No. 19-16232

(Before M. SMITH and HURWITZ, Circuit Judges, and EZRA, District Judge; Opinion filed June 12, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK
Plaintiff-Appellant,

v.

FACEBOOK, INC.
Defendant-Appellee.

On Appeal from Dismissal with Prejudice and Judgment of the United States District Court for the Northern District of California, No. 4:18-cv-05159-JSW (Hon. Jeffrey S. White)

Petition for Rehearing *En Banc*

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STATEMENT OF COUNSEL IN SUPPORT OF REHEARING *EN BANC*

On May 28, 2020, a fortnight before the Ninth Circuit ruled on Appellant Fyk's appeal from the District Court's dismissal of his action (without leave to amend), a historic event occurred without mention by the Panel – President Trump entered an Executive Order ("EO") challenging Social Media companies' ability to shield their conduct behind purported CDA Section 230 immunity.

In conjunction with this EO (which Fyk acknowledges is not controlling on the Ninth Circuit), the Attorney General of the United States said:

> In the years leading up to Section 230, courts had held that an online platform that passively hosted third-party content was not liable as a publisher if any of that content was **defamatory**, but that a platform would be liable as a publisher for all its third-party content if it **exercised discretion to remove any third-party material**.
>
> ***
>
> At the same time, courts have interpreted the scope of Section 230 immunity very broadly, diverging from its original purpose. **This expansive statutory interpretation, combined with technological developments, has reduced the incentives of online platforms to address illicit activity on their services and, at the same time, left them free to moderate lawful content without transparency or accountability**. The time has therefore come to realign the scope of Section 230 with the realities of the modern Internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services. (emphasis added).

In Section I, we discuss the impact of this EO and AG Barr's analysis on Fyk's case and how the Panel's Opinion used an unprecedented expansive, statutory

application of the CDA to allow Facebook immunity from liability without a requisite showing of good faith while Facebook engaged in all manner of anti-competitive and abusive actions that in any other commercial context would give rise to actionable tort claims. Conversely, the Panel Opinion (in)directly employed an inappropriately restrictive interpretation of "development," in contravention of Ninth Circuit authority; *e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) and *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019). The Ninth Circuit's ruling in Fyk's case creates a dissonance in the Ninth Circuit's statutory interpretation of the CDA, which Judge Fisher in *Zango* presciently warned in 2009 would problematically permit CDA immunity to advance an anticompetitive agenda. (*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1178 (9th Cir. 2009).) This is what precisely happened here.

In **Section II**, we discuss how Facebook **did not act as a Good Samaritan** when Facebook: (1) restricted Fyk's information in bad faith; and (2) took action to solicit a new higher paying participant (Fyk's competitor), and materially contributed to the development of Fyk's information for Fyk's competitor for commercial profit. Fyk's case is about Facebook's development of Fyk's information for a competitor for which Facebook is paid by that competitor. Fyk's case seeks to hold Facebook responsible for fraud, extortion, unfair competition, and

tortious interference with Fyk's economic advantage based on Facebook's anticompetitive animus.

This case is not about free speech, the offensive nature of content, or about holding an interactive service provider liable for statements of "the" publisher. Instead, to fit this square peg into a round hole, the Panel Opinion created confusion about the interaction between 230(c)(1) and 230(c)(2). Fyk's appeal distinguishes Facebook's liability as "a" publisher for its unlawful actions from Facebook's immunity as "the" publisher (relative inactions) for defamation purposes, thereby avoiding any statutory redundancy between 230(c)(1) and 230(c)(2).

Importantly, regardless of whether Facebook was "a" publisher or "the" publisher, the protections of 230(c)(1) are unavailing to Facebook because its actions are inconsistent with 230(c) "Good Samaritan." Fyk identified, and the Panel Opinion accurately acknowledged, "**Facebook allegedly took its actions for monetary purposes.**" This allegation, taken as true as it must be on a motion to dismiss, results in Facebook losing its immunity, consistent with the position of the Ninth Circuit in *Enigma*. A Ninth Circuit panel originally recognized this limitation in its September 12, 2019, *Enigma* opinion (946 F.3d at 1051). Even after vigorous opposition by Defendant Malwarebytes in a Petition for Rehearing *En Banc*, the Ninth Circuit rejected that effort, and the Panel issued an amended opinion reaffirming the good-faith limitation on the "Good Samaritan" provision of Section

230. The Ninth Circuit has already found that Section 230 does not immunize blocking and filtering decisions that are driven by **"anti-competitive animus."** Accordingly, the Panel's ruling on Fyk's appeal is untenable under existing Ninth Circuit precedent, and now, with the Executive Order and Attorney General's analysis. Exhs. A (Panel Ruling); B (Executive Order); and C (AG's Analysis).

In **Section III**, we discuss the additional facts that Fyk could have argued to overcome Plaintiff's Section 230 Immunity if leave to amend his original complaint was not summarily denied by the District Court.

Accordingly, this case is appropriate for *en banc* consideration because: consideration by the full Court is necessary to secure uniformity of the Court's decisions and the proceeding involves a question of exceptional importance.

