NO. _____

In the Supreme Court of the United States

JASON FYK,

Petitioner,

v.

FACEBOOK, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This writ of certiorari centers around the proper scope of immunity conferred by subsection (c) of the Communications Decency Act of 1996 (47 U.S.C. §230, "CDA").

(1) **Procedural:** Does §230(c)(1) confer "immunity from suit" warranting dismissal at the pleading stage, or does it operate as a qualified affirmative defense requiring a factual showing (developed through discovery) of entitlement to §230(c)(2)'s civil liability protections?

(2) **Textual:** Does §230(c)(1) protect affirmative first-party conduct by an interactive computer service provider or user, or is the scope of §230(c)(1) limited to passive "computer service" functions relating to third-party published content?

(3) **Congressional intent:** Does Congress' §230(c) "Good Samaritan" intelligible principle (general provision/intent) apply to both §§230(c)(1) and 230(c)(2)?

(4) **Constitutional:** Is §230(c)(1) unconstitutional (*e.g.*, deprivation of due process and/or equal protection under the law), as applied, when it (a) functions as absolute immunity from suit, and/or (b) is not subject to the "Good Samaritan" general provision?

LIST OF PROCEEDINGS

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

No. 18-cv-05159

Jason Fyk v. Facebook, Inc

Initial Dismissal Order: June 18, 2019. (App.19a)

First Order Denying Motion to Set Aside Judgment: November 1, 2021

Final Order Denying Second Motion to Set Aside Judgment: January 12, 2024 (App.8a)

U.S. Court of Appeals, Ninth Circuit (first appeal)

No. 19-16232

Jason Fyk v. Facebook, Inc.

Final opinion: June 12, 2020

Supreme Court of the United States

No. 20-632

Jason Fyk v. Facebook, Inc

Certiorari denial: January 11, 2021

U.S. Court of Appeals, Ninth Circuit (second appeal)

No. 21-16997

Jason Fyk v. Facebook, Inc.

Final opinion: October 19, 2022

Reconsideration denial: November 9, 2022

Mandate: November 17, 2022

Supreme Court of the United States

No. 22-753

Jason Fyk v. Facebook, Inc

Certiorari denial: April 17, 2023

U.S. Court of Appeals, Ninth Circuit (third appeal)

No. 24-465

Jason Fyk v. Facebook, Inc.

Final Opinion: December 11, 2024. (App.1a).

Order denying petition for rehearing en banc: January 15, 2025. (App.25a).

Mandate: January 23, 2025. (App.6a).

Order denying motion to recall mandate: March 4, 2025. (App.7a).

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The opinion of the United States Ninth Circuit Court of Appeals, dated December 11, 2024 is included at App.1a. The opinion of the U.S. District Court, N.D. California, dated January 12, 2024 is included at App.8a.

JURISDICTION

On December 11, 2024, the Ninth Circuit issued its Memorandum, affirming the N.D. California January 12, 2024, decision in favor of Facebook. (App.1a). Rehearing *en banc* was sought by Fyk on December 24, 2024. (App.74a). The Ninth Circuit denied Fyk's rehearing *en banc* request on January 15, 2025. (App.25a). On January 23, 2025, the Ninth Circuit entered its Mandate. (App.6a). On March 3, 2025, Fyk filed his Motion to Recall Mandate. (App.27a). Less than 24-hours later, on March 4, 2025, the Ninth Circuit entered an Order on Fyk's Motion to Recall Mandate that read "Denied." (App.7a).

The basis for jurisdiction in Northern District of California Court was 28 U.S.C. §1332. The basis for jurisdiction in the Ninth Circuit Court was 28 U.S.C. §1291. This Court's jurisdiction is based on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

47 U.S.C. §230, the Communications Decency Act ("CDA") is included at App.802a.

INTRODUCTION

Big Tech is unlawfully censoring millions of Americans, and the United States Government is wholly responsible.

Section 230 of the CDA was never intended to suppress speech or shield corporations from *all* accountability. It was designed to foster a free and open internet where diverse voices could thrive. Yet, through years of judicial misinterpretation, it has been weaponized to chill free speech, crush competition, and grant Big Tech unchecked power.

This Petition demonstrates how judicial misapplication and legal evasion have transformed §230 from a qualified affirmative defense into a tool for censorship and anticompetitive conduct. Our solution is straightforward: *apply the statute as written, consistent with Congressional intent, and constitutional guarantees.* This would restore §230(c)(1) to its proper definitional role and reinstate §230(c)(2)'s good faith requirements. Such a correction realigns §230 with its intended purpose, reestablishes accountability, and prevents further constitutional violations.

Over time, circuit courts (primarily the Ninth Circuit) have eroded statutory safeguards by judicially

conferring "*immunity from suit*," contrary to the Federal Rules of Civil Procedure and constitutional protections such as due process, equal protection, and free speech. As a result, judicial institutions have enabled the rise of Big Tech monopolies and the Censorship Industrial Complex, deprived millions of Americans of their rights, and caused immeasurable harm — including loss of life.

This case presents the ideal vehicle to resolve the widespread confusion surrounding §230's proper interpretation and application. Since Fyk's 2019 dismissal, courts have fractured on core legal issues:

- **Sister Circuit Conflicts:** The Fourth, Third, and Fifth Circuits (*e.g.*, *Henderson v. Public Data*, 53 F.4th 110 (4th Cir. 2022), *Anderson v. TikTok*, No. 22-3061, 2024 WL 3948248 (3d Cir. Aug. 27, 2024), *A.B. v. Salesforce*, 123 F.4th 788 (5th Cir. 2024) contradict the Ninth Circuit's expansive and inconsistent interpretation of §230(c)(1) in *Fyk v. Facebook*.
- **Intra-Circuit Conflicts:** Recent Ninth Circuit cases (*e.g.*, *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019); *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021); *Diep v. Apple, Inc.*, No. 22-16514, 2024 WL 1299995 (9th Cir. Mar. 27, 2024) undermine the "rationale" used against Fyk by his Ninth Circuit panel.
- **District Court Conflicts:** Northern District of California rulings (*e.g.*, *Dangaard v. Instagram, LLC,* No. C 22-01101 WHA, 2022 WL 17342198 (N.D. Cal. Nov. 30, 2022); *RNC v. Google, LLC*, No. 22-cv-01904-DJC-DJP, 2024 WL 3595538

(E.D. Cal. Jul. 31, 2024); *Rumble, Inc. v. Google, LLC*, No. 21-cv-00229-HSG, 2022 WL 3018062 (N.D. Cal. Jul., 29, 2022)) expose further judicial inconsistency.

Currently, different courts apply §230(c)(1), at the pleading stage, in diametrically opposed ways, even in cases with similar facts and claims, including anticompetitive allegations. Some litigants, like Fyk, are denied any opportunity to proceed, while others are allowed to test their claims through discovery. A stark example is the comparison between *Dangaard* and *Fyk*. Both were filed in the Northern District of California and involved nearly identical issues. Judge Alsup in *Dangaard* properly denied immunity, while Judges White and Gilliam, Jr. in *Fyk* misapplied §230(c)(1) as absolute immunity, shielding Facebook from all alleged conduct. Justice should not hinge on the luck of the judicial draw. Litigation demands predictability, consistency, and uniformity,[1] none of which exist in California §230 jurisprudence.

