enigma* Statement at 4, App.315a, to confer overbroad (c)(1) immunity.

Second, the Ninth Circuit's ruling lumps re-publishing and dissemination (*i.e.*, acting as "a" publisher / "secondary publisher" / "distributor") into the CDA that only speaks to insulating the ICSP from being "treated as the publisher" (*i.e.*, "the" primary publisher). Fyk never characterized Facebook as "the" publisher responsible for his actions. The Ninth Circuit's conflating "a publisher" (Facebook's re-publishing action) with "the publisher" (Fyk's initial publishing actions), when (c)(1) only speaks to the latter, was another instance "of reading extra immunity into statutes where it does not belong." *Id.*, App.315a.

Third, the Ninth Circuit in Fyk's case paid short-shrift to the careful articulation in *Fair Housing* of the distinction between a content "creator" and a content "developer" and the effect of that distinction under (f)(3) in transforming an ICSP into an ICP ineligible for any CDA protections. Throughout the Ninth Circuit's Memorandum, "creator" and "developer" are improperly conflated, despite Fyk's allegations that Facebook actively (and unlawfully) developed Fyk's content, in whole or in part, for Facebook's pecuniary gain. This case is not about Fyk's content per se (notably because the content itself remained largely, if not entirely, the same throughout), it is about Facebook's tortious business misconduct in manipulating (developing) Fyk's content, under color of CDA authority, for another user (Fyk's competitor's) but not Fyk.

3. "That Facebook allegedly took its actions for monetary purposes does not somehow transform Facebook into a content developer."

Fyk, No. 19-16232, [D.E. 40-1] at 3-4, App.4a. The Ninth Circuit missed Fyk's entire point as to Facebook's underlying anti-competitive motivations

for its selective actions as alleged by Fyk. The point Fyk made in his briefing (and endorsed by the Ninth Circuit in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.* 946 F.3d 1040 (9th Cir. 2019)) is that an ICSP (such as Facebook) is not a "Good Samaritan" where, as one example, the ICSP's actions are motivated by an anti-competitive animus (*i.e.*, for monetary purposes as an unfair and direct competitor). The CDA confers upon private actors (Facebook) the right / privilege to enforce the CDA (instead of the FCC, for example), so long as it acts in good faith via the Internet's version of Good Samaritan laws (the CDA). Fyk's appeal and this Petition accordingly posit that Facebook's monetary motivations, at the onset, determine whether or not Facebook is entitled to any "Good Samaritan" protections.

4. "[T]he fact that [Fyk] generated (published / provided) the content at issue does not make § 230(c)(1) inapplicable."

Fyk, No. 19-16232, [D.E. 40-1] at 4, App.4a. As discussed in detail below, it does—where the ICSP (here, Facebook) serves as "a" publisher of the content of "the" publisher (*i.e.*, engages as a secondary publisher or distributor of content in addition to "the" primary publisher, oftentimes in an in whole or in part development capacity), (c)(1) does not protect the ICSP so engaged. This Ninth Circuit holding "read[s] extra immunity into statutes where it does not belong," SCJ Thomas' *Enigma* Statement at 4, App.315a, creating absolute (c)(1) immunity where none exists in the plain text of the CDA.

5. "We reject Fyk's argument that granting § 230(c)(1) immunity to Facebook renders § 230(c)(2)(A) mere surplusage. . . . 'The persons who can take

> advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but any provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue can take advantage of subsection (c)(2)(A).'"

Fyk, No. 19-16232, [D.E. 40-1] at 4-5, App.5a (citing to *Barnes*). This circular argument is untenable as is underscored by the last sentence recognizing when (c)(2)(A) might be available as an additional "shield" from liability "perhaps because they developed, even in part, the content at issue" (*i.e.*, acting as an ICP) taking the ICSP outside the realm of (c)(1) immunity. (c)(2)(a) does not provide additional protections for the development of information in part and the Ninth Circuit is simply wrong.

The Ninth Circuit's dismissal affirmation, the Executive Order (App.22a-32a), and the Department of Justice's ("DOJ") CDA Review (App.33a-36a) prompted Fyk to file a Petition for Rehearing *En Banc* on June 26, 2020, attached at App.131a-151a. On July 21, 2020, the Ninth Circuit summarily denied the Petition for Rehearing *En Banc, see* App.13a (which such Appendix entry also includes the Ninth Circuit's July 30, 2020, Mandate).

This Petition ensues. This Court should grant the writ to provide guidance on this issue of significant national importance about which existing jurisprudence is inconsistent to the point of incoherent application, that has garnered the attention of SCJ Thomas, the President, the DOJ, Congress, and the public.

STATEMENT OF THE CASE

Fyk is the owner-publisher of WTF Magazine. For years, Fyk used social media to create and post humorous content on Facebook's purported "free" social media platform. Fyk's content was extremely popular and, ultimately, Fyk had more than 25,000,000 documented followers at peak on his Facebook pages / businesses. According to some ratings, Fyk's Facebook page (WTF Magazine) was ranked the fifth most popular page on Facebook, ahead of competitors like BuzzFeed, College Humor, Upworthy, and large media companies like CNN. Fyk's large Facebook presence resulted in his pages becoming income generating business ventures, generating hundreds of thousands of dollars a month in advertising and lead generating activities, which such value was derived from Fyk's high-volume fan base distribution.

Between 2010 and 2016, Facebook implemented an "optional" paid for reach program. Facebook began selling distribution, which it had previously offered for free and, in doing so, became a direct competitor of users like Fyk. This advertising business model "create[d] a misalignment of interests between [Facebook] and people who use [Facebook's] services," Mark Zuckerberg, *Understanding Facebook's Business Model* (Jan. 24, 2019),[7] which incentivized(s) Facebook to selectively and tortiously interfere with users' ability to monetize by removing content from non-paying / low-paying users in favor of higher paying

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[7] This article is attached at App.324a.

"high[er] quality participants in the ecosystem." Mark Zuckerberg Interview / Public Discussion With Mathias Döpfner (Apr. 1, 2019).[8] A high-ranking Facebook executive bluntly told Fyk that Fyk's business was disfavored compared to other businesses that opted into paying Facebook extraordinary sums of advertising money. Although Fyk reluctantly opted into Facebook's commercial program at a relatively low amount of money (in comparison to others, such as Fyk's competitor), Facebook reduced the reach / distribution / availability of Fyk's pages / businesses by over 99% overnight. Then, in October 2016, Facebook fully deactivated several of Fyk's pages / businesses, totaling over 14,000,000 fans cumulatively, under the fraudulent aegis of "content policing" pursuant to (c)(2)(a). Facebook's content policing, however, was not uniformly applied or enforced as a result of Facebook's insatiable thirst for financial gain.

In February and March of 2017, Fyk contacted a prior business colleague (and now competitor) who was favored by Facebook, having paid over $22,000,000.00 in advertising. Fyk's competitor had dedicated Facebook representatives (whereas Fyk was not offered the same services) offering additional assistance directly from Facebook. Fyk asked his competitor if they could possibly have their Facebook representative restore Fyk's unpublished and / or deleted pages for Fyk. Facebook's response was to decline Fyk's competitor's request unless Fyk's competitor was to take ownership of the unpublished and / or deleted content / pages. Facing no equitable solution, Fyk fire sold his pages

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[8] This interview can be found at https://www.youtube.com/watch?v=zUbzcDUXzr4&t=1s.

/ businesses to the competitor. Facebook thereafter restored (contributing to the development of, at least in part) the exact same content that Facebook had restricted and maintained was purportedly violative of its purported "offensive" content Community Standard rules (*i.e.*, purportedly violative of (c)(2)(A)) while owned by Fyk. Facebook's preferred (*i.e.*, higher paying) customers did not suffer the same consequences as Fyk, simply because they paid more.

On August 22, 2018, Fyk sued Facebook in the District Court, alleging fraud, unfair competition, extortion, and tortious interference with his economic advantage based on Facebook's anti-competitive animus. Facebook filed a 12(b)(6) motion, based largely (almost entirely) on (c)(1) immunity. The District Court (Hon. Jeffrey S. White presiding) continued the proceedings, then vacated oral arguments and granted Facebook's motion on the papers, without affording Fyk leave to amend the Verified Complaint. Fyk's appeal to the Ninth Circuit ensued.

On May 28, 2020, while Fyk's appeal was still pending, President Trump entered Executive Order 13925 ("EO"), challenging social media companies' ability to shield their misconduct behind 230 immunity. *See* App.22a-32a. In conjunction with this EO, the DOJ stated:

> In the years leading up to Section 230, courts had held that an online platform that passively hosted third-party content was not liable as a publisher if any of that content was defamatory, but that a platform would be liable as a publisher for all its third-party content if it exercised discretion to remove any third-party material.

[* * *]

> "At the same time, courts have interpreted the scope of Section 230 immunity very broadly, diverging from its original purpose. This expansive statutory interpretation, combined with technological developments, has reduced the incentives of online platforms to address illicit activity on their services and, at the same time, left them free to moderate lawful content without transparency or accountability. The time has therefore come to realign the scope of Section 230 with the realities of the modern internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services."

DOJ CDA Review at 1-2, App.132a-133a.

The Ninth Circuit panel affirmed the District Court decision without oral argument in a cursory five-page Memorandum. *See* App.1a-5a. Fyk filed a Petition for Hearing *En Banc*, *see* App.131a-151a, which was summarily denied on July 21, 2020, *see* App.13a.

On October 13, 2020, following the *en banc* denial, SCJ Thomas rendered a Statement in the *Enigma v. Malwarebytes* denial of certiorari, welcoming consideration of that which is at issue in this case. *See* App. 312a-323a ("Without the benefit of briefing on the merits, we need not decide today the correct interpretation of § 230. But in an appropriate case, it behooves us to do so"). This case is the "appropriate case."

Fyk's case is not about treating Facebook as the primary publisher of Fyk's content, and his case does

not hinge entirely on the primary versus secondary publisher issue. As discussed throughout this Petition (and outlined in this "Statement of the Case"), there are several ways in which Facebook lost any CDA immunity.

First, Facebook's manipulation of Fyk's content took it outside of CDA protections since Facebook became a secondary publisher / distributor / "a" publisher / ICP after Fyk published his content. Facebook's only glancing (and patently false) allegation of inappropriate content identified in its Answering Brief was its assertion that a page (www.facebook.com/takeapissfunny) was "dedicated to photos and videos of people urinating." *Fyk*, No. C 18-05159 JSW, [D.E. 20] at 1, App.253a. As described in Fyk's briefing, Fyk's content never exceeded a good faith understanding of offensive content restrictions described in (c)(2)(a). *See, e.g.*, Verified Complaint at ¶ 24, App.163a-165a (describing how Facebook crushed one of Fyk's pages / businesses due to his purported racism for posting a screenshot of the Disney children's movie *Pocahontas*, which such Facebook misconduct is but one example of policing not done in "good faith" per (c)(2)(A)). Indeed, quite often, Facebook permits identical content by a preferred user. *See, e.g., id.* at ¶ 23 and n. 8, App.163a.

Second, Facebook's conduct was not that of a "Good Samaritan." Facebook directly competes (unfairly) with its own users' content (*e.g.*, sponsored advertising), like Fyk's. Facebook has had an active, self-motivated publisher role ("secondary publisher") in all content on its platform. Facebook restricted Fyk's content under fraudulent pretext, actively solicited a higher paying user, and actively redistributed Fyk's content

contingent upon Facebook's promise to make Fyk's content available a second time (development without his involvement) for Fyk's competitor. Facebook was not simply a "passive conduit" of information, it actively developed and manipulated Fyk's content to enrich itself.

Facebook asserts that it is a passive "platform for all ideas," Mark Zuckerberg Congressional Testimony (Apr. 10, 2018),[9] where "the most important thing about [the user's] Newsfeed is who [the user] chooses to engage with and the pages [the user] chooses to follow," Tessa Lyons (Facebook Product /Newsfeed Manager) Presentation (Apr. 13, 2018),[10] but that is demonstrably false. As Facebook's CEO, Mark Zuckerberg, said, "we're showing the content on the basis of us believing it is high quality, trustworthy content rather than just ok you followed some publication, and now you're going to get the stream of what they publish." Mark Zuckerberg Interview / Public Discussion With Mathias Döpfner (Apr. 1, 2019).[11] Even Facebook's own counsel identifies Facebook's active secondary publisher role: "we decide what content to make available through our platform, a right protected by Section 230 . . . . [W]e rely on the discretion protected by this law to police bad behavior on our service." Natalie Naugle (Facebook's Associate General Counsel for Litigation), The Guardian, *Is Facebook a*

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[9] This testimony can be found at https://www.youtube.com/watch?v=-VJeD3zbZZI.

[10] This presentation can be found at https://www.youtube.com/watch?v=X3LxpEej7gQ&t=209s.

[11] *See* n. 8, *supra*.

Publisher? In Public It Says No, but in Court It Says Yes (Jul. 3, 2018).[12]

Third, Facebook's Newsfeed manager, Tessa Lyons, openly admits Facebook's fraudulent / extortionate "strategy" is to tortiously interfere with users' (like Fyk's) prospective economic advantages when "reducing [user's] distribution, removing their ability to monetize removing their ability to advertise is part of our strategy." Tessa Lyons (Facebook Product / Newsfeed Manager) Presentation (Apr. 13, 2018).[13] Fyk seeks to hold Facebook liable for its "own" business tort "misconduct," *see* SCJ Thomas *Enigma* Statement at 9, App.322a, that would be unlawful absent judicial misconstruction of CDA immunity.

Fourth, (c)(1) simply cannot be interpreted /applied (as the Ninth Circuit did here) in a way that renders (c)(2)(A) mere surplusage. Such is violative of ordinary canons of statutory construction. As SCJ Thomas observes: "if a[n] [interactive computer service provider, "ICSP"] unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230 (c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)." *Id.* at 3-4, App.315a. "Courts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress." *Id.* at 4, App.316a (internal citation omitted). "It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability [via a sweeping application of purported (c)(1)

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[12] This article is attached at App.329a-334a.

[13] *See* n. 10, *supra*.

immunity] in the very Act in which Congress explicitly imposed it." *Id.* at 5, App.317a.

> "[I]f Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in § 230(c)(1): No provider 'shall be held liable' for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content. § 230(c)(2). Where Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful."

Id., App.317a-318a. To have (c)(1) and (c)(2)(A) immunities interacting any other, broader way would "eviscerate[] the narrower [(c)(2)(A)] liability shield Congress included in the statute," *id.* at 7, App.319a; *i.e.*, would render (c)(2)(A) superfluous to (c)(1).

REASONS FOR GRANTING THE PETITION

This is the "appropriate case" for this Court to interpret CDA immunity for the first time in the approximate twenty-four-years since its enactment to provide guidance on the interpretation of the intended immunity to be conferred upon private actors enforcing the CDA's purpose.

A. THE QUESTION PRESENTED (PROPER INTERPRETATION / APPLICATION OF CDA IMMUNITY) IS OF EXCEPTIONAL IMPORTANCE.

When a Supreme Court Justice, U.S. President, U.S. Presidential candidate, Congress, DOJ, and FCC have all weighed in regarding the proper interpretation / application of CDA immunity because "courts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress," we must consider this question to be of exceptional national importance and we respectfully suggest that Fyk's case is appropriate for the Court's consideration for such an analysis. Is anti-competitive / monopolistic behavior / "own misconduct" (*id.* at 9, App.322a) entitled to CDA immunity?