I. THE PANEL'S OPINION OVERLOOKED THE EO ENTERED BY PRESIDENT TRUMP ON MAY 28, 2020, AND THE ANALYSIS BY ATTORNEY GENERAL WILLIAM BARR THAT COMPORTS WITH APPELLANT FYK'S ANALYSIS

The President of the United States' recent EO 13925 accurately identified the same issue Fyk has raised in this case. The EO, entitled "Executive Order on Preventing Online Censorship," states, in pertinent part, as follows:

> When an interactive computer service provider removes or restricts access to content and **its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct**. **It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability** like any traditional editor and publisher that is not an online provider.

> (i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine **the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1),** which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its own editorial decisions;
>
> (ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are:
>
> a. deceptive, pretextual, or inconsistent with a provider's terms of service;

EO 13925 (emphasis added). This EO could have been drafted by Fyk based off of Fyk's circumstances.

Facebook's selective application of the CDA as a pretext for tortious interference and unfair competition with Fyk's business is not the type of conduct that would qualify as "good faith." Facebook was not "passively" displaying content and uniformly enforcing the CDA as to all content providers; it was "actively" developing winners (like Fyk's competitor) and losers (Fyk) based on Facebook's financial motivations. Like the President, Fyk contends that where Facebook's application of the CDA is a purposeful commercial activity, Facebook enjoys no (c)(1) or (c)(2)(A) immunity whatsoever. *See also, e.g.*, *Fair Housing* and *Enigma*.

Here, Facebook is attempting to hide behind its role of a service provider while hiding its true function as a developer. The *Batzel* Court indicated that the "development of information" that transforms one into an "information content provider" is "something more substantial than merely editing portions of an email and selecting material for publication." *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

Both creation and development are publishing functions which have been conflated terms. The idea of "the" publisher is "the" creator who brought the content into existence; *i.e.*, the originator; *i.e.*, the person who took action.[1] Where, for example, the creator is the "writer" and the service provider is the "publication," the publication would be liable for what the writer created because the action to publish the information was taken by the publication. If the publication does not take any action with regards to the creation (or development) of the information provided entirely by the writer, the publication cannot be held liable for what the writer has created. In the Internet context, this is the protection of 230(c)(1). However, in the interest of preventing offensive content being passively hosted on the publication, 230(c)(2) provided the publication the ability to **take action** to restrict what the

[1] Of note, the majority opinion in *Fair Housing* spent a great deal of time explaining the difference between "creation" and "development" and criticizing the dissenting opinion for the conflation of the terms. Here, it seems the Panel Opinion (at least as it concerns "creation" versus "development") was inappropriately more aligned with the *Fair Housing* dissent than with the majority.

writer published without fear of liability. No other actions taken by the publication are immunized including republication, promoting, or developing information based on quality or value.

Had Facebook not taken any action to solicit a new owner or contribute to Fyk's information in any way, Facebook would have remained a "passive" host exercising its discretion to *uniformly* restrict materials and 230 immunity would apply. But where (as here) a website acts as a developer of the information, it is "a" publisher, even if it is not the originator; *i.e.*, "the" publisher of the content. Facebook became a developer by way of materially contributing to the growth and distribution of Fyk's published materials for Fyk's competitor predicated on the contingent removal of Fyk.

How does a factfinder determine where creation stops and development begins? As explained in *Batzel*, the party responsible for putting information online may be subject to liability, even if the information originated with a user. *See Batzel*, 333 F.3d at 1033. That is the case here. Fyk is not seeking to treat Facebook as "the" publisher, such as in the context of a defamation action. Rather, Fyk is seeking to treat Facebook as "a" publisher, responsible for its own action as a content provider, manipulating Fyk's information in order to compensate itself through the solicitation of a higher value participant. Actions taken by a service provider (Facebook) are not

immune when they develop a user's (Fyk's) information, as such turns the service provider into a content provider.

This is where the confusion with the District Court(and the Panel) apparently exists. Section 230 distinguishes between "passive" or engaging in "good faith" restrictions under (c)(2)(A) and active republishing, making available, (re)creation, origination, solicitation, advancement or promoting growth of content. These actions transform a *service* provider into a *content* provider. Said differently, **restricting materials without discrimination is the only "active" publishing action protected under 230(c),** "passive" hosting is inaction and is protected by 230(c)(1), and any other actions set forth above **are not protected activity under Section 230**.

Over time, the disparate application of the CDA immunity has created a shield for anti-competitive behavior as AG Barr noted. *See* **Exhibit C:** DOJ Review of CDA. Congress enacted Section 230 in part to resolve this quandary by providing immunity to online platforms both for third-party content on their services [(c)(1)] or for removal of certain categories of content [(c)(2)].

Here, the Panel in Fyk's case ignored CDA distinctions. (See, DOJ's Memo, Ex. C). Courts around the nation have provided expansive interpretations of the CDA that has **afforded service providers protections not provided for by law** who, like here, went well beyond a passive hosting service, restricting offensive materials in

"good faith." (*e.g.* for financial incentive). Worse, the Panel ignored Ninth Circuit precedent and sanctioned Facebook's pre-textual abuse of the CDA.

