Appeal 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

APPELLANT'S REPLY BRIEF

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I. Summary Of Reply Brief

While *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009) and *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019) involved §230(c)(2) of the Communications Decency Act ("CDA," Title 47 U.S.C. §230) factual backdrops, and the parties in *Enigma* were direct competitors, the same policy concerns arise here: the filtering practices of Defendant-Appellee, Facebook, Inc. ("Facebook"), were aimed at suppressing Plaintiff-Appellant, Jason Fyk ("Fyk"), as competition in the online advertising and entertainment business; *i.e.*, competitive commercial advertising in the Facebook marketplace. Here, Facebook could have employed §230(c)(2) to attempt to defend itself (although not even that defense is applicable, because, once more, this is not a CDA case) – it claims to have removed obscene material from its platform in good faith (*e.g.*, Facebook disabled certain Fyk pages / businesses for purported "violation of its policies," which was false pretense), ***which is what §230(c)(2) immunizes. Facebook, however, instead chose §230(c)(1) to shield itself.***

To accept Facebook's purported CDA defense (as Fyk's courts have thus far) makes ***§230(c)(1) a backdoor to CDA immunity*** – contrary to the CDA's history and purpose; *i.e.*, contrary to the text of the statute, the CDA's general provision / intelligible principle, due process, and Fyk's Constitutional Rights. That is *extraordinary*, a plain and obvious *manifest injustice* imposed upon Fyk. Thus,

congressional policy, due process, and Fyk's individual civil liberties weigh heavily against Facebook's improper assertion of a CDA §230(c)(1) defense.[1]

Now, after nearly six years of litigation, Facebook has finally admitted in its Answering Brief [D.E. 12.1] what Fyk actually alleged in his August 2018 Verified Complaint (*i.e.*, what this case is really about): "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." *Id*. at 6 (emphasis added). This case was never about treating Facebook as "the publisher or speaker" of Fyk's content or holding Facebook accountable for any content (because no specific content-based harms were ever alleged); rather, this case was / is entirely about Facebook's filtering practices aimed at suppressing Fyk as competition. Fyk's case was simply a few steps ahead of the evolving jurisprudence in this Circuit because the applicable law is well-settled as to how immunity under the CDA should not have resulted in a dismissal of this case, especially at the pleading stage.

So as to not rehash portions of the Opening Brief filed by Fyk on March 8, 2024, [D.E. 5.1], against Facebook, this Reply Brief focuses on the following:

(a) A key party admission made by Facebook in its May 9, 2024, Answering Brief [D.E. 12.1], which such judicial admission substantially impacts this case (the

[1] The above two paragraphs are modifications of the Judge Alsup holding(s) in *Dangaard, et al. v. Instagram, LLC, et al.*, No. C 22-01101 WHA, 2022 WL 17342198, *6 (N.D. Cal. Nov. 30, 2022)), a case on all fours with this case.

admission is noted above, but is discussed further in Section III – Legal Analysis, below);

(b) Facebook's Answering Brief adding nothing new to the equation; but, instead, amounting to: "all prior decisions at the District Court and Circuit Court level were correct just because, so this Court should just go ahead and rubber-stamp same just because;"

(c) Explaining again, this time by way of another recent California court case (not by way of Fyk or Facebook) discussed below, how *Lemmon, et al. v. SNAP, Inc.*, 995 F.3d 1085 (9th Cir. 2021) absolutely applies to this case,[2] and explaining again how District Court cases (*e.g.*, *Dangaard*), while not binding, are getting identical situations right and how this Court (which presides over its District Courts) should not be allowing uneven results (one party getting justice while another party is deprived of justice and constitutional rights under the same circumstances);

(d) New case law that has issued (including from this Court, *e.g.*, *Diep v. Apple, Inc.*, No. 22-16514, 2024 WL 1299995 (9th Cir. Mar. 27, 2024)) since Fyk's March 8, 2024, Opening Brief that further evolves §230 in support of Fyk (*e.g.*, *Diep*; *X Corp v. Bright Data LTD.*, No. 23-03698-WHA, 2024 WL 2113859 (N.D.

[2] At this point, enough has been said about how *Enigma* applies to this case, in particularly given Judge Alsup setting forth the appropriate application of *Enigma* in *Dangaard* (again, a case identical to Fyk's) that Fyk has articulated for years (before *Enigma* even issued).

Cal. May 9, 2024); *Wozniak, et al. v. YouTube, LLC, et al.*, 319 Cal. Rptr. 3d 597 (Ct. App. 6th Dist. Apr. 2, 2024));

(e) The non-forfeitable / inalienable nature of Fyk's constitutional rights and why Judge Gilliam, Jr.'s denial of Fyk's 5.1 Constitutional Challenge is properly before this Court;

(f) Facebook's incorrect conflation of Rule 60(b)(5) and Rule 60(b)(6); and

(g) Artificial Intelligence ("AI"), an objective analytical tool, rendering pro-Fyk conclusions on several key issues and the overall case.

