Case No. 24-465

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JASON FYK,
Plaintiff-Appellant,

v.

FACEBOOK, INC.,
Defendant-Appellee.

Appeal of January 12, 2024, Order Denying Motion for Relief Pursuant to Fed. R. Civ. P 60(B) and Terminating Motion Re: Constitutionality of 47 U.S.C. Sec. 230(C)(1) [D.E. 74] by Hon. Haywood S. Gilliam, Jr. of the U.S. District Court for the Northern District of California, 4:18-cv-05159-HSG

APPELLEE'S ANSWERING BRIEF

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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.

Dated: May 9, 2024

KEKER, VAN NEST & PETERS LLP

By: */s/ William S. Hicks*
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I. INTRODUCTION

Appellant Jason Fyk sued Appellee Facebook, Inc.[1] in 2018 after it disabled some of his Facebook pages for violation of its policies. Facebook moved to dismiss that 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)"). This is Fyk's ***third*** Ninth Circuit appeal seeking to overturn that decision. This Court rejected Fyk's previous gambits, and his current appeal requires the same result.

In his first appeal, Fyk argued that the District Court erred in dismissing his case because Section 230(c)(1) does not apply to actions allegedly taken with anticompetitive animus.[2] In June 2020, a panel of the Ninth Circuit affirmed the District Court's order of dismissal, expressly rejecting Fyk's contention that the alleged anticompetitive motives of an interactive computer service provider are relevant to the analysis of Section 230(c)(1).[3] 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

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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*").

[3] *Id.*

motives underlying the editorial decisions of the provider of an interactive computer service."[4] Seven months later, the U.S. Supreme Court denied Fyk's Petition for Writ of Certiorari.

Undeterred, in March 2021, Fyk returned to District Court where he filed a motion for relief from judgment under Rule 60(b).[5] After the District Court denied that motion, Fyk filed his second Ninth Circuit appeal, urging this Court to adopt the same interpretation of Section 230(c)(1) that it had rejected in *Fyk I*. More specifically, Fyk asserted that the Ninth Circuit's 2019 decision in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*[6] marked a change in the controlling law 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 anticompetitive animus. In October 2022, this Court affirmed the District Court's denial of Rule 60 relief,[7] and seven months later, the U.S. Supreme Court again denied Fyk's Petition for Writ of Certiorari.

In June 2023, three years after this Court affirmed the District Court's final order of dismissal, Fyk filed a ***second*** Rule 60(b) motion asking the District Court

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[4] *Id.* at 598.

[5] Fed. R. Civ. P.

[6] 946 F.3d 1040 (9th Cir. 2019).

[7] *Fyk v. Facebook, Inc.*, No. 21-16997, 2022 WL 10964766, at *1 (9th Cir. Oct. 19, 2022), *cert. denied*, 143 S. Ct. 1752 (hereinafter, "*Fyk II*").

to vacate its dismissal order based on an alleged change in the controlling law. In it, Fyk relied on a smattering of inapposite authorities—including unpublished district court cases and nonbinding out-of-circuit cases—to repeat his argument that Section 230(c)(1) does not immunize content moderation decisions motivated by anticompetitive animus. Then, without waiting for the District Court to decide that motion, Fyk filed a freestanding "Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1)," arguing that the District Court's application of Section 230(c)(1) in its dismissal order renders that subsection unconstitutional. Fyk now appeals the District Court's order denying both motions.

In the instant appeal, Fyk urges this Court to reverse the District Court's dismissal order based on his twice-rejected understanding of Section 230(c)(1). Fyk repeats the argument, already rejected in *Fyk II*, that the Ninth Circuit's *Enigma* decision changed the controlling law concerning Section 230(c)(1).[8] Fyk also argues that the District Court should have reopened his case because other authorities have allegedly embraced his view that "[t]his Court's *Enigma* holding was not exclusive to a §230(c)(2) setting[.]"[9] In addition, Fyk asserts that the

[8] *See* Dkt. 5 (hereinafter, "App. Opening Br.") at 18. Fyk did not assert this argument in his second Rule 60(b) motion.

[9] *Id*.