II. THE NINTH CIRCUIT'S ANALYSIS OF THE CDA IMMUNITY IS UNTENABLE UNDER ITS OWN HOLDING IN *ENIGMA* AND CANONS OF STATUTORY INTERPRETATION

The Panel's decision is untenable under the analysis and underlying predicate legal and factual conclusions used to reach the holding in *Enigma*.[2] *See id.* In principle, *Enigma* provides that defendants are not entitled to CDA 230(c) immunity for anticompetitive conduct, the factual and legal basis for Fyk's Complaint against Facebook. Albeit distinguishable in certain respects, which could (but should not) result in a default rejection of the discussion in this section, *Enigma* provides substantial support for rehearing and careful reconsideration of this matter.

As a threshold matter, the Panel Opinion disregarded a critical distinction that underscores why *Enigma* was unique for the Ninth Circuit: like the *Enigma* litigants, **Fyk and Facebook were direct competitors**. As articulated in Fyk's complaint, Facebook promised users (like Fyk) free reach and distribution in return for their data if they joined and built their audience on Facebook's service platform. Unlike

[2] The *Enigma* Panel's decision was published on September 12, 2019, a mere six days before Fyk filed his opening brief in this Court and the amended opinion on rehearing denial was issued on December 31, 2019, just a few weeks before Fyk filed his reply brief.

most websites, Facebook did not advertise on the sides or top of the page, instead Facebook offered News Feed space for sale which directly displaces its own users for profit. Facebook in partnership with advertisers became a direct competitor with its own users and was incentivized to remove lower value "organic" participation (Fyk's) in favor of higher value "quality" participants who better compensate Facebook (like Fyk's competitor).

Moreover, like Fyk here, Plaintiff Enigma's complaint accused Defendant Malwarebytes of deceptive business practices, tortious interference with business, and contractual relations in violation of state and common law. *See id*. at 1048.

As emphasized in Fyk's opening and reply briefs, **this case is about anti-competitive activity by Facebook**. It is not about free speech, the offensive nature of content, or holding an interactive service provider liable for statements of "the" publisher. As the *Enigma* Panel noted, the concurring opinion by Judge Fisher in *Zango,* warned that extending immunity beyond the facts of that case could "pose serious problems" **where a provider is charged with using § 230 immunity to advance an anticompetitive agenda**. (*Zango*, 568 F.3d at 1178). This 2009 opinion proved remarkably prescient, as Facebook's sharp practices, unchecked, have become more brazen over time despite Congressional and law enforcement inquiries (*see* EO, DOJ memorandum (Exhs. B, C)), focused on tech giant abuses such as the abuses Facebook inflicted on Fyk.

Judge Fisher further stated that an "unbounded" reading of the phrase "otherwise objectionable" would allow a content provider to "block content for anticompetitive purposes or merely at its malicious whim." *Id*. That is exactly Facebook's pre-text for their anti-competitive and tortious behavior.

As the Panel in *Enigma* noted:

> We must today recognize that interpreting the statute to give providers unbridled discretion to block online content would, as Judge Fisher warned, enable and potentially motivate Internet-service providers to act for their own, and not the public, benefit. *See* 568 F.3d at 1178 (Fisher, J., concurring). Immunity for filtering practices aimed at suppressing competition, rather than protecting Internet users, would lessen user control over what information they receive, contrary to Congress's stated policy. *See* § 230(b)(3) (to maximize user control over what content they view) . . . Users would not reasonably anticipate providers blocking valuable online content in order to stifle competition. Immunizing anticompetitive blocking would, therefore, be contrary to another of the statute's express policies: "removing disincentives for the utilization of blocking and filtering technologies." *Id*. § 230(b)(4).

Enigma Software Grp., 946 F.3d at 1051. **We agree**.

Section 230(c), which is entitled "Protection for "Good Samaritan" Blocking and Screening of Offensive Material," is what the early stages of this litigation have entirely revolved around.

Looking to the Health and Safety Code for the State of California – which is simply a proximate analog – "Good Samaritanism" involves one of two fundamental things: ("act[ion]") or a failure to act ("omission"). So long as a person's **action or**

omission is grounded in (a) good faith, (b) unrelated to compensation, and (c) does not constitute gross negligence or willful / wanton misconduct, such action or omission will not subject that person to civil damages.

The analogous language of 230(c)(2)(A), which is the action prong ("any action taken") of the Internet's "Good Samaritan" content policing law (the CDA). Unsurprisingly, 230(c)(2)(A) has the words "action," "good faith," and "voluntary" (*i.e.*, free from compensation) expressly stated. 230(c)(2)(A) immunizes the "provider or user of an interactive computer service" from any liability associated with taking "good faith" "action" to rid ("block or screen") the Internet of filth, for example. This is consistent with Congressional Intent as noted by *Enigma*, specifically, that the Internet "Good Samaritan" should be encouraged in such actions, not somehow be subjected to liability for such actions. That is, of course, so long as such actions are not done in bad faith, uniformly applied, and not motivated by competitive motive like in *Enigma* and Fyk's case. This animus voids any "Good Samaritan" protections it may have otherwise enjoyed.