II. Summary Of Facebook's Answering Brief

Distilled, Facebook's Answering Brief [D.E. 12.1] adds no new argument / legal analysis on the substantive issues at hand. Facebook's Answering Brief simply recasts holdings (in cherry-pick fashion) from this case (out-of-context or with no context), nakedly states that such decisions were correct (just because), and asks this Court to simply maintain status quo (just because). Put differently, Facebook's Answering Brief urges this Court to affirm, without analysis, decisions wrongly made because rubber-stamping prior decisions is the procedurally easy way out.

Moreover, Facebook collapses Rule 60(b)(5) and 60(b)(6) together by claiming that because there was purportedly no change in law (Rule 60(b)(5)), there can necessarily be no Rule 60(b)(6) analysis. As if Rule 60(b)(5) eligibility is a

condition precedent of a Rule 60(b)(6) analysis, which it most certainly is not. Rule 60(b)(6) is not mere surplusage of Rule 60(b)(5).

Moreover, Facebook states that this Court does not have jurisdiction to consider the District Court's rejection of Fyk's companion / inextricably intertwined Rule 5.1 Constitutional Challenge. Facebook does not explain why an appellate court would not have jurisdiction to consider a District Court's incorrect decision on a non-forfeitable, inextricably intertwined Rule 5.1 Constitutional Challenge. Rather, Facebook simply states that Fyk's Opening Brief did not state a specific jurisdictional basis so this Court should forfeit the non-forfeitable Rule 5.1 consideration.

That is it – Facebook's Answering Brief amounts to: "Dear Ninth Circuit: please just maintain the injustice inflicted upon Fyk over the past six years, irrespective of all that has changed pro-Fyk since Judge White's initial dismissal (which such dismissal was based on Facebook's self-serving and improper mischaracterizations as to what Fyk's case was really about)."[3]

[3] It is worth pointing out again that half-a-decade into this case, Judge White (an individual with millions of dollars of investment in Tech stock, at material times) *sua sponte* recused himself from this case as "disqualified" (*i.e.*, extraordinary). That led to Judge Gilliam, Jr. inheriting this case, and Judge Gilliam, Jr. proceeded with giving this case no individualized thought; *i.e.*, choosing to rubber-stamp Judge White's prior incorrect holdings.

III. Legal Analysis

A. The Substantial Impact Of Facebook's Admission

One bad decision after another (at the District and Circuit Court levels) has spiraled (in whole or in part) out of Judge White's dismissal viewpoint as to what this case was / is supposedly about, and that Judge White viewpoint was a cut-and-paste from Facebook's Rule 12(b)(6) motion's version of "facts." That viewpoint was the absurd viewpoint that Fyk's case was somehow a §230(c)(1) case wherein Fyk was somehow trying to hold Facebook accountable for Fyk's content vis-à-vis somehow trying to treat Facebook as the publisher / speaker of Fyk's content; *i.e.*, treat Facebook as Fyk. Absurd – not once has Fyk ever alleged that Facebook was Fyk himself. Finally, nearly six years into this litigation, Facebook admits that which Fyk has been trying to tell his District and Circuit Courts *ad nauseum* since the onset of litigation – "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." [D.E. 12.1] at 6 (emphasis added).

Yes, finally Facebook being honest with the Court regarding what Fyk's August 2018 Verified Complaint alleges – Fyk's case revolves around Facebook's anti-competitive animus. And this Court has routinely determined that a case grounded in anti-competition (wrongdoing of a non-CDA root) is not eligible for any kind of CDA immunity. We have explained numerous times how that is what

this Court's *Enigma* decision stands for, as confirmed by Judge Alsup's *Dangaard* decision. We have explained numerous times how that is what *Lemmon* stands for, when one actually understands the relevance of *Lemmon* (as Judge Gilliam, Jr. did not). We will not regurgitate our analysis of those Ninth Circuit decisions in this Reply Brief, because repetition is not the point of a reply – it is either this Court will apply its law uniformly, certainly, and predictably for Fyk, or not. Rather, we will now discuss how case law that has issued since the filing of the Opening Brief further supports Fyk's position that Facebook enjoys no CDA immunity here (including a recent California case that does recognize the application of *Lemmon* to a case like ours).

B. Case Law Continues To Evolve §230 Narrowly and In Fyk's Favor

For all the nonsensical chatter from Facebook over the years (which Fyk's courts have thus far taken hook, line, and sinker, contrary to hornbook Rule 12(b)(6) review standards where the Plaintiff's allegations are to be taken as true, not the Defendant's re-write of allegations) that Fyk employed various case law "too late," which such chatter has only ever been a convenient way to avoid the merits (never really true, since Fyk has diligently pursued his case at all times and since there is no set timeframe within which to bring 60(b)(5) and 60(b)(6) motions), nobody can rightly contend that case law that has issued after Fyk's March 8, 2024, Opening Brief (*e.g.*, *Diep*, *X Corp*, *Wozniak*) is being employed "too late."