Unchecked abuse of CDA immunity has resulted in unlawful behavior for commercial profit without recourse, 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 choice of law clauses in the user agreements, Ninth Circuit law predominates regardless of where the user resides

across the country or in the world. It would "behoove," *id.* at 10, App.323a, the interests of the hundreds of millions (if not billions) of users of Internet platforms for this Court to accept this case and consider the interpretation of CDA immunity as suggested by SCJ Thomas' *Enigma* Statement, and / or in the ways suggested by President Trump (*see* EO, App.22a-32a), the DOJ (*see* DOJ CDA Review, App.33a-36a), Presidential candidate Biden (*see* n. 3, *supra*), and / or Fyk in his briefing below. It would be timely and critical for this Court, as a majority, to definitively interpret the breadth of CDA immunity for all users of interactive computer services, and for the ICSPs to establish clear guidelines for the immunities conferred.

B. FEDERAL COURTS ARE INCONSISTENT ON THE INTERPRETATION / APPLICATION OF CDA IMMUNITY.

The case citations and related discussions found in SCJ Thomas' *Enigma* Statement make clear that federal courts across this county have been consistently inconsistent for many years. A few courts identified in SCJ Thomas' *Enigma* Statement have interpreted CDA immunity correctly within certain contexts; *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.*, 214CV646FTMPAM CM, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017). But many other courts (including lower courts in this case) have made a convoluted mess 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 "behoove[s]" this Court to provide guidance to all courts. The exceptional nature of this issue compels granting this writ to address the scope of CDA immunity.

C. THE NINTH CIRCUIT'S DECISION IN THIS CASE IS INCORRECT.

We address the several ways in which Facebook can (and did) lose CDA immunity in Fyk's case and why the Ninth Circuit decision was wrong

1. The Ninth Circuit Erred in Deviating from the "Modest" Nature of CDA Immunity Pronounced in Question Presented #1.

The "modest understanding [of CDA immunity] is a far cry from what has prevailed in court," SCJ Thomas' *Enigma* Statement at 3-4, App.315a, in identifying (in)actions by ICSPs that are immunized under (c)(1) and (c)(2)(A). Once more, that "modest understanding" is as follows: "if a[n] [interactive computer service provider, "ICSP"] unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)." *Id.*, App.315a.

Neither of these CDA immunity situations apply to Fyk's case as pleaded; *i.e.*, Facebook is not eligible for CDA immunity in this case if the breadth of CDA

is (as it should be) "modest" and consistent with the CDA's text. "Courts have long emphasized nontextual arguments when interpreting § 230, leaving questionable precedent in their wake." *Id.* at 2, App.313a. Courts have "read[] extra immunity into statutes where it does not belong," *id.* at 4, App.315a, creating sweeping immunity for large technology companies like Facebook. Here, the lower courts went too far beyond the above "modest" (and correct) interpretation of CDA immunity in holding that Facebook is (c)(1) immune as to anything it does. *See, e.g., Fyk*, No. C 18-05159 JSW, [D.E 38] at 4, App.11a ("the CDA bars all claims that seek to hold an interactive computer service liable as a publisher of third party content," emphasis added). And we are here because the Ninth Circuit rubberstamped dismissal.

Key to the Ninth Circuit's and District Court's rulings was their heavy (almost entire) reliance on the far-reaching *Barnes* ruling that "construe[d] § 230(c)(1) to protect any decision to edit or remove content" and "curtailed the limits Congress placed on decisions to remove content." SCJ Thomas *Enigma* Statement at 7, App.320a (emphasis in original). If this Court interprets CDA immunity as "modest[,]" read in the ordinary way of the CDA text, users of social media platforms and ICSPs will have transparency into actions underlying ICSP's CDA actions, and Fyk's case will be remanded to the District Court to proceed on the merits. This Court should examine the scope of immunity actually supported by the actual language of the statute and determine whether (c)(1) immunity that courts have held subsumes (c)(2)(A) immunity contravenes ordinary cannons of statutory construction.

Fyk respectfully requests that this Court grant his Petition to determine the breadth of CDA immunity based on the statute. If this Court determines that the Ninth Circuit decision "read[] extra immunity into [the CDA] where it does not belong," *id*., App.315a, it should remand this case to proceed on the merits, giving Fyk his deserved "chance to raise [his] claims in the first place . . . [and] prove the merits of [his] case . . . ." *Id*. at 9, App.322a.

2. The Ninth Circuit Erred In Expanding (c)(1) Immunity to Encompass Actions Taken by Facebook as a "Secondary Publisher" / "Distributor" / "A Publisher," in Contravention of (c)(1)'s Express "The Publisher" Language.

In affirming the District Court's dismissal, the Ninth Circuit held, in pertinent part: "Pursuant to § 230(c)(1) of the CDA . . . 'immunity from liability exists for (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider.'" *Fyk*, No. 19-16232, [D.E. 40-1] at 2, App.2a (emphasis added) (citing to the *Dyroff* case quoting *Barnes*). This one-word distinction ("a" versus "the" publisher) is fundamental to properly defining the scope of (c)(1) immunity. (c)(1) provides that "[n]o 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).

An oft-repeated refrain is "you cannot treat a service provider as 'a' publisher because they did not

create the content." Wrong. (c)(1) says nothing about shielding ICSPs acting as "a publisher" (*i.e.*, "secondary publisher" / "distributor") of another's content. (c)(1) simply says that ICSPs can enjoy some protection when liability arises from content / posts of another publisher, "the publisher." Several courts (including the Ninth Circuit here) have misconstrued (c)(1) by revising "the publisher" to "a publisher" and proceeding to wrongly hold that (c)(1) shields an ICSP from being held liable for its own conduct when serving as "a" publisher or speaker of any content. One explanation (here, at least) is that the Ninth Circuit cited to and relied on another court's inaccurate paraphrasing of CDA language rather than citing to the actual language of the CDA. *See id.*

James Madison once argued that the most important word relating to "the right to free speech" is the word "the." "The right" implied that free speech pre-existed any potential abridgement, whereas "a right" would have been far less powerful in application of a right of such great importance. One simple word makes a huge difference. Changing "the" to "a" (as the Ninth Circuit did here) changes how (c)(1) immunity works. If an ICSP cannot be treated as "a publisher," then it cannot be held responsible for its own actions / conduct relating to the content of another or otherwise. The difference between "a publisher" and "the publisher" is the difference between who actively provided the content online. "A" versus "the" is perhaps "the" primary source of the confusion surrounding a simple (when interpreted and applied properly) law that was enacted to protect this country's youth from Internet filth, which has wrongly led to ICSPs being able to act

as "a publisher" of another's content with legal impunity.

3. The Ninth Circuit Erred in Determining That an ICSP Who Has Developed Content, in Whole or in Part, Is Not an ICP Unless the Development Was "Substantial" or "Material".

The Ninth Circuit erred in determining that the "in part" language of (f)(3) means "substantial" or "material" development of content. More specifically, the Ninth Circuit wrongly held as follows: "Fyk, however, does not identify how Facebook materially contributed to the content of the pages. . . . We have made clear that republishing and disseminating third party content 'in essentially the same format' 'does not equal creation or development of content." *Fyk*, No. 19-16232, [D.E. 40-1] at 3, App.3a-4a. This is another example of a court reading too much into a statute:

> Only later did courts wrestle with the language of § 230(f)(3) suggesting providers are liable for content they help develop 'in part.' To harmonize that text with the interpretation that § 230(c)(1) protects 'traditional editorial functions,' courts relied on policy arguments to narrowly construe § 230(f)(3) to cover only substantial or material edits and additions. . . . To say that editing a statement and adding commentary in this context does not 'create or develop' the final produce, even in part, is dubious.

SCJ Thomas *Enigma* Statement, at 6-7, App.319a (emphasis added) (internal citations omitted).

Here, by injecting "material contribution" into the (f)(3) development assessment (notwithstanding (f)(3)'s "in whole or in part" language), the Ninth Circuit went too far. Put differently, here the Ninth Circuit's injection:

> departed from the most natural reading of the text by giving [Facebook] immunity for [its] own content. . . . Nowhere does [(c)(1)] protect a company that is itself the information content provider. . . . And an information content provider is not just the primary author or creator; it is anyone 'responsible, in whole or in part, for the creation or development' of content. § 230(f)(3).

Id. at 6 (emphasis in original) (internal citations omitted).

Here, as Fyk has alleged, Facebook developed his content (in a "secondary publisher" / "distributor" role) by deleting his content, orchestrating the sale of his pages / businesses to a competitor after Facebook's deletion of same, steering / soliciting the subject pages / businesses (and the content therein) to Fyk's competitor who paid Facebook millions, and then reposting Fyk's identical pages / businesses (and, naturally, the content therein) for Fyk's competitor. Active manipulation (rather than passive conduit) fits several ordinary definitions of development, and such development rendered Facebook an ICP, under (f)(3), ineligible for any CDA immunity whatsoever.

The Ninth Circuit erred in the development analysis by injecting a "material" / "substantial" component in contravention of the "in whole or in part" language of (f)(3)'s "development" language. Such a departure

from a natural reading of the CDA warrants this Court's review of the lower courts' expansive reading of (c)(1) immunity (especially at an initial pleading stage) on Facebook.

4. The Ninth Circuit Erred in "Eviscerat[Ing] the Narrower [230(c)(2)(A)] Liability Shield Congress Included in the Statute".

Here, both the District Court and Ninth Circuit embraced the *Barnes* notion that (c)(1) immunizes ICSPs from "all" / "any" actions. Despite that insuperable (c)(1) immunity philosophy, the Ninth Circuit construed (c)(2)(A) as an additional immunity, a construction that SCJ Thomas finds conceptually dissonant:

> [H]ad Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in § 230(c)(1): No provider 'shall be held liable' for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content. § 230(c)(2). Where Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume the difference is meaningful.

Id. at 5, App.317a-318a. Moreover:

> But by construing § 230(c)(1) to protect <u>any</u> decision to edit or remove content, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (CA9 2009), courts have curtailed the limits Congress

> placed on decisions to remove content, *see e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, *3 (M.D. Fla. Feb. 8, 2017) (rejecting the interpretation that § 230(c)(1) protects removal decisions because it would 'swallow the more specific immunity in (c)(2)"). With no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content. . . .

Id. at 7, App.320a (emphasis in original) (some internal citations omitted).

This is exactly what the District Court and the Ninth Circuit did here relying heavily on *Barnes*, to find that (c)(1) protected Facebook from "all" of its own actions. If (c)(2) means anything, this interpretation of (c)(1) immunity cannot be correct. This Court should grant this writ to consider and clarify (c)(1) and (c)(2).

5. The Ninth Circuit Erred in Misconstruing Fyk's Case as Something Other than Pursuing Facebook for Its Own Misconduct Outside Content.

Fyk never sought to treat Facebook as "the publisher" of his content; *i.e.*, to somehow treat Facebook as himself. Fyk has at all times sought to hold Facebook accountable for its "own misconduct," SCJ Thomas' *Enigma* Statement at 9, App.322a: tortious interference, unfair competition, fraud, and extortion. As SCJ Thomas' *Enigma* Statement properly points out, claims (like Fyk's) resting on a defendant's "own

misconduct . . . rather than the content of the information," *id.,* App.322a, should not be eligible for CDA immunity.

The wrongdoing for which Fyk seeks to hold Facebook accountable does not fall within the confines of any CDA immunity. Paragraph 20 of Fyk's Verified Complaint alleges Facebook "own misconduct":

> Facebook's misconduct . . . included, for examples, unilateral, systematic, systemic,. . . page and content outlawing, Facebook Messenger disconnection, page and content banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, deletion of individual Facebook administrative profiles, and/or splitting of posts into four categories (text, picture, video, and website links) and systematically directing its tortious inference the hardest at links because links were what made others (like Fyk) the most money and Facebook the least money. This misconduct was grounded, in whole or in part, in Facebook's overarching desire to redistribute reach and value (*e.g.*, wiping out Fyk and orchestrating the handing over of his businesses/pages to a competitor, discussed in greater detail below) through the disproportionate implementation of "rules" (*e.g.*, treating Fyk's page content differently for Fyk than for the competitor to whom Fyk's content was redistributed). Part and parcel with Facebook's disproportionate implemen-

> tation of "rules" was a disproportionate implementation of Facebook's appeal and/or customer service programs for Fyk . . . punctuated by [] Facebook arranging meetings between its representatives and other businessmen and businesswomen, not named Fyk, in order to assist them but not Fyk).

Id., App.160a-161a; *see also, e.g.,* ¶ 18, App.158a-159a (discussing the illegal, CDA-irrelevant underpinnings of Facebook's paid for reach program); ¶¶ 25-40, App. 165a-173a (describing Facebook's misconduct within an illegal "claim jumping" parallel); ¶¶ 42-47, App.174a-178a (discussing Facebook's discriminatory treatment of Fyk compared to Fyk's competitor). This Court should determine that CDA immunity is not available to Facebook under the facts alleged by Fyk and remand this case to the District Court to proceed on the merits.

If every word of the law is important, we must avoid redundancies or duplications in the law wherever possible and interpret the law in a manner most fitting of the legislature's original intent. The legislature never intended for 230 to be an absolute blanket immunity. Its original purpose was to protect our country's children (ironic that Facebook would restrict #savethechildren).

The legislature created a second legal protection ((c)(2)(A)) for an ICSP when it took "any action" as "a publisher" / "secondary publisher" / "distributor" to "restrict materials," so long as it acted voluntarily, in good faith, without monetary motivation, and otherwise legally; *i.e.*, acted as a Good Samaritan. This interpretation is true to the CDA's express language because if an ICSP could not be treated as "a publisher"

and "removing content is something publishers do," (*Fyk*, No. 19-16232, [D.E. 40-1] at n. 2, App.3a (internal citation omitted)), (c)(1) would swallow the protections of (c)(2)(A).

The Ninth Circuit (in Fyk's case and others) exacerbated the confusion over 230 protections. Here, the Ninth Circuit held that (c)(1) does not render (c)(2)(A) "redundant," as (c)(2)(A) "provides an additional shield from liability." *Id.* at 5. More specifically, holding that:

> The persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but any provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue can take advantage of subsection (c)(2).

Id. at 4-5, App.5a (emphasis added). Standing alone, that sub-holding does not overtly appear to create a redundancy between (c)(1) and (c)(2). But that sub-holding does not stand alone—in the greater context, the Ninth Circuit applied (c)(1) to immunize all action while simultaneously recognizing that (c)(2)(A) immunity might be available to an ICSP where the ICSP is no longer eligible for (c)(1) immunity because it became an ICP by "develop[ing], even in part, the content at issue . . . ." *Id.*, App.5a. Fyk's Verified Complaint alleges that Facebook developed his content (at least in part) and thus, the courts below should not have extended (c)(1) immunity to Facebook (especially at the pleading stage).

The May 28, 2020, EO, observes that:

> The interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its own editorial decisions.

EO 13925 at 3, App.136a-137a; *see also* SCJ Thomas' *Enigma* Statement at 7, App.319a ("decisions that broadly interpret § 230(c)(1) to protect traditional publisher functions also eviscerated the narrower [(c)(2)(A)] shield Congress included in the statute").

(c)(1) does not protect "all" / "any" publishing actions taken by an ICSP. The moment an ICSP actively manipulates, develops, modifies content in any way, it transforms into "a publisher" / "secondary publisher" / "distributor" and is left with (c)(2)(A) protections if done to police (but not provide) content, in good faith, and absent monetary motivation. an ICSP cannot be an ICP and enjoy either (c)(1) or (c)(2)(A) immunity. an ICSP can only be a content "restrictor" to possibly enjoy (c)(2)(A) protections; but, for any information it is responsible for providing (as "a publisher" / "information content provider" /"secondary publisher" / "distributor"), it is not eligible for any CDA immunity.