230(c)(1) offers immunity to those who **do not act**, or omit. No person is required to give aid of any sort to someone in need absent a special relationship. 230(c)(1) recognizes that a "provider or user of an interactive computer service" who is a mere "passive conduit" to "any information provided by another information content provider" is immune from any liability arising out of the information

provided by another. Hence, 230(c)(1) does not hold Facebook liable for what information is spoken by "another," so long as Facebook took **no action** with regards to the creation or development of the content of the "another" (*e.g.*, is not a "developer" or "a" publisher, "in whole or in part," of the content) and so long as Facebook's inaction decision is not motivated by its own compensation. **Neither situation applies here.**

This is where the definition of a content provider defined in 230(f)(3) becomes pertinent. Facebook materially contributed to Fyk's peril by *discriminatorily* unpublishing and developing his information *for profit*. Facebook rendered actions in bad faith, for its own compensation and did not act as a Good Samaritan.

Once Facebook "perhaps developed in part" Fyk's information, immunity is lost. 230(f)(3) recognized development, even in part, where the provider or user of the "interactive computer service" becomes an "information content provider," "This grant of immunity [230(c)] applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of' the offending content. Id. § 230(f)(3)." *Fair Hous.*, 521 F.3d at 1162.

As discussed in Fyk's Opening Brief, in the absence of any affirmative act of commercial discrimination, Facebook might have been entitled to (c)(2)(A) "Good Samaritan" immunity, but that is not the case with Fyk. Under the correct

interpretation of section 230, any action or omission by the service provider must be taken in Good Faith, not for compensation, devoid of gross negligence or wanton and willful misconduct. If any (in)action meets the criteria of 230(c) "Good Samaritan," we then look to 230(c)(1). 230(c)(1) protects a service provider when it takes "no action" and only "passively" hosts materials entirely created, originated and or developed by "the" publisher (another). If a service provider takes "any action" voluntarily and in "Good Faith," as a "Good Samaritan" to restrict offensive content, we then look to 230(c)(2). A service provider is protected under 230(c)(2)(A) for its own actions to restrict materials or 230(c)(2)(B) for enabling a user to restrict materials. If a service provider takes "any" action as a publisher to create or develop any information in whole or in part it shall lose immunity with the exception actions protected by 230(c)(2).

Fyk is not asking this Court to take any action except allowing for rehearing to secure a reversal, and remand to the District Court to allow for Fyk to amend his Complaint. Fyk is entitled to add factual allegations to demonstrate that Facebook would not have qualified as acting in "good faith" because, most glaringly, there is nothing "good faith" about deeming Fyk's content violative of (c)(2)(A) while in his possession and not violative while in the possession of his competitor. In the instant appeal, what matters is that Fyk's Complaint alleges Facebook's post-October 2016 misconduct, which was motivated by commercial gain, was targeted and intended to

injure Fyk, removing Facebook from any "action-oriented" (c)(2)(A) "Good Samaritan" protection, and any "inaction-oriented" (c)(1) "Good Samaritan" protection per 230(f)(3).

III. THE PANEL ERRONEOUSLY ASSERTED THAT FYK COULD NOT RAISE FACTS IN HIS COMPLAINT THAT WOULD OVERCOME SECTION 230 IMMUNITY

In addition to the preceding challenges with the Panel's Opinion is the fact that the Panel asserted, without any basis, that Fyk could not raise facts in his Complaint that would overcome purported Section 230 Immunity. This is simply not true.

Facebook targeted Fyk's business through conduct that supports a finding of tortious, fraudulent, extortionate, and anti-competitive activity. The purpose of a Complaint is not to set forth each and every fact, and anticipate every single argument, but to provide notice of the causes of action and, with regard to certain causes of action, state them with specificity.

Notwithstanding, had Fyk been given an opportunity to articulate additional facts, the Panel could not ignore the following instances of conduct by Facebook that would give rise to Facebook's loss of immunity:

- On January 4, 2019, Mark Zuckerberg stated it was Facebook's purpose, "to dramatically increase the distribution and if successful, the monetization to high quality participants." He went on to say, "[b]uild

a service that is contributing to high quality journalism through increasing monetization." Translated, Facebook materially contributes to the development of information by way of increased distribution and monetization of participants Facebook deems to be quality. Here, the "quality" standard was the relative monetary value to Facebook. As a result, his content was eliminated through the pre-text of it being offensive. Later, that exact same content was deemed not offensive in the hands of a "high-quality" participant (Fyk's competitor).

- On April 13, 2013, Tessa Lyons, Facebook Newsfeed manager, explained Facebook's underlying strategy in a public forum: "… so going after actors who repeatedly share this type of content [financially motivated] and reducing [low quality participants] distribution, removing their ability to monetize, and removing their ability to advertise is part of our strategy." Translated, Facebook's strategy is not based on restriction of offensive materials in "good faith," it is based on reducing the financial incentives (*i.e.*, tortious interference) that low value / low quality participants have to create content in the first place. Facebook's strategy is proactive, not reactive, and targets economics. The rules change however if you pay more.