1. *Diep*

In *Diep v. Apple, Inc.*, No. 22-16514, 2024 WL 1299995 (9th Cir. Mar. 27, 2024) (a case that analyzed *Barnes*, *Fair Housing*, *Doe*, *Lemmon*, and other cases that have been brought up several times throughout this action), this Court held, in pertinent part:

> The claims asserted in counts IV (violation of California's Unfair Competition Law ("UCL")) … are not barred by the CDA. These state law consumer protection claims do not arise from Apple's publication decisions … . Rather, these claims seek to hold Apple liable for its own representations … . Because Apple is the primary 'information content provider' with respect to those statements, section 230(c)(1) does not apply.

Id. at *2 (internal citation omitted). ***UCL was precisely Count II of Fyk's Verified Complaint.*** Why does the Ninth Circuit continuously find that unfair competition claims are not barred by the CDA for everybody else other than Fyk? It is time, in light of Fyk's Count II (at the very least) coupled with Facebook's party admission set forth above (that Fyk's allegations sound in Facebook's anti-competitive animus), for this Court to give Fyk the same result as others; here, that would be reversing and remanding (with the reversal / remand either eradicating Facebook's nonsensical CDA immunity defense, or, at the very least, with the reversal / remand allowing Fyk's amendment of the Verified Complaint because such an endeavor would by no means be "futile," legally and / or factually, as Judge White's initial dismissal order wrongly determined; indeed, on the factual front, Fyk possesses far

more evidence of Facebook's wrongdoing than the parties in *Dangaard*, for example, and, we would comfortably wager, than any party in any CDA Social Media case ever).

This Court in *Diep* concluded, in pertinent part:

> But Apple cannot disclaim liability for its own false, misleading, or fraudulent statements. …
>
> Because … section 230(c) … would [not] bar a well-pleaded [unfair competition /] consumer protection claim, the question is whether the operative complaint satisfies … pleading requirements… .
>
> ***
>
> … the question is whether the district court should have dismissed these [unfair competition / consumer protection] claims with prejudice and without leave to amend. Because Plaintiffs could conceivably cure the pleading deficiencies in the [unfair competition /] consumer protection claims, Plaintiffs should have been afforded the opportunity to amend their complaint.
>
> [Rule] 15(a)(2) instructs that federal courts should 'freely give leave to amend when justice so requires.' … Where denial of leave to amend is based on 'an inaccurate view of the law,' we must reverse.
>
> Here, the district court denied leave to amend based on the conclusion that 'all of plaintiffs' claims were premised on Apple's role as a publisher of the Toast Plus app' such that 'any amendment would be futile given Apple's immunity afforded by § 230.' However, Plaintiffs' [unfair competition /] consumer protection claims are not barred by section 230. …
>
> Because the district court's denial of leave to amend [the unfair competition / consumer protection] claims was premised on legal error, we vacate the judgment of the district court as to those claims, and remand with instructions to grant Plaintiffs leave to amend their complaint as to those claims.

Id. at *2-3 (internal citations omitted). Here, Fyk's case remains dismissed with prejudice. Judge White's dismissal opinion did so because of Judge White's incorrect viewpoint regarding what kind of case this was / is (again, a case where Fyk was supposedly somehow trying to treat Facebook as the publisher / speaker of his own content, when, in reality, Fyk's action has always revolved around Facebook's own wrongdoing, namely unfair competition) and associated viewpoint that any amendment would be futile because the CDA would necessarily bar any rendition of Fyk's averments. And Judge Gilliam, Jr. was careless in rubber-stamping Judge White across the board.

Fyk should have been granted leave to amend at the very least, given the impetus of his Verified Complaint is Facebook's unfair competition (and other associated tortious conduct having nothing to do with the CDA); *i.e.*, impetus of his Verified Complaint is Facebook's own wrongdoing having nothing to do with Fyk's content. As this Court determined in *Diep*, unfair competition cases are not barred by CDA immunity and complaint amendment would not be futile.

2. *X Corp*

Another sound Judge Alsup decision out of the Northern District of California Court (in addition to *Dangaard*, a case identical to this case and thoroughly discussed in prior briefing) is X *Corp v. Bright Data LTD.*, No. 23-03698-WHA,