District Court erred when it terminated his freestanding "Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1)." Fyk's arguments are meritless.

The District Court correctly held that the Ninth Circuit's decision in *Lemmon v. Snap, Inc.*[10]—the ***only*** binding decision that Fyk relied upon in his Rule 60(b) motion—was "inapplicable on its own terms to the circumstances already found (and affirmed) here." ER-004. The District Court also correctly determined that the non-binding authorities cited by Fyk could not, and did not, change the controlling Ninth Circuit law concerning Section 230(c)(1). ER-003-04.

Nor is there any basis to disturb the District Court's decision terminating Fyk's freestanding "Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1)." This Court lacks jurisdiction to review that decision. And even if appellate jurisdiction were present, the District Court properly determined that it had no basis to entertain Fyk's motion because there is no active case.

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

II. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the District Court's decision denying Rule 60(b) relief. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332. The District Court entered final

[10] 995 F.3d 1085 (9th Cir. 2021).

judgment on June 18, 2019, after granting Facebook's Motion to Dismiss without leave to amend.[11] On January 12, 2024, the District Court denied Fyk's Rule 60(b) motion seeking to vacate and set aside the order and judgment of dismissal.[12]

Fyk has not identified any source of appellate jurisdiction that would permit review of the District Court's decision terminating Fyk's "Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1)."

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) Does this Court have jurisdiction to review Fyk's freestanding "Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1)?"

(4) If this Court determines that it has jurisdiction to review Fyk's "Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1)," did the District Court abuse its discretion in terminating that motion?

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[11] *Fyk v. Facebook, Inc.*, Case No. 4:18-cv-05159-JSW (N.D. Cal. June 18, 2019), Dkt. 39.

[12] ER-002-05; *Fyk v. Facebook, Inc.*, Case No. 4:18-cv-05159-HSG (N.D. Cal. Jan. 12, 2024), Dkt. 74.

IV. STATEMENT OF THE CASE

Procedural Background

On August 22, 2018, Fyk filed a complaint in the U.S. District Court for the Northern District of California asserting 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.[13] 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[.]"[14] At some point, Facebook disabled certain of those pages for violation of its policies.[15] 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.[16]

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.[17]

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[13] ER-612-21.

[14] ER-598.

[15] ER-601-04.

[16] *See* ER-604-609. Fyk ultimately decided to sell the pages to a third party. *See* ER-610.

[17] *Fyk v. Facebook, Inc.*, Case No. 4:18-cv-05159-JSW, Dkt. 20.

On June 18, 2019, the District Court issued an order dismissing Fyk's claims with prejudice as barred by Section 230(c)(1).[18] 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.[19]

In September 2019, Fyk appealed the District Court's June 2019 Order to this Court, arguing that the District Court had erred in its application of Section 230(c)(1).[20] 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."[21]

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

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[18] *Fyk v. Facebook, Inc.,* No. C 18-05159 JSW, 2019 WL 11288576 (N.D. Cal. June 18, 2019), *aff'd*, 808 F. App'x 597 (9th Cir. 2020) (hereinafter, "June 2019 Order").

[19] *Id*. at *2-3. The District Court did not address Facebook's contention that the Complaint failed to state any claims.

[20] *Fyk v. Facebook, Inc.*, Case No. 19-16232, Dkt. 12.

[21] *Id*., Dkt. 27 at 15.

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." *Id.* 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*.[22] The Supreme Court denied that Petition on January 11, 2021.[23]

On March 22, 2021, Fyk moved the District Court under Rule 60(b)(5) and (b)(6) to vacate and set aside its June 2019 Order on the purported basis that there had been an intervening change in the controlling law.[24] As relevant here, 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), changed the controlling precedent applied by the District Court.[25] On November 1, 2021, the District Court

[22] App. Opening Br. at 14.

[23] *See Fyk v. Facebook, Inc.*, 141 S. Ct. 1067 (2021).

[24] ER-532-45.