The very courts responsible for these errors now suggest that only this Court can correct them, exemplifying judicial evasion: **"[This] is the final word on the matter unless and until the Supreme Court grants certiorari (which it has twice declined to do in this case already)."** (App.12a). (emphasis added).

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[1] Indeed, even the Ninth Circuit recognizes as much: "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).

Mired in legal conflict and constitutional violations, Fyk has been denied all remedy – no hearings, no amendments, no substantive review, no constitutional challenge, and potentially no legal representation. In the same order, Judge Gilliam, Jr. threatened to revoke the *pro hac vice* status of Fyk's lead counsel, Jeffrey L. Greyber, Esq., if he appeared again before the Court prior to Supreme Court intervention. Therefore, without this Court's review, the manifest injustice Fyk has endured will continue. Compounding the constitutional concerns, Judge White recused himself five years into the case, but only after his deep financial ties to Big Tech were revealed.

The broader legal question here is simple: was §230(c)(1) ever intended to confer absolute *immunity from suit* for all first-party conduct, without justification or the benefit of discovery? If so, that interpretation nullifies §230(c)(2), contradicts Congressional intent, and deprives Americans of due process. That cannot be.

Without this Court's immediate intervention, Americans will remain without consistent legal remedy, and platforms will continue to treat §230(c)(1) as a "get-out-of-jail-free card."

Justice Thomas has repeatedly warned of the urgent need to clarify §230:

> Notwithstanding the statute's narrow focus, lower courts have interpreted §230 to 'confer sweeping immunity' for a platform's *own actions*.... [This Court needs to] squarely address §230's scope.
>
> Although the Court denies certiorari today, there will be other opportunities in the future. But, make no mistake about it – ***there***

> ***is danger in delay***. Social-media platforms have increasingly used §230 as a get-out-of-jail free card. Many platforms claim that users' content is their own First Amendment speech. Because platforms organize users' content into newsfeeds or other compilations, the argument goes, platforms engage in constitutionally protected speech…. When it comes time for platforms to be held accountable for their websites, however, they argue the opposite. Platforms claim that since they are *not* speakers under §230, they cannot be subject to any suit implicating users' content, ***even if the suit revolves around the platform's alleged misconduct***. In the platforms' world, they are fully responsible for their websites when it results in constitutional protections, ***but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry. The Court should consider if this state of affairs is what §230 demands***. I respectfully dissent from the denial of certiorari.

Doe v. Snap, Inc., 144 S.Ct. 2493-2494 (Jul. 2, 2024) (internal citations omitted) (bold italics added, normal italics in original). *See also*, *e.g.*, *Doe v. Facebook, Inc.*, 142 S.Ct. 1087 (Mar. 7, 2022); *Enigma v. Malwarebytes*.

Despite Justice Thomas's prescient warnings and Fyk's sustained efforts, judicially-created "ambiguity" surrounding §230 persists. Big Tech continues to "enjoy greater protections from suit than nearly any other

industry," because courts continue to extend §230 beyond its text and congressional intent.

Justice Thomas is correct, there is great "danger" delaying "address[ing] §230's scope;" *i.e.*, in continuing to allow lower courts to "interpret[ ] §230 to 'confer sweeping immunity' for a platform's *own actions*." *Id.* at 2393. For example, had this Court granted Fyk's earlier petitions, the rise of the Censorship Industrial Complex might have been averted. Elections might not have been influenced, lives might have been saved, and more livelihoods (like Fyk's) might have been preserved. Facebook's destruction of Fyk's business to protect its own interests is not an isolated situation, it is a prime example of Big Tech's unrestrained anticompetitive conduct.

In sum, Big Tech's nefarious conduct, censorship, tortious interference, unfair competition, election interference, and more, will continue unless this Court "address[es] §230's scope" through this case, the ideal vehicle to correct the judicial distortion of the CDA. A ruling that restores Congressional intent (*e.g.*, the Good Samaritan provision) and curtails unwarranted immunity would end the absurdity of Big Tech "enjoy[ing] greater protections from suit than nearly any other industry."

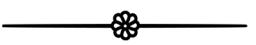
If this Court holds that §230(c)(1) must be applied strictly as written (not as immunity from suit, and not as a shield for first-party conduct), then all supposed ambiguity vanishes – the statute is abundantly clear when read faithfully.

For three decades, the Ninth Circuit's §230 rulings have been consistently inconsistent, lacking coherent *stare decisis*. By absolving corporations of essentially all

liability, courts empowered them to eliminate competition, consolidate power, control public discourse (even on behalf of the government), and escape accountability.

This unchecked merger of Big Tech and government is now a stark reality. Without this Court's intervention, the future of free speech and fair competition is uncertain. It is time to restore accountability. SCOTUS must act, preferably by directly resolving the issue, although, SCOTUS has multiple avenues to resolve this issue: grant certiorari, issue a writ of mandamus, or remand with clear instructions.

Simply put, the implications of this case go far beyond just Fyk, the judicial expansion of §230 has enabled unfair competition, chilled due process, and facilitated public/private censorship on an unprecedented scale. Without this Court's action, the constitutional violations Americans face will persist, public trust in the judiciary will continue to erode, and the alliance between Big Tech and government will continue to fester. The future of the Constitutional Republic is in SCOTUS' hands.



STATEMENT OF THE CASE

Fyk's Verified Complaint alleged Facebook engaged in fraudulent, anticompetitive, tortious, and extortionate business practices, breaching its legal duties, and destroying his multimillion-dollar online marketing and application business, which had over 25,000,000 followers and generated more than $300,000.00/month. ***Fyk's claims do not concern liability for third-party content (the intended scope of §230(c)(1));***

but, rather, Facebook's predatory business practices.

Facebook lured users like Fyk into building their businesses on its purportedly "free" platform for "all ideas," only to later implement anticompetitive content manipulation schemes, such as its extortionate "paid-for-reach" (*i.e.*, sponsored) advertising model, which displaces other users' content and artificially suppresses visibility for those who refuse to pay, like Fyk. Facebook's deceptive trade practice fraudulently masked its profit-driven content restrictions as so-called "good faith" policy enforcement, while unfairly manipulating user reach to serve its financial interests.

By exploiting its own policies, Facebook reduced its users to unpaid laborers, unfairly profiting from their hard work, while simultaneously inviting the rise of the Censorship Industrial Complex.