2024 WL 2113859 (N.D. Cal. May 9, 2024). In *X Corp*, Judge Alsup held, in pertinent part:

> One might ask why X Corp. does not just acquire ownership of X users' content or grant itself an exclusive license under the Terms. That would jeopardize X Corp.'s safe harbors from civil liability for publishing third-party content. Under Section 230(c)(1) of the Communications Decency Act, social media companies are generally immune from claims based on the publication of information 'provided by another information content provider.' 47 U.S.C. § 230(c)(1). Meanwhile, under Section 512(a) of the Digital Millenium Copyright Act ("DMCA"), social media companies can avoid liability for copyright infringement when they 'act only as 'conduits' for the transmission of information.' *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1041 (9th Cir. 2013); 17 U.S.C. § 512(a). X Corp. wants it both ways: to keep its safe harbors yet exercise a copyright owner's right to exclude, wresting fees from those who wish to extract and copy X users' content.
>
> The upshot is that, invoking state contract and tort law, X Corp. would entrench its own private copyright system that rivals, even conflicts with, the actual copyright system enacted by Congress. X Corp. would yank into its private domain and hold for sale information open to all, exercising a copyright owner's right to exclude where it has no such right. We are not concerned here with an arm's length contract between two sophisticated parties in which one or the other adjusts their rights and privileges under federal copyright law. We are instead concerned with a massive regime of adhesive terms imposed by X Corp. that stands to fundamentally alter the rights and privileges of the world at large (or at least hundreds of millions of alleged X users). For the reasons that follow, this order holds that X Corp.'s state-law claims against Bright Data based on scraping and selling of data are preempted by the Copyright Act.

Id. at *12.

Here, Facebook's conduct (exclusion of Fyk for anti-competitive reasons) is akin to that of a copyright owner. As determined in *X Corp*, Facebook cannot have

it both ways. Here, Facebook's anti-competitive exclusionary conduct was anything but that of a "conduit for the transmission of information." Here, Facebook affirmatively interfered with Fyk's pages / businesses by excluding Fyk from its platform so as to "make room for [Facebook's] own sponsored advertisements and to 'strong-arm' Fyk into paying to advertise," [D.E. 12.1] at 6, not because Fyk somehow violated the Facebook TOS or the CDA. Facebook's exclusionary conduct was that of a copyright owner (which Facebook is not because Facebook, like X, does not want to lose its go-to CDA immunity defense). Just as Judge Alsup properly called bullsh__ on X, so too should this Court call bullsh__ on Facebook for trying to work a CDA immunity defense in a scenario where Facebook's conduct has been akin to a copyright owner who cannot enjoy CDA immunity because the copyright owner engages in exclusionary conduct for non-CDA reasons (as here with respect to Facebook's anti-competitive exclusionary conduct).

Again, we recognize (just as with *Dangaard*) that a District Court's decision-making is not binding. But how can this Court rightly allow everybody else not named Fyk to enjoy proper results at the District Court level? Is that kind of inconsistent District Court decision-making really something that this overseeing Court should continue to allow just because District Court decision-making is not binding? Absolutely not – this Court should ensure uniform application of the law within the District Courts it presides over, as discussed further in Section III.C

below. The point is not that District Court decisions bind this Court, the point is that this Court should ensure that Fyk receives the same kind of result as in *Dangaard* and *X Corp*, for examples. *See* §III.C, *infra*. Quite simply, had Fyk drawn Judge Alsup at the District Court level, for example, his case would not have been dismissed … *justice should not be predicated on luck of the draw.*

3. *Wozniak*

We now turn to *Wozniak, et al. v. YouTube, LLC, et al.*, 319 Cal. Rptr. 3d 597 (Ct. App. 6th Dist. Apr. 2, 2024), not for what that case was about or how that case ended up and not because that decision somehow binds this Court. Rather, we now discuss *Wozniak* because it is a California court (*i.e.*, not us, not Facebook) explaining the relevance of *Lemmon* to a case like ours. Something Judge Gilliam, Jr. was somehow unable to recognize in the instant District Court order on appeal:

> Plaintiffs rely on *Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085. In that case, a 20-year-old man and two 17-year-old boys died after driving their car over 100 miles per hour and crashing into a tree. *Id.* at 1089. Shortly before the crash, one of the boys had opened the Snapchat application on his smartphone to document how fast they were driving. *Ibid*. The boys' parents sued Snap, the social media provider that owns the Snapchat application, alleging it encouraged their sons to drive at dangerous speed and thus caused their death through the negligent design of its application. *Id.* at p. 1090-1091. Specifically, they alleged that the application uses a 'speed filter' – which allows users to record and share their real-life speed – and a reward system with trophies and social recognitions, combining to create an incentive for users to reach 100 miles per hour and document it on the application. *Id.* at p. 1089.
>
> The court held that the negligent design claim was not barred by section 230. The parents' claim rested 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. *Lemmon, supra,* 995 F.3d at p. 1091-1092. As the court explained, '[t]he 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. [Citation.] Meanwhile, entities acting solely as publishers—*i.e.*, those that 'review[ ] material submitted for publication, perhaps edit[ ] it for style or technical fluency, and then decide[ ] whether to publish it,' [citation]—generally have no similar duty.' *Id.* at p. 1092. …

Id. at 613-614.

Spot on. Fyk's case is all about non-CDA-oriented duties owed by Facebook. Verified Complaint Count I – Facebook's duty to not tortiously interfere with Fyk's prospective economic advantage / relations; Verified Complaint Count II – Facebook's duty to not unfairly compete with Fyk; Verified Complaint Count III – Facebook's duty to not civilly extort Fyk; and Verified Complaint Count IV – Facebook's duty to not defraud Fyk. Whether Facebook's exclusionary conduct (akin to that of a copyright owner, not a mere CDA passive information conduit) is viewed through a tortious interference, unfair competition, civil extortion, and / or fraud lens, Facebook's exclusion of Fyk had nothing to do with Fyk somehow treating Facebook as the publisher / speaker of Fyk's content (*i.e.*, as Fyk himself). "The dut[ies] underlying [Fyk's] [ ] claim[s] differ[ ] markedly from the duties of publishers as defined by the CDA."