- On April 13, 2013, Tessa Lyons confirmed Facebook's proactive behavior: "For the financially motivated actors, their goal is to get a lot of clicks so they can convert people to go to their websites, which are often covered in low quality ads, and they can monetize and make money from those people's views, and if we reduce the spread of those links, we reduce the number of people who click through and we reduce the economic incentives that they have to create that content in the first place." Translated, Facebook does not want people to make money so Facebook can demand money from its users. But this is contrary to what was promised to users.
- Per an April 16, 2019, NBC report, Chris Daniels, a Facebook business development director, wrote the following in an August 2012 email: "Today the fundamental trade is 'data for distribution' whereas we want to change it to either 'data for $' and/or '$ for distribution'." Translated, Facebook is selecting which businesses get developed and which businesses get restricted, not based on offensive content but based on profit motives.

The above facts, and a **multitude** of others, show that Facebook's conduct was not motivated by removing offensive or obscene materials, but was driven entirely by proactive development and "anti-competitive animus." Facebook's

publicly admitted strategy is to proactively reduce the financial incentives publishers have to create content in order to displace their content (like Fyk's) and materially contribute to the development of content for higher quality, higher paying participants.

CONCLUSION

In his Complaint and all underlying briefing (at the District and Ninth Circuit Court levels), Fyk detailed Facebook's "bad faith" content restriction decisions predicated on Facebook's own monetary purposes. The Courts should never have entertained a 230(c)(1) defense, as it is inapplicable because Fyk does not seek to treat Facebook as "the" publisher / speaker / creator / originator of his own content. Fyk seeks to hold Facebook liable as "a" publisher / developer for its own legally repugnant and unimmunized actions. Facebook did not act as a "Good Samaritan" and Facebook was responsible, at least in part, for its action to solicit Fyk's competitor with the promise of materially contributing to the development of Fyk's information for Fyk's competitor.

The conceptual dissonance of the Panel's Opinion and existing Ninth Circuit authority on the inapplicability of CDA immunity for anticompetitive conduct, compels granting this petition for rehearing *en banc*.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 and Ninth Circuit Rule 40-1, undersigned counsel certifies that this document complies with the word limitation because it does not exceed 4,200 words. It includes 4,196 words, not including the first three pages or this certificate. This document 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.

Dated: June 26, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, 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/ Michael J. Smikun, Esq.
Michael J. Smikun, Esq.

EXHIBIT “A”

NOT FOR PUBLICATION

FILED

JUN 12 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JASON FYK, Plaintiff-Appellant, v. FACEBOOK, INC., Defendant-Appellee.	No. 19-16232 D.C. No. 4:18-cv-05159-JSW MEMORANDUM*

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

Submitted June 10, 2020**
San Francisco, California

Before: M. SMITH and HURWITZ, Circuit Judges, and EZRA,*** District Judge.

Jason Fyk appeals the district court's order and judgment dismissing with prejudice his state law claims against Facebook, Inc. (Facebook) as barred pursuant

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

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

*** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

to the Communications Decency Act (CDA). We have jurisdiction pursuant to 28 U.S.C. § 1291. "We review de novo the district court's grant of a motion to dismiss under Rule 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016).[1] We affirm.

1. Pursuant to § 230(c)(1) of the CDA, 47 U.S.C. § 230(c)(1), "[i]mmunity from liability exists for '(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.'" *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009)). "When a plaintiff cannot allege enough facts to overcome Section 230 immunity, a plaintiff's claims should be dismissed." *Id.* The district court properly determined that Facebook has § 230(c)(1) immunity from Fyk's claims in this case.

The first and second requirements for § 230(c)(1) immunity are not in dispute.[2] Fyk focuses on the third requirement. He contends that Facebook is not

[1] We reject Fyk's argument that the district court impermissibly converted the motion to dismiss into a motion for summary judgment. The district court did not deviate from the Rule 12(b)(6) standard by alluding to the allegation in Fyk's complaint that Facebook de-published one of his pages concerning urination, nor did that allusion affect the court's analysis.

[2] Fyk concedes that Facebook is the provider of an "interactive computer

entitled to § 230(c)(1) immunity because it acted as a content developer by allegedly de-publishing pages that he created and then re-publishing them for another third party after he sold them to a competitor. We disagree.

"[A] website may lose immunity under the CDA by making a material contribution to the creation or development of content." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016); *see also Fair Hous.*, 521 F.3d at 1166. Fyk, however, does not identify how Facebook materially contributed to the content of the pages. He concedes that the pages were the same after Facebook permitted their re-publication as when he created and owned them. We have made clear that republishing or disseminating third party content "in essentially the same format" "does not equal creation or development of content." *Kimzey*, 836 F.3d at 1270, 1271.