Facebook deliberately suppressed Fyk's "free" organic reach and speech on Facebook's purportedly "free" "platform for all ideas" by purposefully interfering with Petitioner's business property (a violation of Facebook's legal duties to Fyk), while redirecting that same stolen reach to his competitor, Red Blue Media (anonymously identified as "a competitor" in Fyk's Verified Complaint), through unlawful *backroom* deals that enriched Facebook. Facebook, motivated by commercial gain, deliberately manipulated the availability of Fyk's business assets (a material contribution to both the development of content and unlawfulness of the conduct) by unpublishing six of his pages and rendering the rest of his business assets worthless (relatively unavailable) under the pretext of vague, unidentified, and unjustified policy violations. Yet, when Fyk's former colleague requested reinstatement

of Fyk's assets – his page reach / value, on behalf of Fyk, Facebook made its terms clear – reinstatement would only happen if Red Blue Media took ownership of Fyk's pages (another material contribution).

Left with no viable alternative, Fyk was forced to sell several of his business pages at a drastically reduced value (the only remaining value left to him) to his competitor (Red Blue Media) based on the *quid pro quo* agreement made between Red Blue Media and Facebook. Under this clandestine arrangement, Facebook would reinstate Fyk's pages' reach (another material contribution) – their true value – only if Red Blue Media became the owner. (App.880a-883a, App.307a-308a).

Critically, Fyk built his business on Facebook based on the free, organic reach the platform promised, only to have it fraudulently stripped and redirected to a competitor, Red Blue Media, which had paid Facebook approximately $22,000,000 more in "sponsored" advertising (*i.e.,* paid-for content development). Facebook directly facilitated and participated in this transfer, reinstating the very same content it had previously used to fraudulently justify restricting Fyk.

Facebook's reinstatement of Fyk's purportedly offensive content, in its exact same *form* (substantively the same) not *function* (new ownership, increased availability, and value), *prima facie* proves the initial restriction by Facebook was fraudulent. Facebook's backroom dealings to restore Fyk's asset value exclusively for its preferred advertising partner, Red Blue Media, and not Fyk, exposes its true motives – anticompetitive, extortionate, and tortiously motivated interference with Fyk's business. This unlawful conduct underscores the deceptive nature of Facebook's *entire* (content develop-

ment) business model and its violations of legal duties to its customers than its role as "the publisher or speaker" of Fyk's content, and this unlawful conduct by no means constitutes the conduct of a "Good Samaritan" and/or "good faith" conduct, as required by §230 and §230(c)(2), respectively.

At no point during litigation (not that Fyk was afforded any litigation) has Fyk ever attempted to treat Facebook as "the publisher or speaker" of his content (*i.e.*, Fyk). In his Verified Complaint, Fyk sought legal redress and accountability for Facebook's unlawful business practices. Facebook's predatory content development/provision scheme was not designed to moderate content neutrally or in good faith, but to artificially manipulate/restrain its own competition, enriching itself while harming competitors in the online information content provision market, like Fyk and all other users. This constitutes unfair competition, fraud, civil extortion, and tortious interference. It exposes Facebook's *bait-and-switch* business model, one built on exploiting users' success for its own financial gain.

Again, this case has nothing to do with content or content-based harms or holding Facebook accountable for harms caused by another information content provider. Rather, Fyk's claims are about Facebook's breach of its legal duties to users like Fyk, a deliberate scheme that exploited its dominance to eliminate competition in the online information provision market.

REASONS FOR GRANTING THE PETITION

Courts have increasingly strayed from the plain text, congressional intent, and constitutional limitations of §230. Section 230 was intended as a narrow liability protection, but has been judicially transformed into overbroad immunity affording Big Tech unfettered authority over speech, competition, and commerce. These errors extend beyond substantive misinterpretations – courts have also distorted procedural rules, improperly converting an affirmative defense into a jurisdictional bar, denying plaintiffs due process and eliminating legal remedies.

At its core, this Petition asks this Court whether a litigant in the Ninth Circuit is afforded the same due process as a litigant in the Third, Fourth, and Fifth Circuits when challenging anti-competitive conduct by a commercial enterprise that invokes CDA protection.

I. PROCEDURAL ANALYSIS

Contrary to the bulk of California case law, §230 does not provide "immunity from suit." Rather, it offers limited civil liability protection, available only if a platform meets the statute's specific requirements. This includes justifying its content moderation as good faith prior restraint, to prevent harm, and demonstrating that its restraints on third-party liberties comply with Congress' "Good Samaritan" intelligible principle.

Section 230(c)(1) does not operate as an unlimited liability shield. It merely states that platforms or users cannot be treated as "the publisher or speaker" of third-party content, but only when they take *no*

affirmative action regarding that content. If a platform does absolutely nothing (meaning it never considers or engages with the content) it cannot be held responsible for failing to prevent harm. By contrast, §230 (c)(2) permits platforms to restrict/de-develop content but imposes conditions – §230(c)(2)(A) applies when restrictions occurs in good faith, and §230(c)(2)(B) applies when platforms provide tools for users to filter content themselves.

A platform that directly considers and restricts content cannot unilaterally declare its actions were taken in good faith, nor can a court presume good faith without factual determination. Good faith is a question for the trier of fact, not a matter for dismissal at the pleading stage (let alone dismissal with prejudice). If a platform fails to establish that it acted as a "Good Samaritan" to prevent harm, §230 protections do not apply. Yet, courts have repeatedly disregarded this fundamental requirement, allowing Big Tech to evade fact-based scrutiny, improperly shielding them from accountability.

The distinction between civil liability protection and immunity from suit is critical. Civil liability protection allows a party to be sued, requiring them to establish a legal defense (*i.e.*, affirmative defense) in court (after parties have engaged in discovery). Immunity from suit, by contrast, bars litigation entirely, preventing any factual inquiry – precisely what has occurred here.

Correctly read, §230 provides only limited civil liability protection, not immunity from suit. If platforms are not required to justify their actions, the good faith requirements of §230(c)(2) are rendered meaningless, and so too the "Good Samaritan" intelligible principle.

The statute's plain text and intent (discussed below) confirm that platforms must defend their conduct in court rather than receive automatic protection without scrutiny.

Over time, courts have improperly transformed §230(c)(1) into an immunity from suit (akin to sovereign immunity), allowing platforms to escape litigation before any facts can be examined. This core procedural misapplication deprives plaintiffs of due process and eliminates their right to challenge whether §230 factually applies to their case.

***Energy Automation Systems v. Xcentric Ventures*: Lost Procedural Precedent**

From the outset of this case, Fyk recognized the District Court had applied an inapposite analytical framework and relied on distinguishable case law, improperly converting §230(c)(1) into a "*carte blanche*," "*sovereign-like*" immunity from suit. This approach circumvented the necessary procedural process for factual analysis.

In his very first brief, filed back in 2018, Fyk astutely identified this core procedural error:

> Because Facebook's novel Subsection (c)(1) argument is a 'matter outside the pleadings,' the Court should 'exclude[ ]' the Subsection (c)(1) argument or treat the argument 'as one for summary judgment under Rule 56 [and allow] [a]ll parties… a reasonable opportunity [*i.e.*, discovery] to present all material that is pertinent to the motion [for summary judgment].' Fed. R. Civ. P. 12(d).

(App.776a-777a).

This fundamental procedural safeguard has been entirely ignored in *Fyk* for seven years, allowing Facebook to evade all factual scrutiny by misrepresenting §230(c)(1) at the pleading stage.