Just as the negligent product design claim in *Lemmon* fell outside CDA immunity because it dealt with Defendant duties that "differ[ed] markedly from the duties of publishers as defined by the CDA," so too with respect to all four of Fyk's Counts. All four Counts within the Verified Complaint revolve around legal duties having nothing to do with the kind of publishing / speaking implicating CDA immunity. Again, as Facebook has finally admitted, "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." [D.E. 12.1] at 6 (emphasis added). At no time, ever, has Fyk alleged that Facebook was somehow the publisher / speaker of Fyk's content … absurd.

Every single recent case from outside of this jurisdiction (*e.g.*, *Henderson* (4th Circuit) and *Jarkesy* (5th Circuit)) that Fyk has cited for the proposition of change in law warranting reconsideration of dismissal is pro-Fyk. Every single California District Court case (*e.g.*, *Dangaard, Rumble, Doe, etc.*) that Fyk has cited for the proposition of change in law warranting reconsideration of dismissal is pro-Fyk. Every single Ninth Circuit case (*e.g.*, *Enigma* and *Lemmon*) that Fyk has cited for the proposition of change in law warranting reconsideration of dismissal is pro-Fyk. Every single post-Opening Brief case (*Diep*, *X Corp.*, and *Wozniak*) that Fyk cites in this Reply Brief for the proposition of change in law warranting reconsideration of dismissal is pro-Fyk.

Nothing said in Facebook's Answering Brief supports the upholding of dismissal from a merits perspective. Rather, as stated above, Facebook's Answering Brief simply says that prior decisions in this case were correct (just because) and that this Court should ratify same (just because).

This Court can simply no longer turn a blind eye to reality – the reality being that Judge White's dismissal order (and associated judgment), which has been at the root of every single wrong decision inflicted upon Fyk in the California court system (including the Judge Gilliam, Jr. Order that is up on this appeal), was predicated on Facebook's re-write of Fyk's Verified Complaint allegations.[4] Again, Facebook has hoodwinked every single court into believing that Fyk's Verified Complaint somehow sought to treat Facebook as the publisher / speaker of Fyk's content (*i.e.*, place Facebook in the same position as Fyk), thus eligible for CDA immunity. When, in reality, "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." [D.E. 12.1] at 6 (emphasis added). With Facebook finally being truthful regarding what Fyk's Verified Complaint alleges, it can no longer be denied

[4] Inclusive of blatant Facebook lies like one of Fyk's businesses / pages being dedicated to featuring public urination, an utter falsehood that Judge White's initial dismissal order biasedly chose to feature / highlight at the very beginning of same. This is but one example (of several) of how Facebook (and Judge White, and Judge Gilliam, Jr. through rubber-stamping of Judge White) defamed Fyk while carrying out their legal wrongs over the years, causing Fyk, among other things, great reputational harm.

that Fyk's case pattern matches or parallels the case patterns cited above (and in the Opening Brief), wherein Courts (including this Court) have routinely found that causes of action involving legal duties having nothing to do with the kind of publishing / speaking contemplated by the CDA (*e.g.*, unfair competition causes of action) are not eligible for CDA immunity.

C. This Court Must Ensure Even-Handed Application Of The Law At The District Court Level

The choice of law here (for any of the four causes of action set forth in the Verified Complaint) is California law. "Application of California law in this case 'furthers the choice-of-law values of certainty, predictability and uniformity of result and ... ease in the determination and application of the applicable law.'" *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 783 (9th Cir. 1991). This Court recognizes the values of "certainty, predictability and uniformity of result and … ease in determination and application of the applicable law." Not to mention due process and equal protection of the laws guaranteed by the U.S. Constitution, neither such right having been enjoyed by Fyk in his courts' inconsistent application of law in comparison to other similarly-situated litigants.

Anything but "certainty, predictability and uniformity of result and … ease in determination and application of the applicable law" have unfolded within Fyk's District and Circuit Courts. Many others have enjoyed justice as it concerns the issues at hand, whereas Fyk has been wronged by his courts at every turn.

If this Court really means what it said in *Schoenberg* about valuing certainty, predictability, and uniformity in the application of law, this Court must finally put an end to the wholly inapplicable and unfettered CDA immunity that Facebook has gotten away with for nearly six years in a non-CDA case. This Court must make Fyk's result uniform with the *Dangaard* result, for example. This Court must make Fyk's result uniform with the *Enigma* result, as another example. The list goes on – this Court must make Fyk's result uniform with the *Diep*, *Rumble*, *Doe*, *Lemmon*, and *X Corp.* results. Not to mention, this Court should be interested in uniformity across Circuits, *i.e.*, this Court should be interested in aligning its Fyk decision-making with cases like *Henderson* (4th Circuit) (especially since in *Henderson* the Fourth Circuit unwound its *Zeran* decision, upon which other incorrect decisions like *Barnes* have been based) and *Jarkesy* (5th Circuit). Yet, for some reason, Fyk's case has been stranded on its own outlier island for over half-a-decade. That is wrong, contravening the Ninth Circuit's professed values.