[25] ER-536-42.

issued an order denying Fyk's Rule 60 motion, holding that the Ninth Circuit's *Enigma* opinion "did not reverse any case law upon which the Order was based."[26]

In October 2022, the Ninth Circuit issued its decision in *Fyk II*, affirming the District Court's November 2021 Order and holding that Fyk had failed to raise his *Enigma* argument "within a reasonable time," as required by Rule 60(c)(1). *Fyk II*, 2022 WL 10964766, at *1. As this Court explained in *Fyk II*, the Ninth Circuit issued its decision in *Fyk I* "nine months after the *Enigma* decision was first issued, and more than five months after it was reissued." *Id*. This Court further noted that Fyk had failed to submit a Rule 28(j) letter during that period, then "waited more than nine additional months before filing his Rule 60(b) motion in the district court on March 22, 2021." *Id*. Seeing "no reason why [Fyk] could not have either raised his *Enigma* argument in his first appeal or made his Rule 60(b) motion much earlier," this Court held that Fyk's Rule 60(b) was untimely. *Id*. Subsequently, Fyk filed a Petition for Writ of Certiorari concerning the *Fyk II* decision,[27] which the Supreme Court denied in April 2023.[28]

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[26] ER-513-14 (11/01/2021 Order Denying Motion for Relief Pursuant to Fed. R. Civ. P. 60(b)) (hereinafter, "November 2021 Order").

[27] App. Opening Br. at 16.

[28] *Fyk v. Facebook, Inc*., 143 S. Ct. 1752 (2023).

In June 2023, Fyk returned once again to District Court and filed a ***second*** motion under Rule 60(b)(5) and (6) seeking to vacate the June 2019 Order.[29] In it, Fyk argued that a change in controlling law "[w]arrants [r]eversal [o]f [t]he [a]ntiquated [d]ismissal [o]rder[,]" relying on six authorities (including five cases decided by district courts or courts outside the Ninth Circuit).[30] The only binding authority that Fyk relied upon was *Lemmon v. Snap, Inc.*,[31] which the Ninth Circuit decided in 2021, two years before Fyk brought his Motion. In December 2023, Fyk filed a notice of supplemental authority purporting to supplement his Rule 60(b) Motion with an unpublished district court decision, *Dangaard, et al. v. Instagram, LLC*, *et al.*,[32] that had been decided seven months before Fyk filed his Motion. ER-007-08.

While Fyk's Motion was pending, in October 2023, Fyk filed a freestanding "Motion Re: the (Un)Constitutionality of 47 U.S.C. § 230(c)(1)," *see* ER-028-37, arguing that the District Court's interpretation of Section 230(c)(1) underlying its June 2019 dismissal order renders Section 230(c)(1) unconstitutional. ER 29.

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[29] ER-057-83 (6/16/2023 Second Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment) (hereinafter "Motion" or "Rule 60(b) Motion").

[30] ER-065-80.

[31] 995 F.3d 1085 (9th Cir. 2021).

[32] No. C 22-01101 WHA, 2022 WL 17342198 (N.D. Cal. Nov. 30, 2022).

In January 2024, the District Court issued an order denying Fyk's Rule 60(b) Motion and terminating his freestanding "Motion Re: the (Un)Constitutionality of 47 U.S.C. § 230(c)(1)."[33] In it, the District Court explained that five of the six authorities relied upon by Fyk are not binding "and by definition could not have changed the controlling legal framework for interpreting Section 230(c)(1) in this Circuit (even assuming that such a change could be a basis for Rule 60(b) relief, which the Court need not decide here)." ER-003. The District Court also explained that Fyk's notice of supplemental authority, attaching the *Dangaard* decision, was both procedurally improper (it was decided months before Fyk filed his Motion) and substantively unavailing because *Dangaard* is not binding. ER-003-04.

As for *Lemmon v. Snap, Inc*., the only binding Ninth Circuit authority cited by Fyk, the District Court explained that "Plaintiff nowhere explains why it is relevant to the issues here, and the Court discerns nothing in it that could possibly warrant vacating this years-old judgment." ER-004. The District Court further held that "nothing in the record undermines Judge White's earlier conclusion that Plaintiff 'has not shown the 'extraordinary circumstances' required under 60(b) for granting relief.'" ER-005. Having rejected Fyk's Rule 60(b) Motion, the District

[33] ER-002-05; *Fyk v. Facebook, Inc*., Case No. 18-05159-HSG (N.D. Cal. January 12, 2024), Dkt. 74 (hereinafter, "January 2024 Order").