As an example of the disparate application of the Federal Rules of Civil Procedure and statutory interpretation of the CDA, in *Energy Automation Systems, Inc. v. Xcentric Ventures, LLC*, No. 3:06-1079, 2007 WL 1557202, *12-15 (M.D. Tenn. May 25, 2007), Judge Aleta Trauger properly held that when a §230 defense depends on disputed facts, courts *must* convert a motion to dismiss under Rule 12(b)(6) into a Rule 56 motion for summary judgment, allowing for discovery. The court held that where factual disputes exist, dismissal is improper. Yet, in Fyk's case, and in many others, this procedural step was eliminated.

Fyk's Verified Complaint, constituted fact-based evidence, automatically creating a factual dispute that the courts should have accepted as true at the motion to dismiss pleading stage. Rule 12(b)(6) is a procedural safeguard, not a mechanism for summarily granting immunity. If factual disputes exist (*as they did here*), dismissal is improper and the case should proceed through discovery.

Despite this, courts have misused/abused the pleading stage to discretionarily grant platforms premature immunity, dismissing cases before any factual development. Section 230 was never intended as a jurisdictional bar, and affirmative defenses should not justify dismissal unless the defense is clear from the face of the complaint, such as when a plaintiff directly seeks to hold a platform liable as "the publisher or speaker" of third-party content. Fyk did not do so. His Verified Complaint alleged that Facebook

acted in bad faith for anticompetitive reasons, yet Fyk's courts ignored this distinction. Plainly, Fyk was not attempting to treat Facebook as "the publisher or speaker" of his own content (*i.e.,* as himself).

The trial judge in Fyk's case (Judge Jeffrey White) erred by failing to resolve factual disputes in Fyk's favor, and did not convert Facebook's §230(c)(1) argument into a Rule 56 summary judgment proceeding later resolvable after discovery transpired. Instead, Judge White summarily adopted Facebook's misrepresentations at the dismissal stage, disregarding Rule 12(b)(6) standards entirely, failing to recognize §230(c)(1) as an affirmative defense.

Facebook's sole factual justification relied on a fraudulent misrepresentation regarding the disposition of a mistakenly listed page in Fyk's Verified Complaint – www.facebook.com/takeapissfunny. (App.837a-839a). Fyk never owned or controlled the page, and Facebook knew it had nothing to do with urination. The phrase "Take a Piss" is British slang for satire (regarding something "funny"). Moreover, the page was part of a coerced sales agreement between Fyk and Red Blue Media, structured around Facebook's *backroom*, anticompetitive *quid pro quo* dealings. Despite knowing the truth, Facebook misrepresented this to the District Court, not just to justify its actions, but to defame Fyk. This heavily disputed factual misrepresentation alone should have procedurally precluded dismissal.

Rather than addressing these disputed facts, Judge White adopted Facebook's falsehoods in the first paragraph of his dismissal order, violating basic procedural safeguards. Fyk, trusting the court to recognize the misrepresentation, did not rebut it in his reply brief. Instead, the court legitimized the lie, amplifying

the harm. Judge White's failure did not merely dismiss Fyk's case, it compounded the reputational and legal harm Facebook had inflicted.

Fyk has never been given an opportunity to present the facts of his case. His complaint was dismissed without discovery, factual examination, or leave to amend, based solely on Facebook's false version of events, which the court improperly accepted as true.

Judge White's ruling contains several fundamental contradictions, even going so far as employing Ninth Circuit precedent to contradict Ninth Circuit precedent. For example, he cited *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009), and *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008), to justify dismissing Fyk's factual claims, despite *Barnes* explicitly holding that neither §230(c)(1) nor §230(c)(2) provides immunity from suit:

> Section 230(c) has *two parts*. Yahoo relies exclusively on the first part [*i.e.*, 230(c)(1)], which bars courts from treating certain internet [computer] service providers as publishers or speakers. Looking at the text, it appears clear that *neither this subsection nor any other* declares a general immunity from liability deriving from third-party content, as Yahoo argues it does. '*Subsection (c)(1) does not mention 'immunity' or any synonym*.'

Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100 (9th Cir. 2009) (emphasis added).

Despite the Ninth Circuit Court's clear language in its *Barnes* decision, Judge White misapplied *Barnes* to justify premature immunity. Judge White stated: "[t]o determine whether a plaintiff's theory of liability

treats the defendant as **a publisher**,..." Notably, Judge White *altered the statutory language*, writing "a publisher" instead of "the publisher" (a critical textual error discussed in more detail below). He continued: "[w]hat matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." (App.23a).

> Substituting Fyk's allegations, it would read:
>
> What matters is whether [unfair competition, fraud, civil extortion, or tortious interference] inherently requires the court to treat [Facebook] as the publisher or speaker of content provided by [Fyk.]

Clearly, Fyk's allegation did not.

Judge White further cited *Barnes*: "[i]f the duty that the plaintiff alleges was violated by defendant derives from the defendant's status or conduct as a 'publisher or speaker,'... section 230(c)(1) precludes liability. (App.23a) citing *Barnes*, 570 F.3d at 1102.

§230(c)(1) does not preclude liability based on a defendant's conduct as **"a"** publisher or speaker (again, a critical textual error discussed in more detail below), that function belongs to §230(c)(2). Judge White also stated: "[p]ublication involves the reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." (App.23a) citing *Barnes*, 570 F.3d at 1102.

While publication may involve "reviewing, editing, and deciding whether to publish or withdraw" third-party content, these actions constitute content "creation" or "development" as described under §230(f)(3)

and all fall within the first-party conduct explicitly governed by §230(c)(2).

Judge White then cited *Roommates.com*: "[a]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." (App.23a) citing *Roommates.com*, 521 F.3d at 1170-71.

Section 230(c)(1), *by itself*, does not protect "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." That function explicitly belongs to §230(c)(2), which applies only under specific conditions.

Nowhere in §230 does Congress grant platforms immunity from suit for all publication decisions, yet that is precisely how the trial court applied §230(c)(1) contrary to *Barnes*, using it to fully immunize Facebook and deprive Fyk of legal remedy.

Courts across the country, including in Fyk's case, have deprived litigants of due process by misapplying §230(c)(1) as a "sovereign-like" immunity from suit at the pleading stage – despite controlling precedent like *Barnes* expressly rejecting such treatment. Dismissal at the pleading stage without allowing factual investigation, or the opportunity to be heard, undermines the most basic procedural safeguards. (App.776a-777a, App.28a-48a).

Facebook also relied on *Levitt v. Yelp! Inc.*, No. C 10-1321MHP, 2011 WL 131532320, *6 (N.D. Cal. Mar. 22, 2011) and *Nemet Chevrolet, Ltd. v. Consumeraffairs .com, Inc.*, 564 F. Supp. 2d 544, 551 (E.D. Va. 2008) to justify immunity from suit, but neither case holds that §230(c)(1) is an automatic bar to litigation. Instead, both affirm that §230 is an affirmative defense (defense

to liability), not immunity from suit. If properly applied, Fyk's case should have been converted to a Rule 56 motion and proceeded to discovery.