Facebook's Answering Brief predominantly yaps about how hardly any of Fyk's *many* cited cases are binding on this Court, but such yapping misses the point of what a manifest injustice is about. The point is that Fyk should enjoy a uniform application of the law … certainty … predictability … that is why Fyk has cited all of the cases he has cited, to show that many other similarly-situated litigants have enjoyed just results. This Court should adhere to its professed values in aligning

Fyk's case with all the other cases Fyk has brought to this Court's attention in the Opening Brief and in this Reply Brief. To not do so would be the epitome of hypocrisy and continued manifest injustice and deprivation of constitutional rights.

D. Procedural Considerations

1. Fyk's Constitutional Rights Are Non-Forfeitable / Inalienable And Appropriately Before This Court

This Court has opined that the only way it would lack jurisdiction to review a District Court order involving constitutional rights would be if the constitutional rights were untimely addressed at the District Court level. *See, e.g., Singh v. Mukasey*, 533 F.3d 1103, 1109 (9th Cir. 2008) (citing, inter alia, *U.S. v. Olano*, 507 U.S. 725, 731 (1993)). As thoroughly discussed in Fyk's Opening Brief, *see* [D.E. 5.1] at pp. 27-41, it was not until years into this case that Fyk's Courts made decisions stripping him of his constitutional rights. As thoroughly discussed in Fyk's Opening Brief, case law holds that a Rule 5.1 Constitutional Challenge is not ripe until a case has been fully briefed. As explained in Fyk's Opening Brief, Fyk brought his Rule 5.1 Constitutional Challenge in a tribunal with jurisdiction to consider it as soon as he was eligible to bring it.

Facebook's Answering Brief nakedly states that this Court should not consider Facebook's Rule 5.1 Constitutional Challenge because Fyk did not specify this Court's jurisdictional basis to do so, the Answering Brief does not go so far as to actually say this Court lacks jurisdiction. Because it is axiomatic that this Court

has jurisdiction. *See, e.g,*. *https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide#:~:text=U.S.%20appellate%20courts%20have%20jurisdiction,%2C%20state%2C%20or%20local%20governments*. This US Courts (.gov) publication states:

> U.S. appellate courts have jurisdiction over cases that allege violations of federal constitutional rights, regardless of whether the alleged violations involve federal, state, or local governments. Thus, appeals based on constitutional grounds permit federal court review of state and local laws, practices, and court rulings, not just direct appeals of federal cases.
>
> Constitutional cases include some of the most contentious issues considered by the federal Judiciary – freedom of speech and religion, the right to bear arms, search and seizure, right to counsel, and equal protection under the law, just to name a few. …

See id.

It seems Facebook's Answering Brief also argues that Fyk was required to engage in Rule 60 proceedings relating to the District Court's incorrect Rule 5.1 Constitutional Challenge decision before bringing the 5.1 Constitutional Challenge up on this appeal. Yet, Rule 60 proceedings are not a condition precedent to appeal. Indeed, Rule 60(a)'s express language makes clear that appeal can occur before (or without) engaging in Rule 60 proceedings: "But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave." *Id.* Judge Gilliam, Jr.'s Order, that is being appealed here, combined ruling on Fyk's Rule 60(b) motion and Fyk's Rule 5.1

Constitutional Challenge. Fyk was accordingly on the appellate clock with respect to the Rule 60(b) component of Judge Gilliam, Jr.'s combined determination, and the Rule 5.1 Constitutional Challenge is a companion to the Rule 60(b) motion. Given a Rule 60 motion is not a condition precedent to appeal, given the interrelation between the Rule 60(b) motion practice and the Rule 5.1 Constitutional Challenge, given Judge Gilliam, Jr.'s combined ruling, and given conservation of judicial resources, Fyk properly elected to bring the Rule 5.1 Constitutional Challenge before this Court. Again, per the US Courts' publication above: "U.S. appellate courts have jurisdiction over cases that allege violations of federal constitutional rights."

That which is at issue in Fyk's Rule 5.1 Constitutional Challenge is inalienable and non-forfeitable. We are talking about the deprivation of a U.S. citizen's constitutional rights – there could not be anything more serious. For this Court to ignore Fyk's Rule 5.1 Constitutional Challenge (again, which is inextricably intertwined with the issues at play in the subject Rule 60(b) motion practice) would be yet another extraordinary manifest injustice impressed upon Fyk.