Court found "no basis for taking up Plaintiff's freestanding 'motion re: the (un)constitutionality' of Section 230(c)(1)," and therefore terminated it. *Id*.

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 challenges the District Court's determination that the authorities cited in his Rule 60(b) Motion did not change the controlling law concerning Section 230(c)(1).[34] He also repeats the argument, already rejected in *Fyk II*, that this Court's *Enigma* decision changed the controlling law underlying the District Court's dismissal decision.

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).[35] 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.

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[34] App. Opening Br. at 18.

[35] *Id.* at 19.

Finally, Fyk argues that the District Court abused its discretion by terminating his "Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1)."[36] Fyk argues that this constitutional challenge was "nonforfeitable" and that the District Court wrongly terminated his freestanding motion even though it was filed in a closed case long after the District Court's final order and judgment of dismissal, which this Court affirmed in *Fyk I*.

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 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).

Rule 60(b)(5) provides for relief from a final judgment only when "the judgment has been satisfied, released, or discharged; it is based on an earlier

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[36] *Id.*

judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." 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 *Lemmon* opinion is facially irrelevant to the issues in this case, and that the nonbinding out-of-circuit and district court cases relied upon by Fyk,

by definition, could not have changed the controlling law. In *Fyk II*, this Court has already rejected Fyk's argument, repeated in this appeal, that *Enigma* marked a change in the controlling law warranting reopening his case.

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.

Moreover, Fyk failed to bring his Rule 60(b) Motion "within a reasonable time,"[37] which provides a further basis upon which to affirm the District Court's Order. Indeed, the Ninth Circuit's *Lemmon* decision was decided two years before Fyk asserted in his Rule 60(b) Motion that *Lemmon* changed the controlling law.

As for Fyk's argument that the District Court improperly terminated his "Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1)," Fyk has failed to demonstrate that this Court has jurisdiction to review the decision. Moreover, even if jurisdiction were present, no basis exists to disturb the District Court's decision.

[37] Fed. R. Civ. P. 60(c)(1).

Having declined to reopen Fyk's case, the District Court correctly concluded that there was no basis to entertain Fyk's freestanding motion challenging the constitutionality of Section 230(c)(1), which Fyk had filed in a closed case long after the final order and judgment of dismissal.

VII. ARGUMENT

A. The District Court did not abuse its discretion in denying Fyk's Rule 60(b) Motion.

1. The District Court did not abuse its discretion in holding that Fyk failed to identify a change in the controlling law.

Rule 60(b)(5) provides for relief from a final judgment only when "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). "[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 ***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.[38]

[38] 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*

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." 47 U.S.C. § 230(c)(1). 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.[39]

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 1096, 1102 (9th Cir. 2009). "[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

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ER-051, 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 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").

[39] 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.).

boiled down to deciding whether to exclude material that third parties seek to post online." *Id*. (internal quotations omitted and emphasis in original).

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.[40] 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*][41] because Facebook allegedly 'discriminated' against him by singling out his pages." *Id*. In rejecting that

[40] *See Fyk v. Facebook, Inc.*, Case No. 19-16232, Dkt. No. 12 at 7 ("[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."); *id*. at 36 (arguing that Facebook forfeited CDA immunity by alleging taking action "in direct competition with Fyk").

[41] 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)).

contention, this Court explained that Fyk's argument "mistakes the alleged illegality of the particular content at issue in *Fair Housing* with an anti-discrimination rule that we have never adopted to apply § 230(c)(1) immunity." *Id*.

Fyk now seeks to vacate the District Court's June 2019 Order under Rule 60(b)(5)[42] on the purported basis that various cases (including out-of-circuit and district court cases) somehow changed the controlling Ninth Circuit law concerning Section 230(c)(1). According to Fyk, these authorities validate his long-held theory that Section 230(c)(1) immunity is unavailable if "a defendant's anti-competitive animus is central to the wrongs complained of by the plaintiff[.]"[43] Fyk is mistaken, and the District Court's Order should be affirmed.

a. Ninth Circuit cases

Of the seven cases relied upon by Fyk in his opening brief, only two—*Enigma Software Group USA, LLC v. Malwarebytes, Inc.*[44] and *Lemmon v. Snap,*

[42] 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).