The procedural misapplications of §230 has led many courts to improperly confer Big Tech with blanket immunity from suit. Courts have consistently failed to distinguish between an affirmative defense and a jurisdictional bar, depriving plaintiffs of due process. Key procedural safeguards (such as converting dismissal motions into summary judgment when disputed facts exist, and letting discovery properly run its course before engaging in summary adjudication) have been bypassed, violating fundamental legal standards. This misapplication has rendered statutory good faith requirements meaningless, contradicting the clear text and intent of the law. If this Court simply affirms that §230 does not confer protections beyond its written text or Congressional intent, it will correct the statute's misapplication and restore proper legal accountability to the Internet.

II. STATUTORY ANALYSIS

From the outset, Fyk has argued that §230 has not been applied as written, as intended by Congress, or in a constitutionally sound manner. The District Court relied on a fundamental procedural defect (discussed above) to transform §230(c)(1) into an improper immunity from suit, nullifying §230's intended purpose. The Ninth Circuit then misapplied similar flawed precedent out of context to again sidestep meaningful review. Judge White declared Facebook "sovereignly" immune, and the Ninth Circuit simply rubber-stamped that erroneous and unconstitutional decision without ever addressing any of the core statutory issues.

Below is a condensed summary of the key statutory arguments detailed in Fyk's prior briefings before this Court – the textual error, the Congressional intent issue, and the ongoing "as applied" Constitutional due process violations. While the deprivation of due process and free speech are central to this Petition, the constitutional issues need not be reached if this Court corrects either the procedural defect or the statutory misapplications (text or intent) discussed here.

Because the constitutional concerns stem directly from the nullification of congressional intent (*i.e.*, the intelligible principle – Congress's mandate), they are included in this section. If this Court corrects either the statutory or procedural errors, however, the constitutional question can be avoided entirely. We accordingly do not focus extensively on constitutional issues here.

A. Textual Analysis of §230(c)(1)

A small grammatical mistake can dramatically alter the meaning of a law. Section 230(c)(1) states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.*

Courts have, however, repeatedly misquoted and misapplied this provision. In *Fyk*, Judge White rewrote the statute, stating: "[b]ecause the CDA bars all claims that seek to hold an interactive computer service liable as ***a publisher*** of third-party content, the Court finds that the CDA precludes Plaintiff's claims." (App.23a). (emphasis added).

By replacing the definite article "the" with an indefinite article "a," the court changed the law's meaning. Given a proper, textually sound interpretation, the statute prevents platforms or users of platforms from being treated as "the" original publisher of third-party content with which they have no publishing involvement. The statute does not, however, grant blanket immunity ("bar all claims") for all publishing actions. Courts have ignored this critical article distinction, distorting the law to mean that platforms can never be treated as publishers in the general sense, no matter how actively they manipulate content. This critical textual error has transformed a very narrow protection into absolute publisher immunity, allowing platforms to claim legal protection for their own *first-party* editorial choices, a result Congress never intended.

B. The Surplusage Problem – Nullification of §230(c)(2)

Courts have also misinterpreted §230(c)(1) in a way that renders §230(c)(2) meaningless (*i.e.*, mere surplusage). This Court has repeatedly held that statutes must be interpreted to give effect to every word, including the word "the," avoiding interpretations that render any part superfluous. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[i]t is our duty to give effect, if possible, to every clause and word of a statute."); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.")

Assuming *arguendo* §230(c)(1) already provides absolute publishing immunity, then §230(c)(2) serves no practical purpose.

The text of Section 230(c)(2) can be found in the Appendix along with the entire CDA excerpt. Section 230(c)(2) explicitly conditions liability protection on "good faith" consideration, yet courts (again, California courts) have erased this prerequisite motive by misapplying §230(c)(1) as a jurisdictional bar. Again, assuming *arguendo* that California courts are correct, that platforms can never be treated as publishers under §230(c)(1), then §230(c)(2)(A) becomes mere surplusage – "superfluous, void, or insignificant."

Reading the CDA as a whole and coherently, its separate provisions must be given distinct purposes:

- §230(c)(1) prevents platforms from being treated as the original publisher of third-party content.
- §230(c)(2)(A) grants first-party liability protection only for good faith content restrictions.
- §230(c)(2)(B) protects platforms when they provide tools for others to restrict content.

By misinterpreting §230(c)(1) as an immunity from suit, courts have expanded its scope beyond its text, overriding §230(c)(2), and nullifying Congress's "good faith" safeguard in the process.

Justice Thomas identified this very same surplusage issue in *Enigma Software Group USA, LLC*:

> Had Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in §230(c)(1): No provider 'shall be held liable' for information provided by a third party. After all, it used that exact categorical

> language in the very next subsection, which governs removal of content. §230(c)(2).

Malwarebytes, Inc. v. Enigma Software Group USA, LLC, 141 S.Ct. 13, 16 (2020).

Justice Thomas highlights a critical point – Congress deliberately wrote §230(c)(2) to govern first-party content restrictions. Had §230(c)(1) truly provided immunity for all publishing decisions, Congress would not have needed to create a separate provision governing publishing decisions.

If §230(c)(1) truly protected all first-party content moderation (which, again, it absolutely does not), then §230(c)(2) would be meaningless. Congress would not have required "good faith" if platforms were already automatically immune for their own publishing conduct.

C. The Development Hardline – When A Platform Becomes "A" Publisher

Courts have long struggled to draw the definitive content development hardline between passive hosting and affirmative content development; *i.e.*, determining when §230(c)(1) no longer applies and the §230(c)(2) analysis begins. This failure to draw a definitive line has led to contradictory rulings, such as *Dangaard v. Instagram* compared to *Fyk v. Facebook*. In *Dangaard*, Judge Alsup astutely rejected Facebook's §230(c)(1) immunity from suit argument, recognizing it was being used as a "backdoor to CDA immunity contrary to the statute's history and purpose." In contrast, Judge White in *Fyk* granted blanket immunity without any factual analysis. The application of a federal statute cannot be left to the luck of the judicial draw;

consistency in statutory interpretation is essential to ensuring justice and accountability.

Congress clearly intended for platforms to be liable when they create or develop content, even in part. Section 230(f)(3) defines an "information content provider" as: "Any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.*

Platforms cross the development hardline the moment they take any affirmative editorial actions (*i.e.*, consider the content being provided). Active, first-party intent-driven content consideration is a material form of content development, which is not protected by §230(c)(1). In fact, *§230(c)(1) does not protect any affirmative first-party conduct, at all.*

II. Congressional Intent and Constitutional Analysis

The "Good Samaritan" principle has been lost in the judicial confusion surrounding its proper application.