2. Facebook Incorrectly Conflates Rule 60(b)(5) And 60(b)(6)

Facebook's Answering Brief argues that there has been no change of law warranting Rule 60(b)(5) relief, so there accordingly cannot be a 60(b)(6) extraordinary circumstances (*see, e.g., Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009)) analysis. What? Meaning, according to Facebook, Rule 60(b)(6) relief is

surplusage or duplicative of 60(b)(5) relief. What? Judge Gilliam, Jr.'s improper change of law Rule 60(b)(5) determination by no means relieved Judge Gilliam, Jr. of engaging in a 60(b)(6) analysis. Had Judge Gilliam, Jr. properly engaged in a Rule 60(b)(6) analysis (guided by, for example, *Phelps* considerations), his Honor would have had his pick of extraordinary circumstances that have unfolded here warranting Rule 60(b)(6) relief. Engaging in a true *Phelps* Rule 60(b)(6) analysis, it is undeniable that the manifest injustice Fyk has experienced has been "extraordinary" on steroids:

(a) It is extraordinary that Judge White accepted Facebook's re-write of Fyk's allegations contrary to hornbook Rule 12(b)(6) review standards. And that Facebook re-write (and associated Judge White endorsement) has infected every single decision in this case. That is, until Facebook's Answering Brief finally decided to be truthful about what Fyk's Verified Complaint actually alleges.

(b) It is extraordinary that a self-determined "disqualified" Judge (Judge White, with substantial Tech investments at material times) decided to infect this case with his inherently biased decision-making for over half-a-decade pre-recusal.

(c) It is extraordinary that the newly appointed Judge (Judge Gilliam, Jr.) decided to engage in no independent thinking; *i.e.*, decided to ratify all prior Judge White decisions because that was the easiest thing to do.

(d) It is extraordinary that Fyk's courts have never applied the law uniformly to him; *i.e.*, that Fyk's courts have provided justice to other similarly-situated litigants.

(e) It is extraordinary that this Court refused to apply its own law (*Enigma*) to Fyk (when at all times since the inception of this case, Fyk has been arguing *Enigma's* "Good Samaritan[ism]" before *Enigma* even existed; again, Fyk's case was ahead of its time).

(f) It is extraordinary that this Court has just issued decisions post-Opening Brief (*Diep*) supportive of Fyk.

(g) It is extraordinary that the District Court (just by Fyk's unfortunate luck of the draw because, again, Judge Alsup, for example, would have decided otherwise) divested §230(c)(1) of the "Good Samaritan" general provision / intelligible principle overarching all of §230(c) in unconstitutional fashion.

The list goes on – the extraordinary circumstances lacing this case warranting Rule 60(b)(6) relief are incalculable. At every turn, Fyk has been wronged. If this case does not warrant 60(b)(6) relief, no case ever would.

There cannot be a conflation of Rule 60(b)(5) and 60(b)(6) as Facebook's Answering Brief suggests. Such would, among other things, run afoul of canons of statutory construction (*e.g.*, surplusage). Fyk deserved Judge Gilliam, Jr.'s independent 60(b)(6) analysis. It was wrong for Judge Gilliam, Jr. to opine that

because there was supposedly no change of law warranting 60(b)(5) relief there could necessarily be no 60(b)(6) analysis.

E. AI Confirms That Fyk Has Been Right All Along

We would imagine that, at this point, this Court might appreciate the voice of someone (or something) not named Fyk or Facebook. Enter AI, an objective analytical tool with no dog in the fight.[5] Here are the AI conclusions on several key issues of this case, all of which suggest that Fyk has always been in the right and Fyk's Courts have done nothing but wrong him thus far. In no particular order:

- This AI link covers several key issues: https://chatgpt.com/share/be1c9b20-2663-4701-add5-adbbb3692c25 [6]
    - Key AI conclusions (found within Ex. A) are (bold emphasis in original and italics added):
        - **"The Publisher or Speaker"**: Implies sole responsibility and liability, contrary to the protections intended by §230. **"A Publisher or Speaker"**: Allows for multiple responsible entities, preserving the immunity for service providers.

          Understanding this distinction is crucial in legal interpretations and applications of §230, as it fundamentally affects the liability and responsibilities of interactive computer services.

[5] "Machine learning is a field of study in artificial intelligence concerned with the development and study of statistical algorithms that can learn from data and generalize to unseen data, and thus perform tasks without explicit instructions." https://en.wikipedia.org/wiki/Machine_learning

[6] A printout of this link is attached as **Exhibit A** and incorporated fully herein by reference. Exhibits A-C all derived from ChatGPT 4o.

- If §230(c)(1) applies to all publication decisions regardless of motive, it would theoretically include decisions to restrict access to content as described in §230(c)(2). However, the explicit good faith requirement in §230(c)(2) suggests that for actions aimed specifically at restricting content, the service provider must meet this additional criterion to claim immunity under §230(c)(2). Therefore, while there is a broad overlap, each subsection provides specific protections that must be considered independently.

- The broad application of §230(c)(1) without considering the evidentiary requirements of §230(c)(2) could potentially circumvent the latter's provisions, leading to immunity even in cases of bad faith or anticompetitive behavior. This interpretation aligns with Judge Alsup's findings in the Dangaard decision, highlighting the need to scrutinize the use of §230(c)(1) to ensure it does not negate the intent and requirements of §230(c)(2).