(f)(3) gives us the legal definition of what an ICP is: "[t]he term information content provider means any person or entity that is responsible, in whole or in

part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* Again, canons of statutory construction instruct that every word of the law is important—"[w]here Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful." SCJ Thomas' *Enigma* Statement at 5, App. 318a. So, an ICP is "any entity . . . responsible . . . in part . . . for the development of information provided online." By legal definition, very little is required in order to be classified as an ICP—the words "in part" make this abundantly clear. If the ICSP developed the information (even in part), it does not receive CDA protections because it is providing, not restricting (which such restriction, again, would only be eligible for (c)(2)(A) immunity, if any) materials.[14]

As an example of development, if an ICSP is paid to increase the availability of information and actively provide that information to users, it is responsible, at least in part, for the development of—not the creation of—that content. As another example, if an ICSP pays a partner to rate content false and create additional context that the ICSP actively makes available to its users, it is responsible for both creation

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[14] We intentionally left "creation" out of this analysis. (f)(3) specifically says creation "or" development. Creation implies that information is being brought into existence. Development, on the other hand, does not require any aspect of creation. The content at issue could be entirely created by "another" content provider; but, if an ICSP actively manipulates the content, it is responsible (at least in part) for the development of that content and transforms the ICSP into an ICP not eligible for any CDA immunity. *See, e.g., Fair Housing*, 521 F.3d 1157 (9th Cir. 2008).

and development of that information, at least in part, and is not protected by 230. As another example (particularly apropos here), if an ICSP deletes / unpublishes (thus becoming "a publisher") "the publisher's" content, solicits another owner of the publisher's content, actively orchestrates the sale of "the publisher's" content to the competitor of "the publisher" because the competitor pays the ICSP more advertising money, makes "the publisher's" content available again for a competitor contingent upon "the publisher" no longer owning the content, then re-publishes "the publisher's" identical content for the competitor without "the publisher's" involvement, then the ICSP has become "a publisher"/"secondary publisher" / "distributor" / "ICP" ineligible for any CDA immunity. It cannot be that the rules change based on the user's value to Facebook.

6. The Ninth Circuit Erred in Determining an ICSP Is Eligible for CDA Immunity Where (As Here) Its Conduct Is Motivated by an Anti-Competitive Animus Because Such Does Not Fit the Mold of an Internet "Good Samaritan".

Does an ICSP's motive matter when it takes action or deliberately does not act to restrict harmful content? Here, the Ninth Circuit said that "unlike . . . (c)(2)(A), nothing in 230 (c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service." *Fyk*, No. 19-16232, [D.E. 40-1] at 4, App.4a. In stark contrast, the title of 230(c) says "Protections for 'Good Samaritan' blocking and screening of offensive materials." "Good Samaritan" is in quotes because the legislature intended (interpreting a law by looking to the "backdrop against which Congress" enacted same, *see,*

e.g., SCJ Thomas' *Enigma* Statement at 2, App.314a, internal citation omitted) to emphasize the application of Good Samaritanism to any action or omission; thus, (c)(1) and (c)(2) are both subject to a measure of Good Samaritan motive.

"Good Samaritanism" is very important and has been largely overlooked by the courts, including our lower courts. To maintain "Good Samaritan" protections, an ICSP must act in good faith, without compensatory benefit, without gross negligence, and without wanton or willful misconduct. If an ICSP is acting in bad faith or for its own economic, ideological, or political motivation, it certainly is not being a "Good Samaritan" and should lose its liability protections.

The Ninth Circuit panel in *Enigma* determined that actions driven by an anti-competitive animus render an ICSP ineligible for enjoyment of Good Samaritan 230(c) protections. The Ninth Circuit panel in Fyk's case acknowledged the anti-competitive animus of our unfair competition cause of action and related Verified Complaint averments, but inexplicably did not adhere to its own *Enigma* and *Fair Housing* holdings. Fyk carefully articulated the Good Samaritan nature of 230(c) at pages 7-15 of his Ninth Circuit Reply Brief (App.113a-119a), but the lower courts ignored it.

D. THIS CASE IS A SUPERIOR VEHICLE FOR ADDRESSING THE ISSUES PRESENTED.

In this "appropriate case," it would "behoove" this Court to provide guidance to all courts on the breadth of CDA immunity (*see* SCJ Thomas' *Enigma* Statement at 10, App.323a) so that there is consistency in the way the immunity is applied. Indeed:

> Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail. . . . Extending § 230 immunity beyond the natural reading of the text can have serious consequences. Before giving companies immunity from civil claims. . . [this Court] should be certain that is what the law demands.

Id. at 9-10, App.322a-323a (emphasis added).

This is the case by which this Court can / should "par[e] back the sweeping immunity courts have read into § 230." This is the case by which this Court can / should "give plaintiff[] a chance to raise [his] claims in the first place." This is the case by which this Court can / should avoid the "serious consequences" emanating from "[e]xtending § 230 immunity beyond the natural reading of the [CDA] text." This is the case by which this Court can / should provide certainty as to "what the law demands."

More than two decades after the CDA's enactment, a few monolithic technology companies dominate the entire digital landscape. Was the legislature's purpose for 230 to protect a company from any and all anti-trust or tort claims? Was 230 enacted to protect an ICSP from any and all of its "own" publishing actions? Was 230 enacted to allow the economic, ideological, or political manipulation of information? Was 230 enacted to provide an anti-competitive, anti-political, and / or anti-ideological weapon for Big Tech and to relinquish

the enforcement of the CDA to those commercial actors without any transparency or accountability?

"I don't think it should be up to any given company to decide what the definition of harmful content is." Mark Zuckerberg Interview / Public Discussion With Mathias Döpfner (Apr. 1, 2019).[15] "When you give everyone a voice and give people power, the system usually ends up in a really good place. So, what we view our role as, is giving people that power." Mark Zuckerberg Quote Compilation (May 15, 2012).[16] We concur, and this Court should too—this Court should grant this Petition.

Respectfully submitted,

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15 *See* n. 8, *supra*.

16 This compilation can be found at https://www.youtube.com/watch?v=1pyJazLfBcs.

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COUNSEL FOR PETITIONER

NOVEMBER 2, 2020

VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL (AUGUST 22, 2018)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 3:18-cv-05159-JSW

Plaintiff, Jason Fyk ("Fyk"), respectfully brings this action for damages and relief against Defendant, Facebook, Inc. ("Facebook"), and alleges as follows:[1]

NATURE OF THE ACTION

1. This case asks whether Facebook can, without consequence, engage in brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent practices that caused the build-up (through years of hard work and entrepreneurship) and subsequent destruc tion of Fyk's multi-million dollar business with over

[1] As litigation and discovery progress, Fyk reserves the right to amend this complaint should additional causes of action manifest.

25,000,000 followers merely because Facebook "owns" its "free" social media platform. So as to put in perspective just how large Fyk's following was, one source ranked Fyk's primary business/page as the fifth most active page on Facebook, ranking one spot ahead of CNN, for example.

2. Fyk, believing in Facebook's promise of a "free" social media platform to connect the world, was a remarkable success story. Fyk created and posted humorous content on Facebook's "free" social media platform. Fyk's content was extremely popular, as evidenced by over 25,000,000 followers. The success of Fyk's Facebook pages resulted in these pages becoming business ventures, generating hundreds of thousands of dollars a month in advertising and/or web trafficking earnings flowing from Fyk's valuable high-volume fan base.

3. Fyk developed a significant "voice" in reliance on Facebook's inducement to build his businesses on its "free" social media platform. Fyk invested tremendous time, energy, and resources in reliance on Facebook's promises. Facebook's promises made it one of the most lucrative and valuable economic and influential forces in the world.

4. Facebook has broken its promise to everyone and committed significant wrongs specific to Fyk. Facebook's systemic and specific wrongs are both wrongs with remedies.

5. More specifically, Facebook induced many (including Fyk) to build the Facebook empire and then, in a classic bait and switch, stole the value for its own commercial gain by changing its operating system and forcing itself into the business arenas others had

developed. Fyk suffered damages as a result of this bait and switch. So as to put in perspective just how much Facebook damaged Fyk, former Fyk competitors (who were smaller and/or less successful than Fyk before Facebook destroyed Fyk's businesses/ pages) have been valued between $100,000,000.00 and $1,500,000,000 .00.

6. Amidst its bait and switch, Facebook damaged Fyk (and likely many others) by pretextually wielding the Communications Decency Act ("CDA"), Title 47, United States Code, Section 230(c)(2), against Fyk in order to unfairly and unlawfully destroy and/or severely devalue Fyk's businesses/pages. This case asks whether Facebook can manipulate its users' content and direct preferential treatment to certain users to the detriment of other users by applying discretionary "enforcement" policies and practices (under the guise of the CDA, for example) because Facebook exercises plenary control over its "free" social media platform. So as to put in perspective just how different Facebook's treatment of Fyk was compared to others, Facebook flew representation to Los Angeles, California to aid and abet a Fyk competitor in the competitor's Facebook-driven acquisition of the Fyk businesses/pages that Facebook had destroyed.

7. In stark contrast to its public claims (before Congress, for example) of freely and openly connecting the world, Facebook is unlawfully silencing people (including Fyk) for its own financial gain.

8. Despite Facebook's claims of being able to fully and completely control anything and everything that occurs on its "free" social media platform, Facebook is not above the law and must be held accountable for its wrongs.

9. Our system of justice is what prevents the strongest and most powerful in our nation from trampling on those who are weaker and less powerful. It would be hard to imagine a clearer illustration of why our justice system must protect the weak from the powerful than this case where the mighty (Facebook) has destroyed the weaker's (Fyk's) businesses and American Dream. This is a true case of David versus Goliath.

PARTIES

10. At all material times, Fyk was/is a citizen and resident of Cochranville, Pennsylvania.

11. Upon information and belief and at all material times, Facebook was/is a company incorporated in the State of Delaware, with its principal place of business in Menlo Park, California. While there is some question as to whether the California forum selection and choice of law provisions embedded in Facebook's terms of service are applicable to this action (which does not relate to the terms of service akin to a breach of contract), Fyk does not wish to squander time and resources (his or the Court's) quarreling with venue.

JURISDICTION AND VENUE

12. This Court possesses original jurisdiction pursuant to Title 28, United States Code, Section 1332, as the parties are diverse and the amount in controversy exceeds $75,000.00 exclusive of fees, costs, interest, or otherwise.

13. Venue is proper in the Northern District Court of California pursuant to Title 28, United States

Code, Section 1391(b), since this judicial district is where Facebook maintains its principal place of business, since various events or omissions which give rise to and/or underlie this suit occurred within this judicial district, and/or since the (in)applicability of the forum selection and choice of law provisions in Facebook's terms of service are not worth fighting about.

COMMON ALLEGATIONS

14. For a period of many years, Fyk maintained businesses/pages on Facebook's purportedly "free" social media platform. That is until Facebook unilaterally, systematically, systemically, and/or capriciously (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) changed the Facebook "free" social media platform model almost overnight and pursuant to corporate greed, playing judge, jury, and executioner as to the continued existence of businesses/pages of those like Fyk who had developed a livelihood on the platform.

15. Fyk's businesses were made up of many Facebook pages, with over 25,000,000 viewers/ followers /audience at their peak. These businesses/ pages were humorous in nature, designed to get a laugh out of Fyk's viewers/followers audience. The intended nature of the subject businesses/pages worked–at his peak, Fyk's primary business/page was, according to some ratings, the fifth largest Facebook viewership presence in the entire world (ahead of competitors like BuzzFeed, College Humor, and Upworthy, for examples, and ahead of other large media presences like CNN, for example) and making hundreds of thousands of dollars a month in advertising and/or web trafficking earnings.

16. Indeed, the primary source of income generated by Fyk's businesses/pages was through advertisement earnings and/or web traffic to other sites (for valuable increased fanbase)–naturally, companies were inclined to pay Fyk to associate with his pages consisting of millions of viewers/followers.[2]

17. For many years in the 2010-2016 range (or thereabouts), Facebook had systematically and systemically welcomed folks into the seemingly warm waters of making a living on the "free" Facebook social media platform.

18. Upon information and belief, it was towards the latter part of the aforementioned 2010-2016 timeframe that Facebook unilaterally, systematically,

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[2] Companies that paid Fyk to advertise and/or traffic their companies (that is, before Facebook destroyed such economic relationships) included, but were not necessarily limited to, the following: (a) College Humor, (b) Guff, (c) Memez, (d) Mylikes, (e) Smarty Social, (f) Diply, (g) Top Ten Hen, (h) LOLWOT, (i) Cybrid Media, (j) PBH Media, (k) Liquid Social, (l) Red Can, (m) Ranker, (n) Bored Panda, and (o) Providr. And, then, there were many other realistic ways in which Fyk could have increased his economic advantage (*i.e.*, made money) but for Facebook's wrongdoing, which such realistic ways would have included, but not necessarily been limited to, the following: (a) an application called APPularity, further discussed below, (b) a TV series and/or movie, and (c) a book. Facebook was/is well aware that Fyk had business relations with companies like these, as Facebook's new mission is to demonetize folks like Fyk out of these relations by crushing folks like Fyk under the guise of CDA, filtering of purportedly low-quality content. *See, e.g.*, footnote 11, *infra*; *see also, e.g.*, June 22, 2016, https://www.c-span.org/video/?411573-1/facebook-coo-sheryl-sandberg-discusses-technological-innovation; July 1, 2015, http://fortune.com/2015/07/01/facebook-video-monetization; and Tessa Lyons' April 13, 2018 (https://www.youtube.com/watch?v=X3LxpEej7gQ).

systemically, and/or capriciously (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) decided to implement an "optional" paid for reach program, rather than the organic reach program (*i.e.*, "free" Facebook social media platform) that Fyk and many other Facebook businessmen and businesswomen had been part of for years. Why? Because Facebook all-of-a-sudden no longer cared to continue to make business smooth for those who declined the "optional" paid for reach program. Why? Because Facebook was now of the unilateral, systematic, systemic, and/or capricious mindset (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) that it was time to make its "free" social media platform profitable at the expense of those like Fyk upon whose backs the "free" Facebook social media platform succeeded and notwithstanding nothing explicitly making the "optional" paid for reach program "mandatory."[3] What did this create for Fyk and likely the myriad other businessmen and businesswomen on Facebook's "free" social media platform? Fear. Fear (analogized in averments twenty-five through thirty-five, *infra,* to "claim jumping") that if Fyk did not engage in Facebook's new "optional" paid for reach

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[3] Although there is nothing explicitly making the "optional" paid for reach program "mandatory" that we are presently aware of sans the benefit of discovery, the threat is there that if people do not pay Facebook, they will not play with Facebook. For example, some news outlets report that Facebook (through the likes of Facebook's head of global news partnerships, Campbell Brown) is advising behind "closed doors" that Facebook will put people on "hospice" if people do not work with Facebook; *i.e.*, if payments are not received. *See, e.g.*, August 14, 2018, https://www.thesun.co.uk/news/7014408/facebook-threatens-press-saying-work-with-us-or-end-up-in-hospice.

program, he would be blacklisted in the form of having his businesses heavily curtailed or altogether eliminated. And, for Fyk, this fear was heightened when a high-ranking Facebook executive advised him that his business was not one Facebook much cared to work with when compared to other businesses (specific names intentionally omitted from this public record) who relented to Facebook's new "optional" paid for reach program to the tune of tens of millions of dollars in payments a year to Facebook.