Many courts' interpretation of §230(c)(1) is not just grammatically, procedurally, and structurally flawed, their misinterpretations directly contradict Congress's articulated "Good Samaritan" intelligible principle. Under the nondelegation doctrine, Congress cannot grant private entities unfettered power (*e.g.*, to censor speech without accountability) without clear guidelines. An intelligible principle ensures proper limits: "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W.*

Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

Section 230(c)'s general provision / intelligible principle provides this guiding principle: "(c) Protection for 'Good Samaritan' blocking and screening of offensive material." Congress explicitly directed platforms to act as "Good Samaritans" across all §230(c) (hence, the "Good Samaritan" intelligible principle being placed by Congress at the start of §230(c)) in exchange for legal protection. A Good Samaritan is someone who intervenes to prevent harm or assists others to prevent harm, not someone acting for self-interest or competitive advantage. California courts, however, have embraced the absurd prerogative that the Good Samaritan general provision somehow only applies to §230(c)(2), thereby transforming §230(c)(1) into a limitless liability shield, allowing platforms to act in bad faith, restrict competitors, and even silence lawful speech at the Government's behest, directly contradicting Congress's general intent.

A. Affirmative Defenses – the Self-Defense Analogy

Section 230 functions as an affirmative defense, meaning platforms must justify their actions under the law, not claim automatic immunity from suit. This is analogous to self-defense in criminal law:

- Using force against another person is generally illegal, unless done to prevent imminent harm.
- Merely claiming self-defense is not enough, the defendant must prove their actions were reasonable and justified.

Similarly, platforms must prove their content restrictions were taken in "good faith" to qualify for protection under §230(c)(2). Yet courts have eradicated this fundamental factual requirement, improperly allowing platforms to bypass it entirely by invoking §230(c)(1) as an impregnable immunity, a misapplication that directly undermines American civil liberties, including free speech.

B. Due Process & the Unconstitutional Application of §230(c)(1)

The misapplication of §230(c)(1) has rendered the statute unconstitutional *as applied* by eliminating due process protections for individuals, like Fyk, harmed by unlawful platform decisions. Courts have expanded §230(c)(1) far beyond its text, creating an absolute immunity shield that denies individuals any legal recourse to challenge wrongful restraint (*e.g.*, censorship).

C. Prior Restraint & First Amendment Violations

Prior restraint prohibits preemptive speech restrictions unless justified by an imminent risk of harm. While platforms may have discretion to moderate "otherwise objectionable" content under their own free speech rights, courts render such restraint unconstitutional when they "immunize" it without "Good Samaritan" – "good faith" justification. By misapplying §230(c)(1) as an immunity from suit, courts have effectively sanctioned unconstitutional prior restraint (*i.e.*, censorship), granting platforms unchecked authority to restrain third-party users' liberties (*e.g.*,

by removing their content) without any justification, accountability, or legal remedy.

Worse, when acting under government pressure or directive – something Mark Zuckerberg has openly admitted in or around December 2024 – platforms effectively function as state instruments of censorship, making their actions subject to immediate constitutional scrutiny. Yet, even this fundamental constitutional safeguard has been largely ignored in California. The crisis this judicial negligence has created in America underscores the urgent need for this Court to act decisively, to rein in California (*now the §230 outlier circuit*) and bring it into alignment with the Third, Fourth, and Fifth Circuits.

D. Judicial Evasion to Avoid Scrutiny of §230

Fyk also challenged the constitutionality of §230 pursuant to Rule 5.1. Concurrent with his ongoing case against Facebook, Fyk invoked a Rule 5.1 constitutional challenge in California, requiring the Department of Justice to be notified of the constitutional challenge. The court terminated Fyk's constitutional challenge by using contradictory reasoning, calling it "freestanding" (*i.e.*, standing independent) while simultaneously requiring it to be filed as an "independent action." This circular logic ensured that no court ever meaningfully reviewed Fyk's constitutional challenge, again shielding §230 from any meaningful scrutiny.

IV. Circuit Court & Intra-Circuit Conflicts Warrant this Court's Intervention

The Ninth Circuit's decision in *Fyk v. Facebook* now conflicts with multiple sister circuits that have

rejected the overbroad application of §230(c)(1), warranting granting of a writ of certiorari to reconcile the conflicts among the circuit courts.

The Third, Fourth, and Fifth Circuits (through *Anderson v. TikTok*, *Henderson v. Public Data*, and *A.B. v. Salesforce*, respectively) have properly narrowed §230(c)(1), affirming that the statute does not provide immunity for a platform's own misconduct. Within the Ninth Circuit itself, *Enigma v. Malwarebytes*, *Lemmon v. Snap*, and *Diep v. Apple* further highlight intra-circuit inconsistencies, further entrenching the legal uncertainty in Ninth Circuit courts, where most Big Tech §230 cases arise, leaving outcomes entirely to the luck of the judicial draw.

This section first examines direct sister circuit conflicts. It then highlights the intra-circuit inconsistencies that underscore failure by the courts in the Ninth Circuit to apply the law uniformly.

A. Sister Circuit Conflicts

1. *Henderson v. Public Data*, 53 F.4th 110 (4th Cir. 2022)

In *Henderson,* the Fourth Circuit clarified the proper context of its own *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997) decision, reaffirming that *Zeran* was correctly decided but had been widely misapplied thereafter. Later courts had improperly expanded *Zeran's* narrow liability protection into a broad immunity doctrine, creating confusion that undermined every subsequent ruling relying on it, including *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009), and the Ninth Circuit Court's so-called "decisions" in *Fyk*.

While *Barnes* correctly recognized that §230(c)(1) is not immunity from suit, its ambiguous wording and "sloppy" draftsmanship led to inconsistent application. For example, *Barnes* incorrectly stated: "Subsection 230(c)(1) creates a *baseline* rule: no liability for publishing or speaking the content of other information service providers." *Barnes*, 570 F.3d at 1108. This so-called "baseline rule" is a misstatement of the statute – nowhere in §230 does the term "information service provider" appear. The statute references "information content providers" and "interactive computer service providers" (ICSPs) two distinct legal classifications. Likewise, *Barnes* "sloppily" misuses "a publisher" instead of using the statute's actual language, "the publisher," further compounding the confusion. These inconsistencies make *Barnes* an unreliable precedent. The *Barnes* court, however, did get one thing right – §*230(c)(1) is not immunity from suit*.

As a result, California courts (including those in *Fyk*) used *Barnes* against litigants to erroneously grant ICSPs §230(c)(1) immunity from suit, contradicting *Barnes'* own holding. Facebook also relied on *Nemet Chevrolet, Ltd.* and *Levitt* out of context, to justify immunity from suit, despite both decisions reaffirming that §230(c)(1) is not a bar to litigation, citing to the *Energy Automation Systems* decision out of the Middle District of Tennessee (Nashville Division) Court.

Recognizing this ongoing confusion, the Fourth Circuit in *Henderson* recontextualized *Zeran* to eliminate future judicial misinterpretations. The court explicitly clarified: "Section 230(c)(1) extends only to bar certain claims imposing liability for specific information that another party provided." *Henderson*, 53 F.4th at 6.