That Facebook allegedly took its actions for monetary purposes does not

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service." 47 U.S.C. § 230(f)(2); *see also Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) (en banc) ("[T]the most common interactive services are websites[.]"). He has also not challenged the district court's determination that his claims seek to treat Facebook as a publisher and has therefore waived that issue. *See Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief."). In any event, it is clear that Fyk seeks to hold Facebook liable as a publisher for its decisions to de-publish and re-publish the pages. *See Barnes*, 570 F.3d at 1103 ("[R]emoving content is something publishers do . . . . It is because such conduct is *publishing conduct* that we have insisted that section 230 protects from liability any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online." (emphasis in original) (citation and internal quotation marks omitted)).

somehow transform Facebook into a content developer. Unlike 47 U.S.C. § 230(c)(2)(A), nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service. We otherwise reject Fyk's argument that his case is like *Fair Housing* because Facebook allegedly "discriminated" against him by singling out his pages. Fyk mistakes the alleged illegality of the particular content at issue in *Fair Housing* with an anti-discrimination rule that we have never adopted to apply § 230(c)(1) immunity.

2. Contrary to Fyk's arguments here regarding a so-called "first party" and "third party" distinction between §§ 230(c)(1) and 230(c)(2)(A), the fact that he generated the content at issue does not make § 230(c)(1) inapplicable. We have explained that "[t]he reference to 'another information content provider' [in § 230(c)(1)] distinguishes the circumstance in which the interactive computer service itself meets the definition of 'information content provider' with respect to the information in question." *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003), *superseded in part by statute on other grounds as stated in Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766–67 (9th Cir. 2017). As to Facebook, Fyk is "another information content provider." *See Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094 (N.D. Cal. 2015), *aff'd*, 697 F. App'x 526, 526 (9th Cir. 2017).

3. We reject Fyk's argument that granting § 230(c)(1) immunity to

Facebook renders § 230(c)(2)(A) mere surplusage. As we have explained, § 230(c)(2)(a) "provides an *additional shield* from liability." *Barnes*, 570 F.3d at 1105 (emphasis added). "[T]he persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but any provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue can take advantage of subsection (c)(2)." *Id*.

4. Finally, we reject Fyk's argument that Facebook is estopped from relying on § 230(c)(1) immunity based on its purported pre-suit reliance on § 230(c)(2)(A) immunity to justify its conduct. The CDA precludes the imposition of liability that is inconsistent with its provisions. 47 U.S.C. § 230(e)(3).

AFFIRMED.

EXHIBIT “B”

EXECUTIVE ORDERS

Executive Order on Preventing Online Censorship

INFRASTRUCTURE & TECHNOLOGY | Issued on: May 28, 2020

★ ★ ★

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people.

In a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet. This practice is fundamentally un-American and anti-democratic. When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. They cease functioning as passive bulletin boards, and ought to be viewed and treated as content creators.

The growth of online platforms in recent years raises important questions about applying the ideals of the First Amendment to modern communications technology. Today, many Americans follow the news, stay in touch with friends and family, and share their views on current events through social media and other online platforms. As a result, these platforms function in many ways as a 21st century equivalent of the public square.

Twitter, Facebook, Instagram, and YouTube wield immense, if not unprecedented, power to shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see.

As President, I have made clear my commitment to free and open debate on the internet. Such debate is just as important online as it is in our universities, our town halls, and our homes. It is essential to sustaining our

EXHIBIT “B”

democracy.

Online platforms are engaging in selective censorship that is harming our national discourse. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms "flagging" content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse.

Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician's tweet. As recently as last week, Representative Adam Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called 'Site Integrity' has flaunted his political bias in his own tweets.

At the same time online platforms are invoking inconsistent, irrational, and groundless justifications to censor or otherwise restrict Americans' speech here at home, several online platforms are profiting from and promoting the aggression and disinformation spread by foreign governments like China. One United States company, for example, created a search engine for the Chinese Communist Party that would have blacklisted searches for "human rights," hid data unfavorable to the Chinese Communist Party, and tracked users determined appropriate for surveillance. It also established research partnerships in China that provide direct benefits to the Chinese military. Other companies have accepted advertisements paid for by the Chinese government that spread false information about China's mass imprisonment of religious minorities, thereby enabling these abuses of human rights. They have also amplified China's propaganda abroad, including by allowing Chinese government officials to use their platforms to spread misinformation regarding the origins of the COVID-19 pandemic, and to undermine pro-democracy protests in Hong Kong.

As a Nation, we must foster and protect diverse viewpoints in today's digital communications environment where all Americans can and should have a voice. We must seek transparency and accountability from online platforms, and encourage standards and tools to protect and preserve the integrity and openness of American discourse and freedom of expression.

Sec. 2. Protections Against Online Censorship. (a) It is the policy of the United States to foster clear ground rules promoting free and open debate on the internet. Prominent among the ground rules governing that debate is the immunity from liability created by section 230(c) of the Communications Decency Act (section 230(c)). 47 U.S.C. 230(c). It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.

Section 230(c) was designed to address early court decisions holding that, if an online platform restricted access to some content posted by others, it would thereby become a "publisher" of all the content posted on its site for purposes of torts such as defamation. As the title of section 230(c) makes clear, the provision provides limited liability "protection" to a provider of an interactive computer service (such as an online platform) that engages in "'Good Samaritan' blocking" of harmful content. In particular, the Congress sought to provide protections for online platforms that attempted to protect minors from harmful content and intended to ensure that such providers would not be discouraged from taking down harmful material. The provision was also intended to further the express vision of the Congress that the internet is a "forum for a true diversity of political discourse." 47 U.S.C. 230(a)(3). The limited protections provided by the statute should be construed with these purposes in mind.