19. So, with the very real fear hanging over him of losing his businesses/pages and the incredibly hard work that went into same in the spirit of the American Dream (most likely like many other Americans/ administrators who, like Fyk, had built their businesses/pages on the premise that Facebook was indeed what it proclaimed and/or held itself out to be—a "free" social media platform), Fyk attempted to placate Facebook (and accordingly avoid putting his businesses/ pages at risk of Facebook-created destruction) by entering Facebook's new "optional" paid for reach program for a period of time, investing approximately $43,000.00 into Facebook's "optional" paid for reach program. Such Fyk investment was underway and ongoing until Facebook unilaterally, systematically, systemically, and/or capriciously (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) deactivated Fyk's "ads account," making it such where Fyk could no longer be a protected or chosen one under Facebook's "optional" paid for reach program. Because of Facebook, Fyk was left with no reasonable alternative other than to return to an organic reach model. Then Facebook's interference, unfair competition, civil extortion, and/or fraud

increased—starting in small increments and escalating into destruction and/or severe devaluation of at least eleven of Fyk's businesses/pages (discussed further below).

20. Facebook's misconduct (again, implemented gradually by Facebook so as to not be so obvious) included, for examples, unilateral, systematic, systemic, and/or capricious (pretty much overnight) page and content outlawing, Facebook Messenger disconnection, page and content banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, deletion of individual Facebook administrative profiles, and/or splitting of posts into four categories (text, picture, video, and website links) and systematically directing its tortious inference the hardest at links because links were what made others (like Fyk) the most money and Facebook the least money. This misconduct was grounded, in whole or in part, in Facebook's overarching desire to redistribute reach and value (*e.g.*, wiping out Fyk and orchestrating the handing over of his businesses/pages to a competitor, discussed in greater detail below) through the disproportionate implementation of "rules" (*e.g.*, treating Fyk's page content differently for Fyk than for the competitor to whom Fyk's content was redistributed). Part and parcel with Facebook's disproportionate implementation of "rules" was a disproportionate implementation of Facebook's appeal and/or customer service programs for Fyk (discussed in greater detail in the following averment, and punctuated by things like Facebook arranging meetings between its representatives and other businessmen and businesswomen,

not named Fyk, in order to assist them but not Fyk). Of course, inoperable pages consisting of millions of viewers who are no longer engaged in such pages due to the inoperativeness of same does not make for an environment in which high paying advertisers and/or web traffickers (from whom Fyk and his employees had made a living) were interested in continuing to be a part of.

21. Not thinking much of Facebook's misconduct early on (again, Facebook's misconduct unfolded gradually and covertly), Fyk availed himself time and time again of the appeal and/or customer service programs supposedly in place at Facebook to remedy incorrect page and content outlawing, Facebook Messenger disconnection, page and content banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, and/or deletion of individual Facebook administrative profiles. These programs worked for Fyk for a period of time; *i.e.*, Facebook would capriciously breathe life back into Fyk's businesses/ pages, conceding in the process that its page and content outlawing, Facebook Messenger disconnection, page and content banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, and/or deletion of individual Facebook administrative profiles was, in fact, incorrect. Fyk's businesses/pages would operate relatively smoothly for a while, until Facebook meddled again with Fyk's businesses/pages (with millions of viewers, reach in the billions, and hundreds of thousands of monthly

advertisement and/or web trafficking earnings at issue). Then, Fyk would appeal and/or work with customer service again. Then, Facebook would breathe life back into the subject businesses/pages. Then, Facebook would meddle again. Then, Facebook would breathe life back into the subject businesses/pages. So on and so forth for years, not tipping Fyk off as to what he was truly experiencing (or what Facebook's ulterior motives were, which such motives are still not entirely known sans the benefit of discovery) until Facebook's meddling culminated with the complete destruction and/or severe devaluation of eleven of Fyk's businesses/pages in October 2016 and unresponsiveness to Fyk's subsequent pleas for appeal and/or customer service.

22. More specifically, in October 2016, Facebook destroyed and/or severely devalued eleven of Fyk's pages (made up of over 25,000,000 viewers/followers), sending his millions of viewers and hundreds of thousands of dollars of monthly advertisement and/or web trafficking earnings down the proverbial drain. More specifically, the Fyk businesses/pages that Facebook destroyed and/or severely devalued (along with the viewer/follower count associated with each) were as follows: (a) Funniest pics–approx. 2,879,000, https://www.facebook.com/FunniestPicsOfficial, (b) Funnier pics–approx. 3,753,000, https://www.facebook.com/FunnierPics, (c) Take the piss funny pics and videos–approx. 4,300,000,_https://www.facebook.com/takeapissfunny, (d) She ratchet–approx. 1,980,000, https://www.facebook.com/sheratchetwtf, (e) All things Disney–approx. 1,173,000, https://www.facebook.com/Smilingloveyou, (f) Cleveland Brown–approx. 2,062,000, https://www.facebook.com/ClevelandBrownsfans, (g)

Quagmire–approx. 1,899,000, https://www.facebook.com/quagmirefans, (h) Peter Griffin–approx. 532,000, https://www.facebook.com/petergriffinfans, (i) WTF Magazine–approx. 2,600,000, https://www.facebook.com/wtfmagazine, (j) Truly Amazing–approx. 1,800,000, https://www.facebook.com/trulyamazingpage, and (k) APPularity–approx. 2,200,000, https://www.facebook.com/appularity. These page URL addresses were the original addresses, they may have subsequently changed, and they may accordingly not direct to the original locations.

23. Facebook's professed "justification" for its destruction and/or severe devaluation of Fyk's eleven businesses/pages was that the content of such businesses/pages was supposedly violative of the CDA. We now illustrate the ludicrousness of Facebook's CDA-related basis for destroying and/or severely devaluing Fyk's businesses/pages and interfering with his prospective economic advantage/relations (*e.g.*, advertisement and/or web trafficking earnings). As discussed in greater detail below, Facebook selectively "enforced" the CDA against Fyk by, for example, deeming identical content CDA-violative as it related to Fyk but not CDA-violative as it related to a Fyk competitor.

24. In or around the end of 2016, Facebook deleted one of Fyk's pages (with millions of viewers and thousands of advertising and/or web trafficking earnings at issue) because, for example, it contained a posted screenshot from the Disney movie *Pocahontas*. Facebook claimed that this screenshot (from a Disney children's movie) was racist and accordingly violative of the CDA; *i.e.*, to use Facebook terminology, the *Pocahontas* screenshot post constituted a "strike" (the "strike"

notion is discussed in greater detail at footnote 8, *infra*). Meanwhile, for comparison's sake, Facebook allowed other businesses/pages at that same time (in or around the end of 2016) and thereafter for that matter to maintain, for examples, a posted screenshot of a mutilated child or instant article Facebook advertisements (moneymakers for Facebook) of things like sexual activities, among other things that really were violative of the CDA.[4] And, for purposes of a public record, these are "benign" examples compared to the other examples we have. And, meanwhile, for comparison's sake within Fyk's own businesses/pages, Facebook allowed other Fyk businesses/pages (of

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[4] Fyk even reported the disgusting posted screenshot of the mutilated child to Facebook and in December 2016 Facebook advised Fyk that such disgusting post was perfectly ok. Of note, Fyk has routinely reported unsavory content to Facebook in an effort to keep Facebook a "safe and welcoming" community. More specifically as to Fyk's reporting of the mutilated child post, Facebook advised Fyk as follows: "Thank you taking the time to report something that you feel may violate our Community Standards. Reports like yours are an important part of making Facebook a safe and welcoming environment. We reviewed the photo you reported for being annoying and uninteresting and found it doesn't violate our Community Standards." An example of a BuzzFeed (a Fyk competitor) post that Facebook apparently deemed perfectly ok was BuzzFeed's July 23, 2017, post entitled *27 NSFW Movie Sex Scenes That'll Turn You The Fu[$#] On.* Ironically, "NSFW" stands for "Not Safe for Work," and remember that Facebook was purportedly concerned with maintaining "a safe and welcoming environment." Other examples (and the list could go on) of BuzzFeed posts that Facebook deemed "safe and welcoming" amidst its "Community Standards" include: *12 Sex Positions Everyone In A Long-Term Relationship Should Try* on May 7, 2016, *Here's How Most People Have Anal Sex* on April 25, 2017, *These Insane Sex Stories Will Blow Your Fu[$#]ing Mind* on May 12, 2017, and *15 Sex + Poop Horror Stories That'll Make You Feel Better About Yourself* on August 11, 2017.

incredibly similar nature to the business/page with the *Pocahontas* screenshot post) to stand. Translated, there was absolutely positively nothing about Fyk's pages violative of the CDA warranting Facebook's crippling of Fyk's livelihood (and the livelihood of his employees), certainly no "good faith" basis for Facebook's wreaking havoc on Fyk under the pretext of the CDA, which such "good faith" language is straight out of Section 230(c)(2) of the CDA. But the best proof in the "there was nothing CDA violative about Fyk's businesses/pages" pudding is set forth in averments forty-two through forty-six, *infra*, in relation to Fyk's fire sale of eight of his businesses/pages (out of the subject eleven businesses/pages noted above) to a similar (if not identical) competitor because of Facebook's irrational and unwarranted tortious interference, unfair and anti-competitive conduct, extortion, and/or fraud leaving him with no other reasonable alternative.

25. Another way to properly classify and better illustrate Facebook's conduct (when one properly disregards Facebook's wayward CDA contention) is "claim jumping," which is more of a lay description of tortious interference with prospective economic advantage/relations.

26. A locally rooted example of "claim jumping" in this country's history was California gold mining. Analogous to Facebook's conduct here, centuries ago in California a small percentage of smalltime miners struck gold/staked claims. Then, it was not uncommon for a stronger, richer mining company to swoop in and "jump the claim" of the smalltime miner. Put differently, it was not uncommon for the stronger, richer mining company to make the smalltime miner

an offer he or she could not refuse (often backed by direct or indirect threat for livelihood, striking fear in the miner), strong-arming the smalltime miner out of his or her realized economic advantage (or prospective economic advantage associated with the extraction of the found gold) developed by his or her hard work in the vein of the American Dream.

27. Here, the land that was/is replete with resources was/is the worldwide web. Facebook does not own the worldwide web, Facebook manages/ services a space on the worldwide web (called a platform) in which people (like Fyk) can stake claims (create pages, *see* averment number twenty-two, *supra*). Staking a claim first involves the discovery of a valuable "mineral" in quantity. Here, the "mineral" (gold) that Fyk discovered on the land (the worldwide web) was advertising earnings, distribution value, news feed space, and/or the like. Fyk prudently invested time and resources in recovering the "mineral" and otherwise staked claims within Facebook's "free" social media platform through the development of boundaries (*i.e.*, development of businesses/pages, web URLs, page identity numbers).

28. Facebook (worldwide web manager/servicer) realized there was a lot of money to be made in the "gold mining" (advertising and web trafficking spaces), so Facebook began mining gold for itself in tortious, unfair, extortionate, fraudulent competition with claim stakeholders like Fyk. Most of the best gold claims (pages, news feeds), however, had been staked by people like Fyk. With past being prologue, Facebook wanted more and more and more . . . and, then, some more. And, so, Facebook (the land manager/servicer turned mining company) changed its strategy to

suppress the resources of the larger claim stakeholders (Fyk). Facebook did not want to get caught sapping the resources of other claim stakeholders, so Facebook came up with "rules and regulations" to be disproportionately implemented/enforced depending on whether or not the claim stakeholder (Fyk) was favorable to or preferred by the land manager/servicer (Facebook). The rules and regulations that Facebook made up were so nebulous in nature that any and all types of gold mining effectively became violative of the land manager's/servicer's new rules and regulations, justifying the Facebook "claim jumping" that ensued in "we can do whatever we want because we are Facebook" fashion.

29. Facebook's "claim jumping" was effectuated by Facebook's doing a variety of things, for examples (a) closing the mine gates (Fyk's businesses/pages) until the land management/service company (Facebook) was paid more by the claim stakeholder (Fyk)—unpublishing pages so as to tortiously interfere, unfairly compete, and/or extort, (b) closing the mine down or cancelling the claim—deleting pages so as to tortiously interfere, unfairly compete, and/or extort, (c) cutting off resources to the mine—reducing reach/distribution so as to tortiously interfere, unfairly compete, and/or extort, (d) replacing individual miners with management/service company (Facebook) miners—replacing Fyk news feeds with Facebook ads so as to tortiously interfere, unfairly compete, and/or extort, and/or (e) imposing regulations that made the mine financially unsound with the intent to usher in a new mining company (Fyk competitor) who paid the management/servicing company (Facebook) a higher percentage—unpublishing, reducing reach, deleting

pages, and assisting a competitor in purchasing the pages so as to tortiously interfere, unfairly compete, and/or extort.

30. As Facebook CEO, Mark Zuckerberg, has proclaimed, Facebook is a "platform for all ideas" (just as California land was once a platform for all gold miners).[5] Land management/servicing was Facebook's business, whereas mining the land was Fyk's business. Once Facebook saw how lucrative Fyk's business was, Facebook jumped the claims that Fyk had staked. Like big mining companies did to the little gold miner in California centuries ago, Facebook crushed Fyk who had staked successful claims through hard work and had not volunteered himself to being crushed.

31. One key common denominator between "claim jumping" (like the gold mining example) and Facebook's conduct here is the involuntariness of same–the crushed little guy in each instance (including Fyk

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[5] Mr. Zuckerberg disingenuously proclaimed at his Harvard commencement speech last summer, Facebook "understand[s] the great arc of human history bends towards people coming together in greater even numbers—from tribes to cities to nations—to achieve things we couldn't on our own . . . . This is my story too—a student at a dorm connecting one community at a time and keeping at it until one day we connect the whole world." Mr. Zuckerberg's disingenuous lip service also included this: "Finding your purpose isn't enough. The challenge for our generation is to create a world where everyone has a sense of purpose." Sounds so rosy, sounds so nice . . . but, alas, Facebook talks that talk and then walks the Fyk walk. Fyk found his sense of purpose, Facebook destroyed it. Facebook disconnected Fyk, rather than connected Fyk. Facebook is destroying and/or disconnecting businesses/pages (like Fyk's) that generate advertising and/or web trafficking earnings so that Facebook can bleed away such monies for itself in legally untenable ways.

here) had no choice or alternative in the business world other than to swallow the difficult pill that the mighty (here, Facebook) had force-fed. Here, Facebook welcomed Fyk (as well as many others, for that matter) into a "free" social media platform and lurked around until someone became the so-called miner who found gold on the Facebook platform; *i.e.*, until someone like Fyk did tremendously well on the "free" Facebook social media platform by building his assets/ economic advantage (*e.g.*, audience and distribution, akin to the aforementioned gold). Then, Facebook swooped in with an "optional" paid for reach program (*i.e.*, an offer people were not supposed to refuse), devalued and redistributed Fyk's economic advantage without Fyk volunteering himself or his businesses to same.

32. Fyk had hardly anything to his name when he launched his businesses/pages on Facebook's "free" social media platform. More specifically, Fyk was facing bankruptcy and eviction when he joined the "free" Facebook social media platform in the hopes of experiencing the American Dream and building a future for his family. He dedicated all the money he had on building a Facebook audience, rather than buying food and other household necessities for him and his family. Kudos to Fyk for building successful businesses/ pages through very hard work in the vein of the American Dream.

33. Then, Facebook sent Fyk's American Dream up in smoke, pretty much overnight, without Fyk volunteering himself or his businesses to same. What is next if Facebook's conduct is allowed to stand? Will fast food restaurant franchisors, for example, lurk around to find the most successful franchisees (built upon the hard work of the franchisee prescribing to

the American Dream) and swoop in to "jump the claim;" *i.e.*, steal or destroy the franchisee's restaurant and redistribute the franchisee's restaurant to the franchisor mothership or some other franchisee who the franchisor likes better as Facebook did to Fyk here? Those are not the pillars upon which this country and the associated American Dream were built.