This holding directly undercut cases that had contextually misapplied *Zeran*, including *Barnes* and all cases cited in *Fyk's* decision. The Fourth Circuit provided a much-needed legal and contextual framework to correct subsequent misinterpretations of *Zeran*, ensuring that §230(c)(1) is understood as a limited liability shield, not an absolute immunity grant.

Despite this fundamental clarification, the Ninth Circuit ignored *Henderson* and refused to reevaluate *Barnes* considering this change in law. Instead of correcting its errors, the Ninth Circuit reinforced *Barnes*' flawed reasoning and perpetuated its persistent misinterpretation of §230(c)(1) recognized by the Fourth Circuit as untenable (and the Third Circuit and Fifth Circuit, next discussed).

2. *Anderson v. TikTok*, No. 22-3061, 2024 WL 3948248 (3d Cir. Aug. 27, 2024)

The Third Circuit's *Anderson* decision further rejected the Ninth Circuit's interpretation of §230(c)(1) in *Fyk* by drawing a critical distinction between third-party content liability and first-party (platform-driven) content manipulation (*i.e.*, the Third Circuit drew the content development hardline). The *Anderson* court ruled:

> [Interactive computer services] are immunized only if they are sued for someone else's expressive activity or content (*i.e.*, third-party speech), but they are not immunized if they are sued for their own expressive activity or content (*i.e.*, first-party speech).

Anderson, 2024 WL 3948248 at *2.

This directly contradicts *Fyk*, where the Ninth Circuit failed to assess whether Facebook's conduct (*e.g.*, engaging in first-party anticompetitive schemes) was distinct from merely hosting third-party speech. Instead, the Ninth Circuit collapsed all publishing conduct into a universal publisher immunity, treating any platform decision as categorically protected under §230(c)(1), even when it involved Facebook's own, affirmative misconduct.

In *Anderson*, the Third Circuit Court correctly examined the nature of the alleged harm, recognizing that platform-driven recommendations, content amplification, and algorithmic steering are affirmative first-party content provision/development actions taken by the platform itself, not passive hosting of third-party content. The court emphasized that §230 does not shield platforms from liability when they act as developers (in part) of harmful content, stating: "Section 230(c)(1) allows suits to proceed if the allegedly wrongful conduct is not based on the mere hosting of *third-party* content, but on the [first-party] acts or omissions of the provider of the interactive computer service." *Anderson*, 2024 WL 3948248 at *9.

This ruling aligns with Fyk's original argument – that Facebook's content restrictions, business interference, and deliberate suppression of his monetization opportunities was not mere hosting of his third-party content, but affirmative first-party misconduct undertaken for its own financial gain. The Third Circuit's distinction between first-party and third-party actions is crucial, as it reinforces that §230(c)(1) does not protect platforms when they-themselves act beyond passive hosting.

Again, had Fyk's courts engaged in a proper *de novo* statutory analysis, they would have reached the same conclusion as *Anderson* – that *platform-driven conduct falls outside §230(c)(1)'s protection and should instead be evaluated under §230(c)(2),* where a good faith congressional standard applies. Instead, courts followed contextually flawed (*i.e.*, "sloppy") precedent that conflated passive hosting with affirmative content control.

The *Anderson* ruling confirms what Fyk has argued all along – that platforms cannot claim §230(c)(1) protection when they affirmatively develop, suppress, or manipulate content in a way that serves their own interests.

3. *A.B. v. Salesforce*, 123 F.4th 788 (5th Cir. 2024)

The Fifth Circuit Court in *Salesforce* also rejected the Ninth Circuit's overbroad interpretation of §230(c)(1). Unlike the Ninth Circuit, the Fifth Circuit carefully applied a *de novo* textual approach, stating:

> Plaintiffs' claims do not seek to hold Salesforce liable for failing to moderate content or any other functions traditionally associated with a publisher's role. These claims would not inherently require Salesforce to exercise any [first-party] functions associated with publication.

Salesforce, 123 F.4th at 798-799.

This aligns precisely with Fyk's argument – Facebook's anticompetitive conduct and content manipulation were independent *business decisions*, not passive content hosting. Yet, rather than analyzing

this critical distinction, the Ninth Circuit summarily granted immunity.

Further, the *Salesforce* court rejected the notion that merely invoking third-party speech automatically triggers §230 protection:

> The fact that *third-party* speech is involved somewhere in the chain of causation that led to a plaintiff's injuries does not mean that a plaintiff's claims necessarily treat a defendant as [the first-party] publisher or speaker of that *third-party* speech.

Salesforce, 123 F.4th at 795.

Although the Fifth Circuit also mistakenly used "a" instead of "the" in its citation, its fundamental analysis remains correct. The ruling supports Fyk's position that the Ninth Circuit improperly erased the distinction between liability for third-party content and liability for a platform's first-party conduct.

This was precisely the first-party vs. third-party distinction that Fyk presented to the District Court:

> *Facebook's Motion to Dismiss ("M2D") is based on an untenable theory that its actions are entitled to blanket, unbridled "just because" immunity under 47 U.S.C. § 230(c)(1) ("CDA"). But the express language of the CDA* […] makes clear that Subsection (c)(1) only immunizes a "provider ... of an interactive computer service" (Facebook) from third-party liability concerning information *(i.e.*, content) published or spoken by *"another* information content provider" on the "interactive computer

> service['s]" platform. [] **This is not a third-party case** […]. Subsection (c)(1) (and case law) says that Facebook is not liable for "information provided by another information content provider" simply because "another" publishes or speaks on the Facebook platform because, again, the language of Subsection (c)(1) does not classify Facebook as the *per se* publisher or speaker of "another's" content. **Subsection (c)(1) does not, however, immunize Facebook from first-party liability concerning content published or spoken by the "content provider" (Fyk)—this case is first-party.**

(App.771a-772a). (emphasis in original) (bold emphasis added) (footnote omitted).

Had the District Court or the Ninth Circuit conducted a legitimate substantive statutory analysis of Fyk's claims, Facebook's actions (favoring a competitor, suppressing Fyk's content, and engaging in fraudulent business practices) would have been recognized as independent first-party misconduct beyond the scope of §230(c)(1), and dismissal at the pleading stage would not have occurred.

Much like courts instinctively presume that merely naming an ICSP in a lawsuit means the plaintiff is necessarily treating the defendant as *"a"* publisher of third-party content (and that §230(c)(1) immunity automatically applies), they also reflexively assume that any challenged conduct must arise from the platform's terms of service – and that those terms automatically dictate forum no matter the nature of the

cause(s) of action alleged by the plaintiff. This presumption is both legally and factually flawed.

The harms Fyk suffered here did not stem from any contractual dispute, user content, or moderation function, but from Facebook's offline anticompetitive collusion (*i.e.,* ill-gotten intent/motivation) with his competitors (*e.g.*, Red Blue Media) – conduct entirely outside the scope of Facebook's user agreement. Likewise, Big Tech's coordination with the government to suppress constitutionally protected speech is not governed by any enforceable contract – and if such censorship were contemplated, the provisions of Facebook's terms of service would be facially unconscionable. Yet courts too-often summarily enforce forum selection clauses without first meaningfully assessing whether the claims actually arise from the contract. This automatic deference routinely funnels cases back to California (bypassing and nullifying other states' laws, such as Texas' HB20) where courts have consistently granted Big Tech undue automatic immunity from suit, just as they did in Fyk's case. Big Tech is well-aware of this advantage and strategically works to keep litigation within the Ninth Circuit's jurisdiction.