In particular, subparagraph (c)(2) expressly addresses protections from "civil liability" and specifies that an interactive computer service provider may not be made liable "on account of" its decision in "good faith" to restrict access to content that it considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable." It is the policy of the United States to ensure that, to the maximum extent permissible under the law, this provision is not distorted to provide liability protection for online platforms that — far from acting in "good faith" to remove objectionable content — instead engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree. Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.

(b) To advance the policy described in subsection (a) of this section, all executive departments and agencies should ensure that their application of section 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard. In addition, within 60 days of the date of this order, the Secretary of Commerce (Secretary), in consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA), shall file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify:

(i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its

own editorial decisions;

(ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are:

(A) deceptive, pretextual, or inconsistent with a provider's terms of service; or

(B) taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard; and

(iii) any other proposed regulations that the NTIA concludes may be appropriate to advance the policy described in subsection (a) of this section.

Sec. 3. Protecting Federal Taxpayer Dollars from Financing Online Platforms That Restrict Free Speech. (a) The head of each executive department and agency (agency) shall review its agency's Federal spending on advertising and marketing paid to online platforms. Such review shall include the amount of money spent, the online platforms that receive Federal dollars, and the statutory authorities available to restrict their receipt of advertising dollars.

(b) Within 30 days of the date of this order, the head of each agency shall report its findings to the Director of the Office of Management and Budget.

(c) The Department of Justice shall review the viewpoint-based speech restrictions imposed by each online platform identified in the report described in subsection (b) of this section and assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.

Sec. 4. Federal Review of Unfair or Deceptive Acts or Practices. (a) It is the policy of the United States that large online platforms, such as Twitter and Facebook, as the critical means of promoting the free flow of speech and ideas today, should not restrict protected speech. The Supreme Court has noted that social media sites, as the modern public square, "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. *Cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-89 (1980).

(b) In May of 2019, the White House launched a Tech Bias Reporting tool to allow Americans to report incidents of online censorship. In just weeks, the White House received over 16,000 complaints of online

platforms censoring or otherwise taking action against users based on their political viewpoints. The White House will submit such complaints received to the Department of Justice and the Federal Trade Commission (FTC).

(c) The FTC shall consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices in or affecting commerce, pursuant to section 45 of title 15, United States Code. Such unfair or deceptive acts or practice may include practices by entities covered by section 230 that restrict speech in ways that do not align with those entities' public representations about those practices.

(d) For large online platforms that are vast arenas for public debate, including the social media platform Twitter, the FTC shall also, consistent with its legal authority, consider whether complaints allege violations of law that implicate the policies set forth in section 4(a) of this order. The FTC shall consider developing a report describing such complaints and making the report publicly available, consistent with applicable law.

Sec. 5. State Review of Unfair or Deceptive Acts or Practices and Anti-Discrimination Laws. (a) The Attorney General shall establish a working group regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group shall also develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group shall invite State Attorneys General for discussion and consultation, as appropriate and consistent with applicable law.

(b) Complaints described in section 4(b) of this order will be shared with the working group, consistent with applicable law. The working group shall also collect publicly available information regarding the following:

(i) increased scrutiny of users based on the other users they choose to follow, or their interactions with other users;

(ii) algorithms to suppress content or users based on indications of political alignment or viewpoint;

(iii) differential policies allowing for otherwise impermissible behavior, when committed by accounts associated with the Chinese Communist Party or other anti-democratic associations or governments;

(iv) reliance on third-party entities, including contractors, media organizations, and individuals, with indicia of bias to review content; and

(v) acts that limit the ability of users with particular viewpoints to earn money on the platform compared with other users similarly situated.

Sec. 6. Legislation. The Attorney General shall develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order.

Sec. 7. Definition. For purposes of this order, the term "online platform" means any website or application that allows users to create and share content or engage in social networking, or any general search engine.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

EXHIBIT “C”

THE UNITED STATES DEPARTMENT of JUSTICE

PARTMENT OF JUSTICE'S REVIEW OF SECTION 230 OF THE COMMUNICATIONS DECENCY ACT OF 1996

As part of its broader review of market-leading online platforms, the U.S. Department of Justice analyzed Section 230 of the Communications Decency Act of 1996, which provides immunity to online platforms from civil liability based on third-party content and for the removal of content in certain circumstances. Congress originally enacted the statute to nurture a nascent industry while also incentivizing online platforms to remove content harmful to children. The combination of significant technological changes since 1996 and the expansive interpretation that courts have given Section 230, however, has left online platforms both immune for a wide array of illicit activity on their services and free to moderate content with little transparency or accountability.