34. "Claim jumping" (predicated on force exerted by the mighty that the little guy could not reasonably evade in the business world) is not the economic model upon which this country has functioned since its existence, as "claim jumping" makes for a highly unstable economy. Thankfully, in today's legal world the little guy has legal recourse to rectify the wrongful forced conduct experienced at the hands of the mighty in the business world. Today, we call this kind of legal recourse claims for relief, *infra*, which sound in Facebook's tortious interference with prospective economic advantage/relations (First Claim for Relief), unfair competition (Second Claim for Relief), civil extortion (Third Claim for Relief), and/or fraud (Fourth Claim for Relief). As noted in averment numbers one through nine, *supra*, these legal actions are designed to protect the weaker from the stronger; *i.e.*, meant as legal checks and balances to the unbridled "we can do anything we want because we are stronger" mentality of those like Facebook.

35. Another way to view one of Facebook's seeming motivations for jumping the claims of those (like Fyk) who did well for themselves on the "free" Facebook social media platform was/is to steal the advertising and/or web trafficking earnings generated on successful pages like Fyk's pages; *i.e.*, take the Fyk-built reach from which the advertising and/or web

trafficking monies enjoyed by Fyk flowed and redistribute same to other "sponsors."

36. One need only look to one's Facebook news feed to see examples of such. There stands a good chance that there will be a post on one's news feed from an unknown source; *i.e.*, from somebody or some company unknown to the user of the news feed. This unknown, mystery post will likely have the word "sponsored" in light print. The "sponsor" is a paid advertiser on Facebook.

37. Facebook is now making money in the advertising space (like Fyk did) by unilaterally, systematically, systemically, and/or capriciously replacing Fyk with "sponsors." In order to clear space for Facebook's advertising efforts, Facebook had to clear out posts on Facebook user news feeds that the users actually wanted to see. For example, users wanted to see Fyk's content—that is why he had over 25,000,000 viewers across the subject eleven businesses/pages. Accordingly, Fyk's posts would take up a sizable portion of users' news feeds. So, in order for users to see the random Facebook-sponsored posts that they did not care to see, Facebook had to eliminate (or heavily curtail) the posts that people liked seeing on their news feeds (*e.g.*, Fyk's posts) and force Facebook-sponsored posts onto user news feeds whether the user wanted that or not.

38. In an effort to insulate itself from this misconduct, Facebook initially forced out folks like Fyk under the guise that Fyk's content was "spam." Per Merriam-Webster's Dictionary, "spam" is defined as "unsolicited usually commercial messages (such as . . . Internet postings) sent to a large number of recipients

or posted in a large number of places."[6] Fyk's audience chose to be his audience at the threshold and then had to choose to click on any content website link found in Fyk's businesses/pages which would then lead to content on the website in which an advertisement could be seen that would earn Fyk money; *i.e.*, there was nothing "unsolicited" about Fyk's businesses/pages and associated content website links. Put differently, there was nothing "spammy" about Fyk's businesses/pages and associated content website links upon which Facebook could have legitimately justified muscling him out under the guise of "spam."

39. By way of this misconduct, Facebook was/is making money from whatever advertisers and/or web traffickers are associating themselves with the random Facebook-sponsored posts it is forcing onto user news feeds while strong-arming out user-friendly news feed posts like Fyk's. What Facebook is doing (the forced removal of Fyk-like posts on user news feeds and the forced insertion of Facebook-sponsored posts) is the definition of "spam."[7]

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[6] https://www.merriam-webster.com/dictionary/spam

[7] As another example of Facebook's forcing itself upon users in "spammy" fashion, when a user scrolls through their news feed and has their audio setting set to "off," some advertisements will mysteriously pop up and disregard the user's audio "off" setting (*i.e.*, force the user's audio setting to "on"). This kind of mystery advertisement, of course, is a Facebook-sponsored advertisement and Facebook is blatantly and unilaterally disregarding the user's settings so as to loudly announce (literally) something that makes Facebook money. Facebook's manipulation of users' news feeds hurts the user just as much as the content provider and, to call a fig a fig, amounts to censorship. In lay terms, Facebook is no longer allowing the user to *see* what he/she wants to see and hear what he/she wants to hear. Many "loved" that they could

40. So, as best we can presently tell sans the benefit of discovery, Facebook's effort to crush the American Dream of hard workers like Fyk who built a life for themselves (and their employees, since laid off in Fyk's case due to Facebook's crippling) on the "free" Facebook social media platform all boils down to Facebook's crooked corporate greed: (a) Muscle out (through interference, unfair competition, extortion, fraud, and/or *et cetera*) those who do not wish to (or could no longer, in Fyk's case) partake in Facebook's "optional" paid for reach program, and (b) Delete the news feed posts that Facebook users want to see and inject news feed Facebook-sponsored posts (*i.e.*, "spam") that Facebook users do not want to see and/or have the ability to avoid. The methods by which Facebook is accomplishing such amount to unfair competition, extortion, and fraud, which badly interferes with the prospective economic advantage/relations of hard working Americans who built lives for themselves, their families, their employees, and their employees' families around Facebook's false promises of a "free" social media platform.

41. In relation to Facebook's October 2016 destruction and/or severe devaluation of Fyk's eleven businesses/pages, Fyk's efforts to unravel Facebook's misconduct (akin to the procedure set forth in averment twenty-one, *supra*) was regrettably to no avail–Facebook had now officially decided it was time to completely

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watch videos with sound off, *see, e.g.*, July 1, 2015, http://fortune.com/2015/07/01/facebook-video-monetization, that is until Facebook unilaterally force-changed users' preferences. This Facebook force-feeding as it relates to the user cripples the content provider (like Fyk) in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion.

destroy Fyk's business and interfere with his prospective economic advantage/relations. Facebook's interference and unfair competition even went so far as to lock Fyk out of his advertisement account; *i.e.*, not allowing Fyk to continue his participation in the "optional" paid for reach program.

42. After a few months of Fyk's inability to breathe life back into the businesses/pages that Facebook had destroyed and/or severely devalued (eleven pages consisting of over 25,000,000 viewers/ followers) and after Fyk regrettably had to lay off employees due to Facebook's crippling interference, Fyk was left with no reasonable alternative other than to fire sell eight of his crippled pages (realistically valuated by some in the nine figure range) for a relatively nominal approximate $1,000,000.00 in January 2017 to a competitor located in Los Angeles, California with that competitor already having been advised by Facebook that Facebook would breathe life back into the subject eight pages only if such were purchased by the competitor. This proves, among other things, that there was nothing CDA violative about these eight Fyk businesses/pages that Facebook crippled, as further discussed below.

43. Facebook offered the competitor customer service before, during, and after the fire sale of Fyk's eight business/pages so as to effectuate the fire sale (*i.e.*, so as to redistribute Fyk's economic advantage) to the competitor. In fact, the Facebook customer service offered to the competitor (but never to Fyk at any such level, or, really, at any meaningful level) rose to the level of Facebook flying representation down to Los Angeles to meet with the competitor to make sure the Facebook-induced redistribution of Fyk's economic

advantage (fire sale of the audience and reach that made up the subject eight businesses/pages) went through.

44. Reason being, Facebook plainly wanted to play a direct role in ushering Fyk out of the Facebook "free" social media platform business world in favor of Fyk's competitor. Facebook made clear that the subject eight Fyk businesses/pages that Facebook had black-listed would have no chance of having life breathed back into them until the sale of the businesses/pages was completed with Fyk's competitor—indeed, this is what Facebook represented to the Fyk competitor out of Los Angeles. Facebook worked with the competitor to orchestrate and carry out the sale.

45. Almost immediately after the fire sale to the Fyk competitor went through (thanks, in whole or in part, to Facebook's interactions with the competitor before, during, and after the fire sale process), the supposedly CDA violative Fyk businesses/pages that were fire sold were magically reinstated by Facebook within days of the fire sale's consummation (*i.e.*, contract completion between Fyk and the competitor) with no appreciable change (if any change) in the content of the pages that were supposedly violative of the CDA. Meaning, again, there was absolutely nothing CDA violative about Fyk's businesses/pages . . . Facebook just wanted to steer Fyk's businesses/pages (a/k/a assets, a/k/a economic advantage) to a competitor and otherwise eliminate Fyk by any means necessary. Facebook did so–it severely devalued Fyk's eleven businesses/pages (economic advantage) to the point of Fyk having no reasonable alternative other than to fire sell eight of the businesses/pages for a relatively low sum and then it revalued the same businesses/pages

for the Fyk competitor to whom the businesses/pages were sold.[8]

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[8] The three businesses/pages that Fyk still maintains (Truly Amazing, WTF Magazine, APPularity) are valueless from advertising and/or web trafficking perspectives (which were the real moneymakers) because of Facebook. Though these three businesses/pages were crippled by Facebook along with the other eight businesses/pages in October 2016, Facebook's more recent disproportionate implementation and/or shell-gaming of "rules" pertaining to branded content is what is causing the current advertising and/or web trafficking valuelessness of these three pages. To further illustrate Facebook's discriminatory treatment of Fyk, the chronology concerning Facebook's new branded content rules is noteworthy. Facebook was to roll out its new branded content "rules" starting March 1, 2018, and yet further crippled one of Fyk's remaining three pages prior in February 2018 for two posts purportedly violative of Facebook's new branded content "rules." A certain number of "violations" (called "strikes" by Facebook) on a page could result in the page being banned (lost), Facebook does not tell folks how many such strikes are afforded until there is a ban, and Facebook has kept arbitrarily levying strikes against Fyk (still to this day on his remaining three pages) until it accomplishes what it wants–Fyk's being banned, which cripples his reach. *See* https://newsroom.fb.com/news/2018/08/enforcing-our-community-standards/. The writing is on the wall as to this vicious circular cycle predicated on Facebook whim. Moreover as to Facebook's continued wrongdoing related to Fyk's remaining three businesses/pages, Facebook is still treating Fyk unlike others. For example, on August 13, 2018, Fyk's WTF Magazine business/page received a post ban by Facebook. Fyk's profile was subsequently banned for thirty days due to the purported inappropriate content of the aforementioned post, which such post was doing quite well for Fyk until Facebook's interference. So, Fyk went to the original post of the aforementioned post (on another's page where he originally found the post) and reported that identical post to Facebook. Facebook found the identical post acceptable for another. More specifically, by message dated August 15, 2018, Facebook advised Fyk as follows as to the identical post on another's page that Fyk reported to Facebook: "Thanks for letting us know about

46. And the timing of Facebook's ultimate Fyk crippling in October 2016 is no coincidence to the timing of the Facebook-aided fire sale of Fyk's business/ pages to the Fyk competitor who was in Facebook's good, paying graces. Put differently, the proximity of this cause and effect further demonstrates the relevant connection to Facebook's wrongdoing (interference with prospective economic advantage/ relations, unfair or deceptive practices, unfair competition, civil extortion, and/or fraud)

47. Fyk was wrongly singled out by Facebook, even per the admission of a high-ranking Facebook employee (Chuck Rossi, director of engineering at Facebook) kind enough to communicate reality to Fyk because Mr. Rossi seemingly does not share Facebook's devious and publicly harmful agendas.[9] Indeed, Mr. Rossi, whether known to Facebook or not, administers a group dedicated to restoring businesses/

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this. We looked over the photo, and though it doesn't go against one of our specific Community Standards, you did the right thing by letting us know about it. . . . " Moreover as to damages, Fyk built the APPularity business/page to support an application called APPularity and Fyk personally invested approximately $50,000.00 (and countless hours) in this ap endeavor. Facebook's crippling (again, still to this day) of APPularity (which, again, is one of the three businesses/pages Fyk still maintains) has rendered the APPularity application worthless; *i.e.*, robbed Fyk of his approximate $50,000.00 investment and all the future monies (*i.e.*, prospective economic advantage) he would have doubtless enjoyed from same.

[9] In October 2016, Fyk's Peter Griffin business/page had been unpublished by Facebook. Mr. Rossi helped Fyk restore the Peter Griffin business/page that had been wrongfully unpublished by Facebook. Regrettably, very soon thereafter, Facebook again shut Peter Griffin down.

pages that Facebook has wrongly shut down. Such singling out of Fyk by Facebook might rightly be characterized as discrimination

48. In sum, Facebook's actions with Fyk were unlawful.

FIRST CLAIM FOR RELIEF—INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE/RELATIONS

49. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

50. Facebook intentionally interfered with economic relationships between Fyk and his various advertising companies and/or web traffickers (*see* footnote 2, *supra*, for a non-exhaustive list of such companies) associated with the aforementioned eleven businesses/pages that Facebook intentionally interfered with, which such economic relationships would have doubtless continued to result in an economic benefit/advantage to Fyk.

51. Facebook knew of Fyk's advertising and/or web trafficking relationships . . . advertising and/or web trafficking in general on the Facebook "free" social media platform is no secret, that is how most (if not all) businesses/pages make money through the Facebook social media platform. In fact, Facebook was/is so aware of advertising and/or web trafficking relationships and the lucrativeness of same that Facebook has muscled its way into that line of work while muscling out the very folks who cultivated that line of work all the way back in the days when Facebook was akin to

baron land or an unchartered frontier. Recall, Facebook is not that old,[10] and it needed worker bees (like Fyk) to make it what it is today over a relatively short period of time–that is until the honey was produced and Facebook figured it would kill the bees and take the honey and/or redistribute the honey to other worker bees.

52. Facebook engaged in wrongful conduct separate from the interference with Fyk itself. For example, as discussed in the above common allegations and below other causes of action, Facebook implemented its interference with Fyk *via* the separately wrong conduct of civil extortion (*e.g.*, coercing Fyk to pay approximately $43,000.00 towards worthless "optional" paid for reach amidst threat and fear that his businesses/pages would be crippled if he did not and then not allowing Fyk to continue in the "optional" paid for reach program). As another example, as discussed in the above common allegations and below other causes of action, Facebook implemented its interference with Fyk *via* the separately wrong conduct of unfair competition (*e.g.*, unilaterally deleting Fyk posts from users' news feeds that garnered significant advertising and/or web trafficking monies so as to begin forcing random "spammy" Facebook-sponsored posts into users' news feeds). And, no, there is no competition privilege at play here somehow justifying Facebook's conduct—that privilege only applies when the

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[10] Although Facebook is so interwoven into the fabric of our society (to the point of obsession, in particularly with society's youth) that one might think it has been around since Creation or the Big Bang (depending on belief systems), it has only been around since February 4, 2004, the same day the United States government (Darpa) nixed its LifeLog program.

competition is by fair play; *i.e.*, devoid of independently wrongful conduct. Put differently and for example, there was, in theory, nothing wrong with Facebook entering the advertising and/or web trafficking realms on its platform if that is all Facebook had done side-by-side, mano-a-mano with other advertising and/or web trafficking competitors; but, Facebook did not just enter the advertising and/or web trafficking realms in side-by-side, mano-a-mano competition with other companies earning advertising and/or web trafficking income (like Fyk), Facebook instead engaged in a calculated, systematic, systemic campaign to eliminate its competition by, for examples, (a) unilateral deletion of competitors' news feed posts and unilateral force-placing of "spammy" Facebook-sponsored posts into the news feeds of users who did not invite same (at least not consciously, since so much of the Facebook paradigm is cryptic beyond ordinary comprehension or recognition), (b) deletion of competitor businesses/pages (to which advertisements and/or web trafficking were tied) under misrepresentative pretext like CDA violation, and (c) splitting of posts into four categories (text, picture, video, and website links) and systematically directing its tortious inference the hardest at links because links were what made others (like Fyk) the most money and Facebook the least money.