[43] App. Opening Br. at 17; *see also* ER-067 ("actions underlain by anti-competitive animus (as specifically alleged by Fyk against Facebook, and as alleged by *Rumble* against Google) are not subject to dismissal at the CDA 'Good Samaritan' immunity threshold.").

[44] 946 F.3d 1040 (9th Cir. 2019).

Inc.[45]—are binding in the Ninth Circuit. Neither case provides a basis to reopen Fyk's case.

As an initial matter, this Court already considered, and rejected, Fyk's argument that *Enigma* changed the controlling law. *See* ER-422-23.[46] In *Fyk II*, this Court affirmed the denial of Rule 60(b) relief because Fyk had failed to raise the *Enigma* argument "within a reasonable time." ER-422. That decision is "law of the case," and this Court has no basis to revisit the issue.[47]

Moreover, Fyk waived his *Enigma* argument by failing to raise it in his second Rule 60(b) motion. Fyk's Motion mentions *Enigma* in passing but does not rely upon that decision as a basis to vacate the dismissal order. *See Aramark Facility Servs. v. Serv. Employees Intern. Union, Local 1877, AFL CIO*, 530 F.3d 817, 824 n.2 (9th Cir. 2008) (arguments made in passing and inadequately briefed are waived).

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[45] 995 F.3d 1085 (9th Cir. 2021).

[46] As this Court noted in *Fyk II*, the "gravamen of Fyk's [first] Rule 60(b) motion [was] that [the Ninth Circuit'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." ER-422.

[47] *See Dean v. Trans World Airlines, Inc*., 924 F.2d 805, 810 (9th Cir. 1991) ("Under the 'law of the case' doctrine, one panel of an appellate court will not reconsider questions which another panel has decided on a prior appeal in the same case."); *Ferreira v. Borja*, 93 F.3d 671, 673 (9th Cir. 1996) (applying law of the case doctrine to reject argument decided in earlier appeal in the same case).

In any event, *Enigma* is facially irrelevant. As the District Court rightly explained in denying Fyk's first request for Rule 60(b) relief, the legal question in *Enigma* was "whether § 230(c)(***2***)[48] immunizes blocking and filtering decisions that are driven by anticompetitive animus." *Enigma*, 946 F.3d at 1050 (emphasis added); *id*. at 1045.[49] The *Enigma* decision never once mentions Section 230(c)***(1)***, much less does it purport to reverse Ninth Circuit precedents interpreting that subsection.

The Ninth Circuit's decision in *Lemmon v. Snap, Inc.* is also inapposite. In *Lemmon*, plaintiffs sued Snap, maker of the Snapchat mobile application, for claims arising from a feature that Snapchat designed called the "Speed Filter,"

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[48] 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).").

[49] ER-513-14. 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." *Enigma*, 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.").

which enabled users to record their driving speed and post it on their Snapchat account. The Ninth Circuit held that Snap did not enjoy immunity from suit under Section 230(c)(1), among other reasons, because the plaintiffs' negligent design claim "di[d] not seek to hold Snap liable for its conduct as a publisher or speaker" but rather "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)." *Lemmon*, 995 F.3d at 1091-92. Critically, as the District Court noted in its Order, the Ninth Circuit made clear that the facts in *Lemmon* did not involve Snap's role in "editing, monitoring, or removing of the content that its users generate through Snapchat." *Id*. at 1092 ("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."). In contrast, as the *Lemmon* court further clarified, the plaintiffs "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," because "attempting to hold Snap liable using such evidence would treat Snap as a publisher of third-party content, contrary to our holding here." *Id*. at 1093 and n. 4.