Together, *Henderson, Anderson,* and *Salesforce* reject the Ninth Circuit's §230(c)(1) automatic immunity approach used in *Fyk*. The split between the Third, Fourth, and Fifth Circuits versus the Ninth Circuit highlights the fundamental inconsistency that warrants this Court's careful review and resolution for consistency in its application across the country.

B. Intra-Circuit Conflicts Within the Ninth Circuit

The Ninth Circuit has unequivocally failed to apply §230 consistently within its own court system. While it has ruled correctly in some cases, that platforms are not immune for their own conduct, it has simultaneously granted absolute immunity in others, particularly in *Fyk v. Facebook.* This inconsistency highlights a systemic failure in the Circuit to properly or consistently interpret §230's statutory limits, further warranting SCOTUS' intervention. More troubling, California courts have deliberately obstructed Fyk's access to due process, willfully denying him the ability to amend his Verified Complaint or obtain even a single hearing, despite binding case law within the Ninth Circuit that directly contradicts the ruling in his case.

Rather than meaningfully addressing *Enigma v. Malwarebytes*, *Lemmon v. Snap*, *Diep v. Apple,* or the more recent sister circuit rulings (*Henderson*, *Anderson*, and *Salesforce*), Fyk's courts have relied on procedural hyper-technicalities (sometimes raised by the Ninth Circuit *sua sponte*) or judicial evasion to avoid engagement, sidestepping even Fyk's *non-forfeitable* constitutional challenge. Instead of considering the merits, the judiciary has erroneously dismissed these other cases as "untimely," "not controlling," "irrelevant," "freestanding," or simply ignored them altogether.

The Ninth Circuit's conflicting rulings further expose its ongoing failure to apply a consistent legal standard: (a) *Enigma v. Malwarebytes* (2019) ruled that platforms engaging in anticompetitive conduct are not shielded by §230; (b) *Lemmon v. Snap* (2021) held that §230(c)(1) does not immunize platforms for their own negligent design. (c) *Diep v. Apple* (2024)

recognized that Apple's monetization practices could place its actions outside §230(c)(1).

In *Fyk*, the Ninth Circuit disregarded its own evolving legal precedents, permitting Facebook to continue benefiting from the same anticompetitive defense struck down in *Enigma*, the same tortious and extortionate product design defense rejected in *Lemmon,* and the same fraudulent monetization practices condemned in *Diep*. Worse, the courts did not reject Fyk's reliance on these cases on the merits but sidestepped them entirely. Instead of explaining why *Lemmon*, *Diep*, or *Enigma* did not apply, the courts relied on false procedural pretexts to avoid reconsideration altogether.

And the Ninth Circuit declined to reconsider and disregarded contrary rulings from the Third, Fourth, and Fifth Circuits, dismissing them as "not controlling" (even though Rule 60(b) does not require "controlling" case law for reconsideration) despite their clear impact on Fyk's case.

C. District Court Split

SCOTUS typically does not involve itself in district-level conflicts, but the Northern District of California's contradictory rulings in *Dangaard v. Meta* and *Fyk v. Facebook*, just as one example of the disparate treatment handed down by the Northern District of California as to similarly-situated §230 litigations, exposes a systemic Ninth Circuit failure that demands attention. Despite nearly identical facts, allegations, and §230(c)(1) immunity claims, Judge Alsup in *Dangaard* rejected Meta's §230(c)(1) defense, recognizing it as a "backdoor to CDA immunity—contrary to the CDA's history and purpose" *Dangaard*, 2002 WL 17342198 at *6, while Judge White in *Fyk* granted blanket §230(c)(1)

immunity without any substantive review. The Ninth Circuit's evasive refusal to reconcile this glaring inconsistency in the lower courts suggests more than mere oversight, it exposes a troubling pattern of selective judicial treatment and an apparent unwillingness to clean its own house. Further deepening these concerns, Judge White held undisclosed tech stock but only recused himself as "disqualified" nearly five years into the case (after Judge White's rulings had already severely tainted the case). Despite multiple opportunities, the Ninth Circuit ignored the District Court's glaring contradictions, allowing California courts to selectively apply their outlier interpretation of §230(c)(1) and shield Big Tech from accountability at their discretion, without consistency or oversight.

V. THE URGENT NEED FOR SCOTUS REVIEW (CIRCUIT SPLITS, SIGNIFICANT NATIONAL IMPORTANCE)

The Ninth Circuit's complete failure to reconcile its own contradictions and its persistent refusal to consider clear legal conflicts demands SCOTUS intervention. SCOTUS must act to: (a) Resolve the sister circuit split and clarify that §230(c)(1) does not provide blanket immunity for a platform's own misconduct. (b) End the intra-circuit conflict that the Ninth Circuit declines to resolve (or even consider), leaving plaintiffs without legal recourse. (c) Restore the clear statutory distinction between §230(c)(1) (a definitional rule) and §230(c)(2) (a limited liability protection subject to good faith) by affirming that ***§230(c)(1) is not an immunity from suit and does not protect any affirmative first-party conduct at all***, as one example, and/or affirming that ***§230(c)(1) is most certainly subject***

to the "Good Samaritan" intelligible principle, as another example.

Given the Ninth Circuit's repeated refusal to resolve this issue, it is incumbent upon SCOTUS to step in. Either SCOTUS must settle this matter definitively (please) or remand it to the Ninth Circuit with instructions to conduct a careful *en banc* review and finally reconcile these overwhelming legal inconsistencies; *i.e.*, instruct the California court system to do its job *de novo* and do it correctly.

The unchecked expansion of §230(c)(1) in some courts resulting in abridgements of due process, fair competition, and fundamental speech rights online is unconstitutional and undermines the judiciary as an institution charged with *uniformly* interpreting the laws of the land and upholding the Constitution. Courts should be the last line of defense, not the instruments of oppression. Without this Court's immediate intervention, judicial evasion and corporate overreach will continue to erode the legal system's integrity.

The urgency is clear – SCOTUS must act now to prevent further harm.

WHEREFORE, Petitioner, Jason Fyk, respectfully requests this Court (a) grant a writ of certiorari (preferably and necessarily, as this Petition shows, the Ninth Circuit cannot be trusted to rule correctly in this area); (b) alternatively, by way of either GVR or writ of mandamus, remand this to the Ninth Circuit with explicit instruction to do its job, immediately rectifying the myriad legal wrongs identified in this Petition inflicted upon Fyk throughout the near seven-year pendency of this case, in legal accord with several other sister Circuit Courts identified in this Petition

and for the well-being of Americans on this matter of immense national importance; and/or (c) afford Fyk any other relief the Court deems equitable, just, and/or proper.

Respectfully submitted,

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April 15, 2025