53. Facebook, in engaging in the aforementioned interference *via* myriad methods of conduct wrongful in and of itself, either intended or knew that the advertising and/or web trafficking disruption experienced by Fyk (not to mention other lost economic opportunities set forth in footnote 2, *supra*) was certain or substantially certain to occur as a result of such interference.

54. Fyk's relationships with myriad advertising and/or web trafficking companies was significantly disrupted (in fact, eliminated) due to Facebook's interference. Again, Fyk had to fire sell eight businesses/pages (out of the eleven Facebook had crippled) to a competitor amidst Facebook's direct involvement in effectuating that sale; *i.e.*, amidst Facebook's steering of competition.

55. Facebook has deprived Fyk of hundreds of millions of dollars (if not billions of dollars–case in point, BuzzFeed, a Fyk competitor, now being worth approximately $1,500,000,000.00 according to some sources) by way of Facebook's interference and disruption of his advertising and/or web trafficking monies. At a peak and prior to Facebook's interference, Fyk earned approximately $300,000.00 in one month in advertising and/or web trafficking monies, for example. There was no realistic end in sight to Fyk's economic gain before Facebook's interference; rather, all signs pointed towards Fyk earning even more advertising money but for Facebook's interference. to illustrate, competitors who have survived Facebook's onslaught and were far less successful than Fyk at the time of Facebook's devastating interference (*i.e.*, had millions less followers and accordingly earning significantly less advertising earnings than Fyk) have, upon information and belief, had their businesses on Facebook's platform professionally valuated in the hundreds of millions to billions of dollars range. And, yet, Fyk had to fire sell eight of his hard-earned businesses/pages for many zeros less than what they should have been worth but for Facebook's interference; *i.e.*, for a relatively nominal approximate $1,000,000.00 due to Facebook's interference.

56. Not only was Facebook's conduct a substantial factor in Fyk's significant loss of business income and prospective economic advantage, it was the only factor. Facebook's interference with Fyk's economic advantage imposes liability on Facebook for improper methods of disrupting or diverting Fyk's business relationships (*e.g.*, advertising and/or web trafficking companies, *see* footnote 2, *supra*) outside the boundaries of fair competition. In actuality, one of Facebook's motives (collecting "optional" paid for reach monies on a purportedly "free" social media platform) amounts to extortion, which, in turn, has a chilling effect on fair competition. When it comes to Facebook's desire to take over the advertising and/or web trafficking businesses through forced and unwanted Facebook-sponsored "spammy" posts on users' news feeds by muscling out the posts users want (like Fyk posts), that is where glaring unfair competition comes into play. Users cannot avoid the forced, "spammy" Facebook-sponsored posts, and Facebook is no longer the "free," "give the people a voice" social media platform it purports to be;[11] rather, it, again, has become a platform predicated on redistribution of assets (through legally untenable means) developed

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[11] "Purports" because of the kind of false rhetoric Facebook disseminates to the public with a brainwashing aim based, in part (sans the benefit of discovery), on supposed feedback from mystery Facebook focus groups. *See, e.g.*, Tessa Lyons' April 13, 2018 (https://www.youtube.com/watch?v-X3LxpEej7gQ), May 23, 2018 (https://www.bloomberg.com/news/videos/~2018-05-23/facebook-s-fight-against-misinformation-and-fake-news-video), and June 21, 2018 (https://www.youtube.com/watch?v-DEVZeNESiqw). Ms. Lyons is Facebook's product manager; *see also, e.g.*, June 22, 2016, https://www.c-span.org/video/?411573-1/facebook-coo-sheryl-sandberg-discusses-technological-innovation.

by folks (like Fyk) under the pillar of our society that is the American Dream.

57. Tortious interference with prospective economic advantage/relations is intended to protect stable economic relationships; again, the United States of America was built on fostering stable economic relationships developed in the spirit of the American Dream. Facebook's conduct with Fyk (and many others, for that matter) frustrates such stability and the underlying American Dream, akin to the crooked "claim jumping" scheme set forth above.

WHEREFORE, Plaintiff Jason Fyk respectfully requests the entry of judgment against Defendant Facebook, Inc. for damages including, but not necessarily limited to, (a) compensatory damages well in excess of the $75,000.00 amount in controversy threshold, (b) punitive damages, (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable (*e.g.*, injunction), just, and/or proper.

SECOND CLAIM FOR RELIEF—VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTIONS 17200-17210 (UNFAIR COMPETITION)

58. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

59. California Business & Professions Code Section 17203 provides, in pertinent part, as follows:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent

> jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

60. California Business & Professions Code Section 17201 provides, in pertinent part, as follows: "As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."

61. California Business & Professions Code Section 17200 provides, in pertinent part, as follows: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ."

62. California's unfair competition law affords a private right of action where (as here) the conduct is predicated on "unfair" conduct.

63. Here, there was nothing fair about Facebook's steering Fyk's business/pages to the competitor to whom Fyk had to fire sell eight businesses/pages due to Facebook's leaving Fyk with no reasonable alternative. Such is the epitome of unfair competition, conducive of economic instability and antithetical to the American Dream.

64. Again, Facebook wished to eliminate one competitor (Fyk) in favor of another competitor (the company Fyk was forced to fire sell to because of Facebook) because, for example, the other competitor paid Facebook lucrative sums under Facebook's "optional" paid for reach program. Again, Facebook's excuse for eliminating Fyk was of course not its preference to steer his businesses/pages to a competitor who paid Facebook lots of money notwithstanding a purportedly "free" social media platform, but was instead the nonsense about the content of Fyk's businesses/pages being violative of the CDA (mainly, supposedly "spammy"). But, again, as discussed in greater detail above, this was a lie as evidenced by the fact that Facebook immediately reinstated the supposedly CDA violative pages for the competitor who Fyk was forced to sell to because of Facebook without any appreciable change, if any change, in the content of the subject pages.

65. And there is more to Facebook's unfair competition. Facebook wished to enter into the lucrative advertising and/or web trafficking businesses for itself once it saw how successful those businesses had become for folks like Fyk. Facebook did not fairly enter into competition with Fyk in this regard, such as by building a massive fanbase as Fyk did from the ground up and then reaping the benefits of the advertising and/or web trafficking earnings that flowed from such hard work in the vein of the American Dream. Rather, Facebook imposed its might in anti-competitive fashion by muscling out the Fyk-related posts from user news feeds that users actually wanted and muscling the "spammy" Facebook-sponsored posts

into user news feeds that users had not asked for. This is the epitome of unfair competition.

66. Moreover, Facebook's unfair competition contravenes its own policies–for examples, Facebook has policies of public neutrality in filtering content, giving people a "voice" (as Ms. Lyons, for example, disingenuously proclaims, *see* footnote 11, *supra*), and "connecting" people (as Mr. Zuckerberg, for example, disingenuously proclaims, *see* footnote 5, *supra*). Where (as here) there is, for example, no neutrality employed in content filtering so as to filter out a competitor (Fyk) and his businesses/pages, predicated on Facebook's false advertising (among other things), California law geared towards safeguarding fair competition is turned upside down. Facebook should be held (whether that is legally, equitably, or both) to its professed policies of public neutrality, voice, and connection; *i.e.*, Facebook should not be allowed to arbitrarily throw its professed public policies aside so as to engage in case-by-case unfair competition that singles out and destroys one person (Fyk) both by unfairly steering the hard work of one competitor (Fyk) to another competitor (*e.g.*, Facebook's aiding and abetting the fire sale of eight Fyk businesses/pages to another competitor), by muscling Fyk's advertisement-backed posts off of users' news feeds and muscling in unwanted random "spammy" Facebook-sponsored posts laced with advertising money, and who knows what else sans the benefit of discovery.

WHEREFORE, Plaintiff Jason Fyk, pursuant to California Business & Professions Code Section 17203, respectfully requests the entry of judgment against Defendant Facebook, Inc., for damages including, but not necessarily limited to, (a) restitution in an amount

appropriate to restore Fyk's loss of advertising and/or web trafficking monies at the hands of Facebook's unfair competition (*e.g.*, restore Fyk for every bit of lost advertising and/or web trafficking money associated with every one of his posts on user news feeds that Facebook unilaterally supplanted with its "spammy" sponsored news feed posts), (b) an order enjoining the methods, acts, or practices complained of in this complaint (*e.g.*, Facebook's unsubstantiated banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, deletion of individual Facebook administrative profiles, and/or the like of Fyk businesses/pages), (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable, just, and/or proper.

THIRD CLAIM FOR RELIEF—CIVIL EXTORTION

67. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

68. Facebook implemented its "optional" paid for reach program, in out-of-the-blue fashion for those (like Fyk) who had functioned under an organic reach program on the purportedly "free" Facebook social media platform for years, backed by a transparent "threat" that those who did not engage in the "optional" paid for reach program would suffer (*see, e.g.,* averment number eighteen, *supra*, in regards to the high-ranking Facebook representative advising Fyk that one has to pay Facebook in order to play with Facebook). Then, to boot, Facebook would not even allow Fyk to

continue participating in the "optional" paid for reach program beyond his approximate $43,000.00 investment into same.

69. In so implementing, Facebook knew its "threat" was wrongful or had no basis in fact. Facebook's unilateral "optional" paid for reach program was anything but "optional," as Fyk learned the hard way after his approximate $43,000.00 investment in the "optional" paid for reach program proved worthless and Facebook subsequently kicked him out of the "optional" paid for reach program. "The hard way" because, not-so-coincidentally, Facebook's elimination of Fyk from the "optional" paid for reach program coincided with the financially detrimental merry-go-round that Facebook then subjected him to as outlined in averment number twenty-one, *supra*, and culminating in Facebook's October 2016 destruction and/or severe devaluation of eleven of Fyk's very lucrative businesses/pages and the Facebook-aided fire sale of eight of Fyk's business/pages to a Fyk competitor in January 2017.

70. The "threat" that was the "optional" paid for reach program was coupled with an express demand for money. Fyk reasonably feared for the sustainability of his business/pages if he did not relent to Facebook's "optional" paid for reach program "threat." Because of that fear, Fyk relented to the "optional" paid for reach program for a period of time (to the tune of approximately $43,000.00) in an effort to placate Facebook; *i.e.*, in an effort to inspire Facebook not to meddle with (or eventually crush) this businesses/pages. Again, Fyk noticed no appreciable increase in his already sizable viewership. Again, then Facebook excluded Fyk from the "optional" paid for reach

program. And, again, this is when "threat" and related fear became very real. Once Fyk's "optional" payments to Facebook went away, Facebook's "threat" materialized into what Fyk had feared—the very real hardships outlined in the preceding averment and detailed throughout this complaint.

71. Again, as with all of the Facebook misconduct set forth in this complaint, Facebook's civil extortion undermines the pillars upon which America was built–hard work invested by the proverbial little guy like the gold miner (here, Fyk) to accomplish the American Dream and economic stability crushed (*via* extortion or otherwise) by the powerful like big mining (here, Facebook) bent on snuffing out the little guy's American Dream.[12]

WHEREFORE, Plaintiff Jason Fyk respectfully requests the entry of judgment against Defendant Facebook, Inc., for damages including, but not necessarily limited to, (a) Facebook's reimbursement to Fyk of the approximate $43,000.00 Fyk paid to Facebook in conjunction with Facebook's "optional" paid for reach program, (b) punitive damages, (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable, just, and/or proper.

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[12] Public record reflects that the vast majority of Facebook's shareholder population is made up of institutions rather than individuals.

**FOURTH CLAIM FOR RELIEF—
FRAUD/INTENTIONAL
MISREPRESENTATION**

72. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

73. Facebook made myriad false representations to Fyk that harmed him. For example, Facebook represented to Fyk that the "free" organic reach program was perfectly acceptable when, in reality, only the "optional" paid for reach program is acceptable (*see, e.g.,* footnote 3, *supra*). As another example, Facebook represented to Fyk that he was welcomed to participate in the "optional" paid for reach program when, in reality, that was false. As another example, Facebook represented to Fyk that the businesses/pages Facebook crippled in or around October 2016 were violative of the CDA when, in reality, there was nothing CDA violative about such businesses/pages.

74. Facebook either knew its representations to Fyk (exemplified in the preceding averment) were false or Facebook made such representations to Fyk recklessly and without regard for the truth of such representations

75. Facebook intended for Fyk to rely on its representations. For example, Facebook wished to bait Fyk into the "optional" paid for reach program knowing that it would be quick to pull that rug out from underneath Fyk, and Fyk relied on Facebook's representations that he was welcomed in the "paid for" reach program to the tune of a $43,000.00 investment into same. As another example, Facebook wished for Fyk to rely on its representation that his businesses/pages were violative of the CDA knowing

such representation to be false, and Fyk relied on Facebook's representation that his businesses/pages were CDA violative in fire selling eight of same to the competitor who Facebook steered the fire sale towards.

76. Fyk's reliance on Facebook's representation was reasonable, especially considering the unequal balance of power between the parties. Fyk had no reasonable alternatives other than to try the "optional" paid for reach program and fire sell eight of his crippled businesses/pages, for example.

77. Fyk was harmed by his reliance. For example, Fyk's $43,000.00 investment into the "optional" paid for reach program proved useless. As another example, Fyk's fire sale of eight pages for a relatively nominal approximate $1,000,000.00 to a competitor when competitors (once smaller and/or less successful than Fyk) are now valued anywhere from hundreds of millions of dollars to billions of dollars.

78. Fyk's reliance on Facebook's misrepresentations was not only a substantial factor in Fyk's losing substantial economic advantage (realized and prospective), we submit it was the only factor.

WHEREFORE, Plaintiff Jason Fyk respectfully requests the entry of judgment against Defendant Facebook, Inc., for damages including, but not necessarily limited to, (a) compensatory damages well in excess of the $75,000.00 amount in controversy threshold, (b) punitive damages, (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable (*e.g.*, injunction/enjoinder), just, and/or proper.

JURY DEMAND

Fyk hereby demands jury trial on all matters so triable as a matter of right.

Respectfully submitted,

PUTTERMAN LANDRY + YU LLP

By: /s/ Constance J. Yu

and

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VERIFICATION

I, Jason Fyk declare:

I am the plaintiff in the above-entitled matter.

I have read the foregoing Verified Complaint and know the contents thereof. The same is true of my own knowledge, except as to those matter which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare (or certify) under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed on August 22, 2018.

/s/ Jason Fyk

APPELLANT'S REPLY BRIEF
(JANUARY 3, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK,

Plaintiff-Appellant,

v.

FACEBOOK, INC.

Defendant-Appellee.

No. 19-16232

On Appeal from Dismissal with Prejudice and Judgment of the United States District Court for the Northern District of California, No. 4:18-cv-05159-JSW (Hon. Jeffrey S. White)

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[TOC & TOA Omitted]

I. Summary of Reply Brief

This case is not about objectionable content. This case is not about content-based publication decisions, as evidenced by Defendant-Appellee, Facebook, Inc. ("Facebook"), restoring Plaintiff-Appellant's, Jason Fyk's ("Fyk"), identical information for his competitor because Fyk's competitor better compensated Facebook and had special privileges. This case is not about "Good Samaritan" blocking or screening of offensive materials. This case is not about content. This case exemplifies Facebook's "bad faith," "gross negligence," and "wanton and willful misconduct." This case is about whether Facebook acted as a "Good Samaritan" when it conspired with Fyk's competitor to revalue his information only if his competitor owned his business. This case is about Facebook's fraud, extortion, unfair competition, and tortious interference with Fyk's

business. This case is about the development of Fyk's own information for Fyk's competitor. This case is about Facebook's lawless misconduct to compensate itself to Fyk's detriment.