- Fyk's case appears to have been dismissed under §230(c)(1) without adequately considering whether Facebook's actions fell within the scope of §230(c)(2), which requires good faith. This dismissal may have been in error if Facebook's conduct involved anti-competitive motives or material contributions to the harm, similar to the considerations in Henderson, Lemmon, Dangaard, Diep, and Enigma. Thus, the broad application of §230(c)(1) without considering the specific requirements of §230(c)(2) could indeed render the latter provision mere surplusage and potentially circumvent the statutory intent and legal standards.

- Based on the principles established in the cited cases, §230(c)(1) appears to have been misapplied to Fyk's case if the court did not properly consider whether Facebook's actions fell within the scope of §230(c)(2), which requires a good faith assessment. The evolving case law suggests that if a service provider's actions involve material contribution to the harm or are driven by improper motives, broad immunity under §230(c)(1) should not be granted without scrutinizing these factors. Therefore, the dismissal of Fyk's case under 230(c)(1) without adequately considering these aspects might have been in error.

- Fyk's Rule 5.1 Constitutional Challenge makes a compelling case that §230(c)(1) was applied unconstitutionally in his situation. The key issue is that the broad application of §230(c)(1) without incorporating the good faith / [Good Samaritan] requirement intended for content moderation actions … leads to an unfettered and arbitrary grant of immunity. This application is inconsistent with the principles established in Jarkesy and Enigma, which emphasize the need for a guiding intelligible principle and good faith in granting immunity. Thus, the dismissal of Fyk's case under §230(c)(1) likely failed to properly consider these constitutional requirements, making its application to his case unconstitutional.

- The dismissal of Fyk's case under §230(c)(1) was likely in error and potentially unconstitutional. The evolving case law supports a more nuanced application that includes the good faith requirements of §230(c)(2) and an adherence to constitutional principles requiring clear legislative guidance [Good Samaritan general provision / intelligible principle]. The court should reconsider the application of §230(c)(1) in light of these considerations and ensure a fair and constitutionally sound outcome.

- Here is another AI link hitting on key issues:

  https://chatgpt.com/share/0d723c71-9da7-462e-a75b-e1a09fd273d6 [7]

  - The key AI conclusion (found within Ex. B) is:

    - Based on the recent case law, there is a strong argument that the courts may have erred in dismissing Fyk's claims under §230(c)(1). The principles established in Enigma, Henderson, Lemmon, and Dangaard suggest that §230(c)(1) immunity should not extend to actions driven by anti-competitive motives or wrongful conduct by the platform itself. Therefore, the court should have considered these precedents and the specific nature of Fyk's allegations before dismissing his claims.

[7] A printout of this link is attached as **Exhibit B** and incorporated fully herein by reference.

- Here is another AI link hitting on key issues:

  https://chatgpt.com/share/afc44537-2096-4c3f-9421-2c62bf3086a8 [8]

  - Key AI conclusions (found within Ex. C) are (bold emphasis in original):

    - The evolving case law and recent judicial scrutiny of 230(c)(1) support granting Fyk's Rule 60(b) motion. The principles established in **Enigma**, **Lemmon**, and **Henderson**, combined with the constitutional challenge, argue that the original dismissal was based on an outdated and overly broad interpretation of §230(c)(1). Fyk's case should be reconsidered to address these substantial legal developments and potential constitutional issues.

    - The relevance of **Diep v. Apple** to overturning Fyk's dismissal lies in the case's judicial approach to platform liability and anti-competitive behavior. By leveraging the principles and reasoning applied in **Diep v. Apple**, Fyk can argue that his case was wrongly dismissed based on an outdated and overly broad interpretation of §230(c)(1). This supports his motion for relief under Rule 60(b), highlighting the need for a re-evaluation of his claims in light of evolving legal standards and judicial scrutiny of tech platforms' practices.

In sum, an objective machine (arguably smarter than any human being) concludes correctly. It is well past time for this Court to do likewise.

IV. Conclusion

For all of the foregoing reasons, whether considered separately or together, Fyk respectfully requests this Court's reversal of Judge Gilliam, Jr.'s January 12, 2024, Order Denying [D.E. 61] and [D.E. 66], [D.E. 74], *see* 1-ER-2-5, and remand

[8] A printout of this link is attached as **Exhibit C** and incorporated fully herein by reference.

to the District Court with instruction to eradicate Facebook's CDA immunity defense and move on with the merits of the case (*e.g.*, discovery), or, at the very least, with instruction to grant leave to amend the Verified Complaint.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Ninth Circuit Rule 32-1(b) because, taking into consideration the exclusions set forth in Ninth Circuit Rule 32-1(c), the type-volume limitation does not exceed 7,000 words. This Reply Brief includes 6,914 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. And, pursuant to Ninth Circuit Rule 32-1(e), Ninth Circuit Form 8 is attached hereto as **Exhibit D**.

Dated: July 1, 2024.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2024, 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
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