Here, in contrast to *Lemmon*, the District Court found in its June 2019 Order that "all three of Plaintiff's claims arise from the allegations that Facebook

removed or moderated his pages," and it held that "[b]ecause the CDA bars all claims that seek to hold an interactive computer service liable as a publisher of third party content, . . . the CDA precludes Plaintiff's claims."[50] This Court affirmed that order in *Fyk I*. Accordingly, the District Court rightly concluded that "*Lemmon* is inapplicable on its own terms to the circumstances already found (and affirmed) here." ER-004.

b. District court and out-of-circuit cases

The five remaining cases that Fyk contends changed the controlling Ninth Circuit law were decided either by a district court[51] or by a court outside the Ninth Circuit.[52] In its Order, the District Court correctly held that such nonbinding authority "by definition could not have changed the controlling legal framework for interpreting Section 230(c)(1) *in this Circuit* . . . ." ER-003; *see also Hart v. Massanari*, 266 F.3d 1155, 1163, 1171-73 (9th Cir. 2001) (explaining that trial

[50] June 2019 Order at *3 ("Here, all three of Plaintiff's claims arise from the allegations that Facebook removed or moderated his pages."); ER-004.

[51] Namely, *Rumble, Inc. v. Google LLC*, No. 21-cv-00229-HSG, 2022 WL 3018062 (N.D. Cal. July 29, 2022); *DZ Reserve v. Meta Platforms, Inc.*, No. 3:18-cv-04978, 2022 WL 912890 (N.D. Cal. Mar. 29, 2022); and *Dangaard, et al. v. Instagram, LLC, et al.*, No. C 22-01101 WHA, 2022 WL 17342198 (N.D. Cal. Nov. 30, 2022).

[52] Namely, *Henderson v. The Source for Public Data L.P.*, 53 F. 4th 110 (4th Cir. 2022) and *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446 (5th Cir. 2022).

court decisions never constitute binding precedent and that decisions by federal circuit courts are binding only in that circuit).

Indeed, even Fyk does not dispute this black letter law. In his opening brief, Fyk argues (incorrectly) that the results reached in these cases are "inconsistent" with the outcome in his case (*see*, *e.g.*, App. Opening Br. at 22-23), but he fails to explain how the non-binding district court and out-of-circuit authorities upon which he relies could possibly have changed the controlling Ninth Circuit law underlying the District Court's June 2019 Order.[53] Moreover, even if they were binding, these authorities are irrelevant and would have no bearing on the District Court's June 2019 dismissal decision. *See* ER-052-54.

Accordingly, the district court did not abuse its discretion in refusing to reopen his case based on an alleged change in the controlling law.

2. 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

[53] Nor can he. It is axiomatic that "[o]nce a panel [of the Ninth Circuit] resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting *en banc*, or by the Supreme Court." *Hart*, 266 F.3d at 1171.

high, and that relief should only be granted "sparingly" to avoid "manifest injustice[.]" *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). *See* ER-004-05.

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."[54] 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*.[55] 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 in law

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[54] *See* App. Opening Br. at 6 n.10 ("It was improper for the District Court to not examine a single actual *Phelps* factor, but instead base the 60(b)(6) 'analysis' on a gauge of Fyk's displeased emotional state."); *id*. at 19.

[55] *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).

(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. ER-003-5. 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."

3. Fyk failed to bring his Rule 60(b) Motion "within a reasonable time."

This District Court's January 2024 Order should also be affirmed for the additional reason that Fyk's Rule 60(b) Motion was untimely. *See Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (affirmance may be "based on any ground supported by the record").

Under Rule 60(c), a motion for relief under Rule 60(b) "must be made within a reasonable time." In *Fyk II*, the Ninth Circuit determined that Fyk's first Rule 60(b) motion based on *Enigma* was not "made within a reasonable time" where Fyk filed it approximately 18 months after *Enigma* first issued, about 13 months after it was reissued, and nine months after the Court's decision in *Fyk I*.

Here, the Ninth Circuit's decision in *Lemmon v. Snap, Inc*.—the only Ninth Circuit decision relied upon by Fyk in his Rule 60(b) Motion—was decided in May 2021, ***more than two years*** before Fyk brought his Motion in June 2023. The district court and out-of-circuit decisions that Fyk contends changed the controlling law were decided 8-15 months before Fyk filed his Motion.[56] Fyk has failed to explain why he could not have raised these arguments earlier. Accordingly, his failure to make his Rule 60 Motion "within a reasonable time" provides an additional basis for affirming the District Court's Order.