The heart of Fyk's appeal is whether Facebook is a "passive" "interactive computer service" when it takes discretionary "action" to discriminatorily and/or selectively "enforce" the CDA (offensive content) against Fyk, while ignoring the identical purported "problematic" content (Fyk's) for Fyk's competitor who Facebook is commercially incentivized to support. Facebook's selective application of the CDA as pretext to tortiously interfere with Fyk's business amounts to unfair competition. Facebook is not "passively" displaying content and uniformly enforcing the CDA as to all content providers, it is "actively" developing winners (Fyk's competitor) and losers (Fyk) based on Facebook's own financial compensation. Fyk contends that where (as here) Facebook's application of the CDA is purposeful commercial activity, Facebook enjoys no (c) immunity per (f)(3) and cases properly interpreting same. *See, e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

Facebook destroyed Fyk's business for its own financial gain. As framed by Fyk's Opening Brief [D.E. 12], this appeal asks whether (c)(1) immunizes Facebook from its own active[1] participation in (1) unlawfully destroying/devaluing the subject businesses/

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[1] *Fair Housing*, 521 F.3d at 1162 ("A website operator can be both a service provider and a content provider: If it *passively* displays content that is created entirely by third parties [*i.e.*, if it is relatively 'inactive' in relation to a third party's content], then it is only a service provider with respect to that content. But as to content that it . . . is 'responsible, in whole or in part'

pages just because the businesses/pages were then owned and operated by Fyk;[2, 3] (2) unlawfully orchestrating the distribution of the subject businesses/pages to Fyk's former competitor and then revaluing (developing) the businesses/pages the moment they were owned and operated by someone else who compensated Facebook more than Fyk;[4] and (3) discriminatorily allowing (for compensation) this new owner to operate the businesses/pages with the exact same content Facebook had previously declared violative of the CDA/Community Standards and the basis for restricting access to or availability of materials when owned by Fyk.

II. Summary of Facebook's Answering Brief

In Facebook's Brief [D.E. 17], two important things must be highlighted at the outset and are addressed comprehensively below. First, neither this Court nor the District Court may rely on Facebook's misleading rewrite of Fyk's allegations. *See, e.g.*, *Disability Rights Montana, Inc. v. Batista*, No. 15-35770, 2019 WL

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for . . . *developing*, the website is also a content provider," emphasis added).

2 Such destruction/devaluation was effectuated unlawfully and discriminatorily. *See* [D.E. 12] at n. 6.

3 Facebook's discrimination against Fyk is no different than "Sorry, sir, but I can't show you any listings on this block because you are gay/female/black/a parent." *Fair Hous.* at 1167. Here, Facebook's saying "Sorry, sir, these businesses/pages cannot be on Facebook's block because you are Fyk with the 'wrong' or 'disfavored' political affiliation, speech, or view and/or just do not pay us enough money."

4 Such destruction/devaluation was effectuated unlawfully and discriminatorily. *See* [D.E. 12] at n. 8.

3242038, *4 (9th Cir. Jul. 19, 2019) ("We must 'take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party,'" internal citations omitted). Facebook's Brief relies on proof-texting to invoke CDA immunity by isolating content of Fyk's Facebook pages without providing the context, and simultaneously hiding Facebook's discriminatory (and unlawful) application of the CDA. The most egregious example of Facebook's confabulation of Fyk's allegations is: "Fyk asserts that CDA § 230(c)(1) does not apply because Facebook somehow 'developed' the content when . . . a 'competitor' who purchased [ ] Fyk's pages allegedly published those pages on the Facebook platform." [D.E. 17] at 9.

In reality, Fyk alleges that Facebook itself was directly involved in the quid-pro-quo agreement with the third-party and published the content for that third-party. *See, e.g.,* Complaint, ER 9 at ¶ 6, 13 at ¶ 20, 15 at ¶ 23, 22-24 at ¶¶ 42-46. In other words, the third-party cannot re-publish content created by Fyk without Facebook's direct involvement and development. This is the gravamen of Fyk's Complaint and appeal—Facebook is directly involved as an information content provider (namely, a "developer" per (f)(3)). Facebook misrepresents that Fyk raises this argument for the first time on appeal, *see* [D.E. 17] at 2 and 10, but Fyk raised this issue in the District Court. *See* Resp. to Mot. to Dismiss, ER 50-52. Any challenge to the sufficiency of Fyk's factual allegations may not be raised in this appeal.[5]

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[5] Fyk fully incorporates herein by reference the discussion from his response to Facebook's motion to dismiss wherein he explains that Facebook's motion to dismiss should be treated as what it really is (a motion for summary judgment) and how the District

Second, Facebook's statutory construction requires this Court to conflate (c)(1) and (c)(2) immunity, which is neither supported by law nor logic nor canons of statutory construction. Facebook's untenable theory is laid bare in its Brief, *see* [D.E. 17] at 17, because Facebook adds terms to the CDA to accomplish in argument what the statute does not contain in reality, amounting to: "well, (c)(1) covers everything we do; but, if not, (c)(2) covers everything we do, but we added 'interactive computer service' to it. Then, if we even edit or 'develop in part' information defined under (f)(3), (c)(1) covers that too; but, if not, then (c)(2) covers that as well. Meaning, (c)(1) means the same thing as (c)(2), and (f)(3)'s definitional distinctions are meaningless. And, so, yeah, we are entitled to (c)(1) immunity for everything including actions more fitting of (c)(2)(A) and actions more fitting under (f)(3)'s development distinction."

Fyk's briefing and this appeal unpack the differences in CDA immunity, and challenge Facebook's assertion that it is immunized in relation to the four claims for relief in Fyk's Complaint let alone *carte blanche* (c)(1) immunized.[6] Facebook's effort to contort Fyk's "factual" allegations at the dismissal stage must fail per *Batista*. *See Batista*, 2019 WL 3242038, *4.

Court should have accordingly converted it into a Rule 56 motion and allowed for discovery. *See* Resp. to Mot. to Dismiss, ER 42-43.

[6] As stated in Fyk's Opening Brief, if the alleged facts of this case had to be said to fit any CDA "Good Samaritan" protection paradigm, it would be the (c)(2)(A) paradigm, not the (c)(1) paradigm.

In his Opening Brief,[7] Fyk discussed the issue of CDA immunity distinguishing (f)(3) creation versus development as articulated by *Fair Housing* (among other cases) from third-party versus first-party views, an examination of defamation or false information cases of a third-party nature where (c)(1) is most commonly applied, canons of statutory construction views, and from equitable views. This brief analyzes CDA immunity from its "Good Samaritan" roots.

CDA immunity has various and distinct applications—and this appeal asks the Ninth Circuit to clarify those distinctions. Fyk contends that judicial construction of CDA immunity in cases like *Sikhs* or *Lancaster*, for examples, is misguided because tech giants (like Facebook) are exploiting the CDA confusion that they have deliberately created in order to profit from unfair business practices and interference with competing business. Instead, Fyk contends that judicial construction of CDA immunity in cases like *Fair Housing*, *Perkins*, and *Fraley*, for examples, is correct and provides the public with clarity on what conduct by the "enforcer" of the CDA (here, Facebook) is immunized.

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[7] *See* [D.E. 12] (wherein the bulk of Fyk's discussion focused on the *Fair Housing* Court's "development" versus "creation" distinction because such distinction is easy to understand and to apply here given the facts alleged by Fyk are the perfect example of "development," "in whole or in part," in the Subsection (f)(3) context).

III. Legal Analysis

A. Section A.1 of Answering Brief Is Errant—The District Court's Dismissal Order Never Examined "Development," It Wrongly Treated This as a Pure "Creation" Case

Facebook posits that the District Court did not err in failing to find that Facebook was not a "developer" of the subject content. *See* [D.E. 17] at 9. The District Court's dismissal order, however, never examined or considered the concept of "developer" in the CDA at all, much less in the context of *Fair Housing*. As previously described: "Facebook and the District Court 'ignored the nature of Plaintiff's allegations, which accuse Defendant not of [(de-) creating tortious content, but rather . . . of [tortiously] developing' Fyk's businesses/pages (and, necessarily, the supposed violative content therein) for Fyk's competitor." [D.E. 12] at 26. The dismissal order completely ignored the critical "development" versus "creation" distinction in wrongly treating Fyk's case as a pure "creation" case. *See* Section V.B of Fyk's Opening Brief.[8]

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[8] Facebook again misses the mark with the cases it cites on pages 11-13 (and footnote 4) of its Brief. This case is not about Facebook's "proliferation and dissemination" of Fyk's content, let alone across other non-Facebook search engines. Again, this case is about Facebook being an active hand in commandeering Fyk's content and developing same for someone else.

B. Section A.2 of Answering Brief—Facebook's Tortured View of CDA Immunity Is Untenable

Facebook argues that under this Court's decision in *Barnes*, (c)(1) provides immunity for "all publication decisions, whether to edit, to remove, or to post." *See* [D.E. 17] at 14-15. But in *Barnes* (and other cases cited at footnote 6 of Facebook's Brief), distinguishable in myriad respects, discrimination between one preferred party who paid Facebook a lot of money and another lower paying (and, thus, non-preferred) party was not at play as it is here. The District Court's dismissal order did not distinguish these cases and Fyk contends that the *Barnes* opinion, which refers to (c)(1) as "shield[ing] from liability <u>all</u> publication decisions," was not intended to apply to circumstances where (as here) Facebook cherry-picked which parties to censor <u>via</u> the CDA (lower paying, non-preferred parties like Fyk) and not to censor (higher paying, preferred parties like Fyk's competitor), while simultaneously ignoring the same content (Fyk's own content) from preferred publishers who paid Facebook lots of money. This Court should not allow CDA immunity to be misused when it is not a shield from liability but a sword to vanquish a non-paying (or lesser paying) participant to enhance Facebook's profit.

Whereas Fyk's Opening Brief contains a lengthier discussion of the *Fair Housing* Court's well-articulated "development"/"action" versus "creator" distinction under (f)(3), this brief will show how Facebook's Brief continues to rewrite Fyk's allegations and misdirect CDA immunity. The District Court endorsed Facebook's skewed interpretation of the CDA (based on a distorted interpretation of Fyk's allegations, improper in a

motion on the pleadings), resulting in legitimate concerns that (1) the purpose of the CDA would be hijacked for commercial exploitation, (2) the additional havoc Facebook would wreak on Fyk in the meantime would exacerbate the already significant damages he has suffered as a result of Facebook's tortious interference, fraud, extortion, and unfair competition, and (3) the havoc tech giants would wreak on the Internet community and free market in the meantime would be devastatingly insuperable.

This Court simply cannot take Facebook's bait, especially with so much on the line for Fyk and the Internet community. Accordingly, this brief focuses on what this case is really about (as actually pleaded by Fyk) and what the law really is (as actually espoused by this Court in at least *Fair Housing* and/or as made clear by the germane CDA subtitle itself—*Protection for "Good Samaritan" Blocking And Screening Of Offensive Material*).

Subsection (c) of the CDA, which is what the early stages of this litigation have entirely revolved around, is entitled *Protection for "Good Samaritan" Blocking and Screening of Offensive Material.* And, so, we look to California's Health and Safety Code for the meaning of "Good Samaritan," providing, in pertinent part, as follows:

> (a) No person who in good faith, and not for compensation, renders emergency medical or nonmedical care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission . . . .
>
> (b) . . .

> (2) Except for those persons specified in subdivision (a), no person who in good faith, and not for compensation, renders emergency medical or nonmedical care or assistance at the scene of an emergency shall be liable for civil damages resulting from any act or omission other than an act or omission constituting gross negligence or willful or wanton misconduct. . . .

Cal. Health & Safety Code § 1799.102 (emphasis added).

Per California's Health and Safety Code, "Good Samaritanism" involves one of two things: "act[ion]" or a failure to act ("omission"). If a person's action or omission is grounded in good faith, unrelated to compensation, and does not constitute gross negligence or willful/wanton misconduct, such action or omission will not subject that person to civil damages.

Again, Subsection (c) of the CDA is entitled *Protection for "Good Samaritan" Blocking and Screening of Offensive Material.* The Legislature does not do things for the heck of it. For example, in Fyk's Opening Brief, we discussed the surplusage canon of statutory construction to underscore that the Legislature could not have intended (c)(1) to mean the same thing as (c)(2)(A) as Facebook contends.[9] The Legislature placed emphasis on the phrase "Good Samaritan" (quotation marks) to draw a parallel between Subsection (c) and "Good Samaritan" laws/concepts.

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[9] Facebook's Brief, [D.E. 17] at 17, asserts that (c)(1) covers everything, but, if not, (c)(2) somehow picks up the slack.

"Good Samaritan" assistance laws (*e.g.*, California Health & Safety Code § 1799.102) revolve around the concept of (in)action. And so too do the "Good Samaritan" Internet content policing laws (CDA, Title 47, United States Code, Section 230(c)). If Jane walks by a burning vehicle with John inside and pulls John out of the vehicle, the "Good Samaritan" (Jane) is free from any liability arising out of such *action* (*e.g.*, if John's arm is broken when pulled out) if Jane's actions were done in good faith and did not otherwise constitute gross negligence or willful/wanton misconduct. Same with Subsection 230(c)(2)(A), which is the action prong ("any action taken") of the Internet's "Good Samaritan" content policing law (the CDA).

Not-so-coincidentally, (c)(2)(A) has the words "action," "good faith," and "voluntary" (*i.e.*, free from compensation) built right into it. Subsection 230(c)(2)(A) immunizes the "provider or user of an interactive computer service" from any liability associated with taking "good faith" "action" to rid ("block or screen") the Internet of filth, for example. This makes sense—the Internet "Good Samaritan" (*i.e.*, "provider or user of an interactive computer service") should be encouraged in such actions, not somehow be subjected to liability for same. That is, so long as such actions are done in good faith (not so here) and not motivated by compensation (not so here), which would strip the user or provider of the interactive computer service of any "Good Samaritan" protections he/she/it may have otherwise enjoyed. Having sorted out the simple meaning/intent/ application of 230(c)(2)(A) within the precise (yet wonderfully simplified) "Good Samaritan" context that the Legislature plainly intended (as evidenced by

Subsection (c)'s emphasized title), we now turn to the "Good Samaritan" analysis of (c)(1).

Subsection 230(c)(1) offers some immunity to those who do not act; *i.e.*, omit. In most jurisdictions, unless a caretaker relationship exists or the "Good Samaritan" caused the peril, no person is required to give aid to someone in need. That is what the Legislature recognized in relation to 230(c)(1) of the Internet's "Good Samaritan" law. Subsection 230(c)(1) recognizes that a "provider or user of an interactive computer service" who is a mere "passive conduit" (to borrow *Fair Housing* language) to "any information provided by another information content provider" is immune from liability arising out of the information provided by another. That makes sense—it would not be fair to task Facebook with extinguishing every car fire that arises on its interactive computer service and/or rescuing every individual trapped within the burning car; hence, (c)(1) which does not hold Facebook liable for information provided by another. That is, so long as Facebook has nothing to do with the content (*e.g.*, is not a "developer," "in whole or in part," of the content) and Facebook's inaction decision is not motivated by its own compensation, neither of these situations being present here.

As to the concept of development (captured by (f)(3)), a "Good Samaritan" is not somebody who "develops" the burning vehicle by, for example, pouring gasoline on same. Nor is a "Good Samaritan," as another example, somebody who "develops" the situation by extracting the helpless/immobile individual from the burning vehicle and laying him/her in the middle of the busy highway to be runover. That is where (f)(3) steps in.