B. No basis exists to disturb the District Court's decision terminating Fyk's freestanding motion regarding the constitutionality of Section 230(c)(1).

While Fyk's Rule 60(b) Motion was pending before the District Court, Fyk filed an additional freestanding motion arguing that the interpretation of Section 230(c)(1) underlying the District Court's June 2019 dismissal order renders

[56] *DZ Reserve* was decided in March 2022, 15 months before Fyk filed his second Rule 60(b) motion. The Fifth Circuit issued its opinion in *Jarkesy* in May 2022, more than one year before Fyk filed his second Rule 60(b) motion. *Rumble* was decided in July 2022. *Henderson* and *Dangaard* were decided in November 2022.

Section 230(c)(1) unconstitutional. The District Court correctly terminated that motion after declining to reopen Fyk's case.

Fyk urges this Court to reverse the Court's decision terminating his freestanding constitutional challenge, but he fails to identify a proper source of appellate jurisdiction. "Jurisdiction is never to be assumed, and in every case, jurisdiction must exist by way of some affirmative source." *Williamson v. UNUM Life Ins. Co. of Am.*, 160 F.3d 1247, 1250 (9th Cir. 1998). Fyk asserts that this Court has jurisdiction under 28 U.S.C. § 1291 (hereinafter, "Section 1291") to review his entire appeal.[57] But that statute does not confer jurisdiction here.

Section 1291 "empowers the circuit courts to hear appeals from . . . ***final judgments*** issued by the district courts." *Id.* (emphasis added). "A final judgment is a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id*. (internal quotations and citations omitted). In this case, final judgment was entered and affirmed long before Fyk ever filed his motion challenging the constitutionality of Section 230(c)(1). Accordingly, Section 1291 does not confer jurisdiction over the District Court's decision terminating his freestanding constitutional challenge.[58]

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[57] App. Opening Br at 5.

[58] In a similar case, in which the appellant asked this Court to review the denial of motions filed in a closed case, this Court dismissed the appeal as frivolous and revoked the Petitioner's *in forma pauperis* status. *Drevaleva v. Dep't of Veterans*

Even if appellate jurisdiction were present here, no basis exists to disturb the District Court's termination decision. Having denied Fyk's Rule 60(b) Motion, the District Court had no basis to consider the merits of Fyk's freestanding constitutional challenge, which he filed in a closed case, after final judgment of dismissal. *See Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 665 (9th Cir. 1997) (district court could not entertain motion filed after judgment of dismissal "unless and until [defendant] demonstrated that he was entitled to relief under Rule 60(b)"); *cf. Planned Parenthood of S. Arizona v. Neely*, 130 F.3d 400, 403 (9th Cir. 1997) (holding that district court abused its discretion by allowing plaintiffs to supplement complaint where original action had reached final resolution and the district court did not retain jurisdiction).

VIII. CONCLUSION

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

Affs, No. 21-15658, 2021 WL 4785893 (9th Cir. Aug. 16, 2021) (reviewing *Drevaleva v. U.S. Dep't of Veterans Affs*., No. 19-cv-02665-HSG, 2021 WL 1433063, at *1 (N.D. Cal. Mar. 29, 2021), in which district court denied all pending motions filed in closed case and ordered that no further filings be accepted).

Dated: May 9, 2024

KEKER, VAN NEST & PETERS LLP

By: */s/ William S. Hicks*
PAVEN MALHOTRA
WILLIAM S. HICKS

STATEMENT OF RELATED CASES

Counsel for Appellee is not aware of any related cases pending in this Court.

Dated: May 9, 2024

KEKER, VAN NEST & PETERS LLP

By: */s/ William S. Hicks*
PAVEN MALHOTRA
WILLIAM S. HICKS

CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(A) because it is less than 30 pages.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: May 9, 2024

By: */s/ William S. Hicks*
WILLIAM S. HICKS

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system.

I certify that all participants in the case are registered ACMS users and that service will be accomplished by the appellate ACMS system.

s/Jacquelynn Smith
Jacquelynn Smith