Per (f)(3)-recognized development (and the *Fair Housing* decision, for example, fleshing out the meaning of development and how such falls outside of any CDA immunity) the provider or user of the "interactive computer service" becomes an "information content provider" with no "Good Samaritan" immunity/ protection the moment the provider or user engages in the "development" of information, "in whole or in part." The passerby of the burning vehicle does not enjoy "Good Samaritan" immunity/protection for some action taken unrelated to the "Good Samaritanism" (*e.g.*, pouring gasoline on the burning car, akin to what Facebook did with Fyk's "car" after Facebook itself set his car on fire—extinguished the fire, steered the car to someone else, and refurbished the car for its financial compensation) and ordinary "Good Samaritan" laws (like California's version, *supra*) reinforce this reality by making clear that any gross negligence and/ or willful/wanton misconduct does not enjoy "Good Samaritan" immunity.

Here, as discussed in Fyk's Opening Brief, in the absence of any affirmative act of commercial preference, Facebook might have been entitled to (c)(2)(A) "Good Samaritan" immunity as to its pre-October 2016 destruction of Fyk's businesses/pages if it had demonstrated that such destruction flowed from mere "good faith" content policing/regulation.[10] But these

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10 In addition to Facebook's not being able to establish (c)(2)(A) good faith in relation to its pre-suit crippling of Fyk on purported (c)(2)(A) grounds because there is no way Fyk's content could have been CDA-violative for him and not for his competitor, Facebook's arbitrary treatment in general of what purportedly constitutes spam/obscene content that purportedly violates its

are issues of fact that should not be summarily adjudicated on a motion on the pleadings. *See, e.g.*, *Spy Phone Labs, LLC v. Google, Inc.*, No. 15-cv-03756-KAW, 2016 WL 6025469, *8 (N.D. Cal. Oct. 14, 2016) (a (c)(2)(A) immunity defense "cannot be determined at the pleading stage[,]" but may be raised "at a later stage, such as summary judgment"). Fyk is entitled to demonstrate Facebook was not acting in "good faith" (because, again, there is nothing "good faith" about deeming Fyk's content violative of (c)(2)(A) while in his possession and not violative while in his competitor's possession). On this appeal, what matters is Fyk's Complaint alleges Facebook's post-October 2016 misconduct (of a willful/wanton nature motivated by commercial gain) was targeted and intended to injure Fyk's businesses/pages, removing Facebook from any "action-" oriented (c)(2)(A) "Good Samaritan" protection and any "inaction-" oriented (c)(1) "Good Samaritan" protection per (f)(3) (and case law properly applying same; *e.g.*, *Fair Housing*, *Fraley*, *Perkins*).

Facebook took *action* in tortiously interfering with Fyk's businesses/pages. Facebook took *action* by conspiring with Fyk's competitor to revalue and develop Fyk's information (without his consent) before, during, and after the fire sale of his businesses/pages in order to augment its own compensation. Fyk is not treating Facebook as the publisher, speaker, or creator of his own content, which such treatment (if present, which it is not) could perhaps enjoy some (c)(1) immunity. Rather, Fyk alleges that Facebook was a "developer" of Fyk's information "in whole or in part"

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community policy also renders the tech giant unable to establish good faith.

(for Fyk's competitor, and for Facebook's own enrichment because the competitor was/is Facebook's valued participant and advertising partner), rendering Facebook an "information content provider" per (f)(3) ineligible for "Good Samaritan" protection/immunity under (c). Put differently, Fyk alleges Facebook took action (motivated in bad faith and/or in money) as to his businesses/pages that rose far above a "Good Samaritan" nature, thereby divesting Facebook of any "Good Samaritan" immunity/protection rights under the Internet's "Good Samaritan" law—Subsection 230(c) of the CDA.

C. Section B of Answering Brief—Facebook's Bait and Switch Should Be Estopped and Fyk's Reliance on Fair Housing Was Not Somehow Waived in the Process

Fyk thoroughly analyzed estoppel in his response to Facebook's motion to dismiss, *see* Resp. to Mot. to Dismiss, ER at 49-50, and in abbreviated form in his Opening Brief, *see* [D.E. 12] at Section V.D, both of which such discussions are incorporated fully herein by reference.

Facebook oddly posits that Fyk somehow waived an argument that he expressly articulated in the District Court. *See, e.g.*, [D.E. 17] at 2 ("Mr. Fyk did not advance the [development] argument in the proceedings below and so it was waived") and 10 ("to the extent this tardy argument has not been waived"). Facebook's assertion is untrue. First, there was plenty said in Fyk's response to Facebook's motion to dismiss about Facebook's own conduct (*i.e.*, its "developing") rendering it an "information content provider" by (f)(3) definition subject to no CDA immunity whatsoever per

Fair Housing. *See* [D.E. 12] at 17-18 (discussing the motion to dismiss response's discussion of *Fair Housing, inter alia*); *see also, e.g.,* Resp. to Mot. to Dismiss, ER 46-49. Second, any Facebook argument that Fyk purportedly said too little on a particular topic at any stage in prior briefing is disingenuous given, among other things, the District Court's dismissal order declined to discuss the merits, instead relying on the application of a blanket immunity without analysis.

Facebook obfuscates the facts actually alleged by Fyk and confuses interpretation of CDA immunity. All of Facebook's pre-suit representations to Fyk were that the content displayed on Fyk's businesses/pages was purportedly violative of (c)(2)(A). In an about-face, Facebook's motion to dismiss pointed to (c)(1) and advanced an even more audacious position—that (c)(1) purportedly *carte blanche* immunizes any Facebook conduct (including intentional and discriminatory conduct for profit) and subsumes (c)(2)(A) as well as renders (f)(3) worthless fluff. *See* [D.E. 17] at 17.

Regardless of Facebook's morphing positions, neither position is supported by the applicable authorities or the facts as alleged in Fyk's Complaint. *Fair Housing*, 521 F.3d 1157.

D. Section C of Answering Brief—the District Court Erred When It Permitted Facebook to Mischaracterize "Facts" and Create an Unprecedented Expansion of CDA Immunity

The legal standard the District Court was required to apply is: "[w]e must 'take all allegations of material fact as true and construe them in the light most

favorable to the nonmoving party.'" *Batista*, 2019 WL 3242038, *4. Despite this standard, Facebook's Brief compounds its dismissal motion practice in continuing to rewrite Fyk's allegations with no support. Contrary to Facebook's Brief, the facts (as alleged by Fyk) actually are:[11]

- Facebook's Brief nakedly asserts that it is a figment of Fyk's imagination that Facebook destroyed Fyk's businesses/pages in order to make room for its own sponsored (compensated) advertisements and to strong-arm him into paying to advertise. [D.E. 17] at 1.
    - Wrong. That is not Fyk's imagination, that is Fyk's well-founded allegations. *See, e.g.*, Complaint, ER 20-21, at ¶¶ 35-40.
- Facebook's Brief nakedly asserts that Fyk "contends that Facebook had no valid basis to block his content because Facebook did not block similar content on other users' Facebook pages." *Id.* at 2.
    - This is a half-truth, which is a half lie. The half lie is that "similar content" is not Fyk's

[11] Section V.A of Fyk's Opening Brief speaks more to Facebook's interjection of fudged "facts," and is incorporated fully herein by reference. *See* [D.E. 12] at 12-16. Moreover, Section E of Fyk's Response in Opposition to Motion to Dismiss (ER 50-52) speaks more to Facebook's interjection of fudged "facts," and is incorporated fully herein by reference. In sum, Facebook's dismissal effort has always been a thinly veiled premature motion for summary judgment and needs to be treated as such. *See* Resp. to Mot. to Dismiss, ER 42-43 (explaining when a motion to dismiss needs to be converted to a motion for summary judgment and how, necessarily, discovery needs to unfold before adjudication can occur).

only contention; rather, Fyk's prior filings make abundantly clear that Facebook blocked "identical content" on other pages and on his own pages.

- Facebook's Brief nakedly asserts that the competitor who Fyk was forced to fire sell the businesses/pages to due to Facebook's crippling same "republished some of the pages on the Facebook platform." *Id.* Facebook spends a great deal of time trying to convince the Court that it was a mere "passive conduit" as to the competitor's supposed voluntary re-publishing of Fyk's businesses/pages that Facebook had steered to the competitor. *Id.* at 9-13.
    - Wrong. Fyk's well-founded allegations are that Facebook actively developed the businesses/pages (as an "information content provider" by (f)(3) definition) before, during, and after they went to the competitor. *See, e.g.,* Complaint, ER 22-24, at ¶¶ 42-46. The competitor could not have re-published the businesses/pages, it was Facebook only that did so. There is nothing about the Complaint that remotely suggests Facebook was a mere passive conduit in relation to the competitor's re-publication of the subject businesses/pages. Everything about the Complaint is that Facebook had the lion's share of responsibility for getting the businesses/pages to a higher paying competitor of Fyk's and full responsibility in actively restoring the businesses/pages (not just sitting back and watching the competitor do

it) once the businesses/pages were with the competitor.

- Facebook's Brief nakedly asserts that Fyk is trying to hold it liable for "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Id.* at 7, 14-16.
    - This is a half-truth, which is a half lie. First, part of what is false about this statement is Fyk is suing in a first-party posture, so he is not accusing Facebook of third-party activities. Second, part of what is half true about this statement is that Fyk is holding Facebook accountable for its pre-October 2016 actions. But the half lie is that Fyk is not seeking to hold Facebook accountable under (c)(1) (which has nothing to do with content policing) but instead under (c)(2)(A) because nothing about Facebook's pre-October 2016 wanton misconduct was "good faith." Third, there is Facebook's view that this case is about content. Wrong, that completely misses the thrust of the lawsuit, which is Facebook's post-October 2016 "development" of Fyk's businesses/pages for a higher Facebook paying competitor of Fyk's. Facebook's chatter about *Barnes*, *Sikhs*, *Riggs*, *et cetera* could not be further amiss. The situations underlying Facebook-cited case law are not our situation. This is not a situation where Fyk is trying to hold Facebook accountable for what the content *is*. Rather, again, Fyk is suing Facebook for taking the extra (and illegal) development-

oriented actions related to his businesses/ pages (namely in conjunction with the Los Angeles competitor of Fyk), thereby removing Facebook from any CDA immunity according to (f)(3) and cases appropriately applying same (again, like *Fair Housing* where it was recognized that an "interactive computer service" can lose immunity by going too far in its actions). Fyk is seeking to hold Facebook accountable for throwing gas on the proverbial fire for its own financial compensation. Again, the District Court (and this Court) are to accept Fyk's allegation as true, not accept as true Facebook's bald statement that this case is all about Facebook's decision to remove or "passively" host Fyk's posts (again, which would only even relate, at best, to the pre-October 2016 conduct discussed in the Complaint, not the post-October 2016 conduct that represents the heart of Fyk's case).

- Facebook's Brief, distilled, asserts that (c)(1) "by itself" immunizes any action or illegality in its entirety, but if not, (c)(2) does so as well even if it develops the information. *Id.* at 17.
    - Wrong. This is the epitome of circular rubbish that further bolsters Fyk's Opening Brief point that Facebook is absurdly viewing (c)(2) as mere surplusage to (c)(1), which contravenes canons of statutory construction. Facebook's cobbling together pieces of cases to come up with the absurd proposition set forth on page seventeen of its Brief is, well, absurd. The Legislature

intended very different things of (c)(1) and (c)(2)(A), and Fyk has amply laid out the differences in his Opening Brief and in this brief within the confines of dumb-downed "Good Samaritan" concepts tracking the "Good Samaritan" title of 230(c). And (f)(3) makes clear that (c) immunity has its bounds, ending when someone is converted into an "information content provider" *via* development/active hand relating to the subject content. Facebook's wild notion on page seventeen of its Brief would gut (f)(3) and case law (*e.g.*, *Fair Housing*) saying all CDA immunity is lost once one is deemed to develop and converts oneself into an information content provider.

E. Section D of Answering Brief—"Failure to State a Claim" Was Not Decided Below and Is Not the Crux of This Appeal

In the one paragraph that Facebook's Brief dedicates toward rejuvenating its "failure to state a claim" dismissal chatter, it cites *Kohl v. Bed Bath & Beyond of Cal., LLC,* 778 F.3d 827, 829 (9th Cir. 2015) for the notion that this Court can consider its "failure to state a claim" arguments in this appeal. *See* [D.E. 17] at 20. Although the *Kohl* case is off-base in context, we do not quarrel with the notion that this Court, although "[t]here is no bright line rule," *may* rule on an issue not ruled on by the District Court if such issue was "raised sufficiently for the trial court to rule on it." *See In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (internal citations omitted).

Here, the "failure to state a claim" issue was fully briefed in the underlying dismissal motion practice. *See, e.g.,* Resp. to Mot. to Dismiss, ER 52-55. In the event that this Court, in its discretion, wishes to venture outside what is truly at issue in this appeal and in the District Court's dismissal order (CDA immunity), then Fyk stands on the "failure to a state a claim" briefing found in his response to Facebook's motion to dismiss. *See id.*

IV. Conclusion

We respectfully request that this Court put an end to the complexity and confusion that tech giants (like Facebook) have worked into the CDA over the years. The CDA is easy, it is just the Internet's "Good Samaritan" law with three very simple outcomes: (1) "Good Samaritan" action, as to content, is taken and enjoys (c)(2)(A) immunity so long as (a) the action is grounded in good faith, (b) the action is not compensation driven, and (c) the action is not infected by gross negligence and/or willful/wanton misconduct,[12] (2) inaction/omission as to content "unfolds" and enjoys some (c)(1) immunity so long as (a) the inaction/omission is grounded in good faith, (b) the inaction/omission is not compensation driven, and (c) the inaction/omission is not infected by gross negligence and/or willful/wanton misconduct,[13] or (3) action as to

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[12] This is content policing/regulation whereby an "interactive computer service" affirmatively restricts content it deems filthy (for example), which such "action" can enjoy (c)(2)(A) immunity so long as such is done in "good faith."

[13] This is the "passive conduit" recognized by *Fair Housing, inter alia*. In other words, for example, when an "interactive computer service" *does nothing* when John is accusing Jane of a defamatory

content unfolds that is not of "Good Samaritan" ilk and/or develops the situation underlying the "Good Samaritan" assistance (*e.g.*, pouring gasoline onto the burning car).[14]

And yet Facebook's Brief would have the Court prescribe to the circular madness punctuated on page seventeen of its Brief.

When considering 230(c), protections for "Good Samaritan" blocking and screening of offensive material, we must ask whether Facebook's actions were that of a "Good Samaritan?" No. Were Facebook's actions done in "good faith?" No. Were Facebook's actions done for its own financial compensation? Yes. Were Facebook's *actions* negligent or wanton and willful misconduct? Yes. Was this really about content or really about Facebook's strategy to unlawfully destroy less valuable participants (like Fyk) in order to develop more valuable participants (like Fyk's competitor)? The latter. Facebook's own manager, Tessa Lyon, said it clearly: " . . . so, going after actors and domains (like Fyk) and reducing their distribution, removing their ability to monetize, removing their ability to advertise is part of our strategy." Is this "strategy" about blocking or screening offensive content

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post on the "interactive computer service," the "interactive computer service" can enjoy (c)(1) immunity because its "inaction" cannot be said to morph it into an "information content provider."

[14] This is the "developer" recognized by *Fair Housing, inter alia*. In other words, when the "interactive computer service" actively engages in someone's content, the "the interactive computer service" is rendered an "information content provider" subject to no CDA immunity.

or about Facebook's unlawful behavior underlain by its own compensation motivations? The latter.

For all of the foregoing reasons, whether considered separately or together, Fyk respectfully requests this Court's reversal of the Dismissal Order and remand to the District Court for resolution on the merits.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32 (a)(7)(B)(ii) because the type-volume limitation does not exceed 6,500 words (exclusive of this certificate, cover pages, signature block, and certificate of service). This Reply Brief includes 6,499 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Respectfully Submitted,

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