The Department of Justice has concluded that the time is ripe to realign the scope of Section 230 with the realities of the modern internet. Reform is important now more than ever. Every year, more citizens—including young children—are relying on the internet for everyday activities, while online criminal activity continues to grow. We must ensure that the internet is both an open and safe space for our society. Based on engagement with experts, industry, thought-leaders, lawmakers, and the public, the Department has identified a set of concrete reform proposals to provide stronger incentives for online platforms to address illicit material on their services, while continuing to foster innovation and free speech. Read the Department's Key Takeaways.

Read More

The Department's review of Section 230 arose in the context of our broader review of market-leading online platforms and their practices, announced in July 2019. While competition has been a core part of the Department's review, we also recognize that not all concerns raised about online platforms (including internet-based businesses and social media platforms) fall squarely within the U.S. antitrust laws. Our review has therefore looked broadly at other legal and policy frameworks applicable to online platforms. One key part of that legal landscape is Section 230, which provides immunity to online platforms from civil liability based on third-party content as well as immunity for removal of content in certain circumstances.

Drafted in the early years of internet commerce, Section 230 was enacted in response to a problem that incipient online platforms were facing. In the years leading up to Section 230, courts had held that an online platform that passively hosted third-party content was not liable as a publisher if any of that content was defamatory, but that a platform would be liable as a publisher for all its third-party content if it exercised discretion to remove *any* third-party material. Platforms therefore faced a dilemma: They could try to moderate third-party content but risk being held liable for any and all content posted by third parties, or choose not to moderate content to avoid liability but risk having their services overrun with obscene or unlawful content. Congress enacted Section 230 in part to resolve this quandary by providing immunity to online platforms both for third-party content on their services or for removal of certain categories of content. The statute was meant to nurture emerging internet businesses while also incentivizing them to regulate harmful online content.

The internet has changed dramatically in the 25 years since Section 230's enactment in ways that no one, including the drafters of Section 230, could have predicted. Several online platforms have transformed into some of the nation's largest and most valuable companies, and today's online services bear little resemblance to the rudimentary offerings in 1996. Platforms no longer function as simple forums for posting third-party content, but instead use sophisticated algorithms to promote content and connect users. Platforms also now offer an ever-expanding array of services, playing an increasingly essential role in how Americans communicate, access media, engage in commerce, and generally carry on their everyday lives.

These developments have brought enormous benefits to society. But they have also had downsides. Criminals and other wrongdoers are increasingly turning to online platforms to engage in a host of unlawful activities, including child sexual exploitation, selling illicit drugs, cyberstalking, human trafficking, and terrorism. At the same time, courts have interpreted the scope of Section 230 immunity very broadly, diverging from its original purpose. This expansive statutory interpretation, combined with technological developments, has reduced the incentives of online platforms to address illicit activity on their services and, at the same time, left them free to moderate lawful content without transparency or accountability. The time has therefore come to realign the scope of Section 230 with the realities of the modern internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services.

Much of the modern debate over Section 230 has been at opposite ends of the spectrum. Many have called for an outright repeal of the statute in light of the changed technological landscape and growing online harms. Others, meanwhile, have insisted that Section 230 be left alone and claimed that any reform will crumble the tech industry. Based on our analysis and external engagement, the Department believes there is productive middle ground and has identified a set of measured, yet concrete proposals that address many of the concerns raised about Section 230.

A reassessment of America's laws governing the internet could not be timelier. Citizens are relying on the internet more than ever for commerce, entertainment, education, employment, and public discourse. School closings in light of the COVID-19 pandemic mean that children are spending more time online, at times unsupervised, while more and more criminal activity is moving online. All of these factors make it imperative that we maintain the internet as an open and safe space.

AREAS RIPE FOR SECTION 230 REFORM

The Department identified four areas ripe for reform:

1. Incentivizing Online Platforms to Address Illicit Content
The first category of potential reforms is aimed at incentivizing platforms to address the growing amount of illicit content online, while preserving the core of Section 230's immunity for defamation.

a. Bad Samaritan Carve-Out. First, the Department proposes denying Section 230 immunity to truly bad actors. The title of Section 230's immunity provision—"Protection for 'Good Samaritan' Blocking and Screening of Offensive Material"—makes clear that Section 230 immunity is meant to incentivize and protect responsible online platforms. It therefore makes little sense to immunize from civil liability an online platform that purposefully facilitates or solicits third-party content or activity that would violate federal criminal law.

b. Carve-Outs for Child Abuse, Terrorism, and Cyber-Stalking. Second, the Department proposes exempting from immunity specific categories of claims that address particularly egregious content, including (1) child exploitation and sexual abuse, (2) terrorism, and (3) cyber-stalking. These targeted carve-outs would halt the over-expansion of Section 230 immunity and enable victims to seek civil redress in causes of action far afield from the original purpose of the statute.

c. Case-Specific Carve-outs for Actual Knowledge or Court Judgments. Third, the Department supports reforms to make clear that Section 230 immunity does not apply in a specific case where a platform had actual knowledge or notice that the third party content at issue violated federal criminal law or where the platform was provided with a court judgment that content is unlawful in any respect.

2. Clarifying Federal Government Enforcement Capabilities to Address Unlawful Content
A second category reform would increase the ability of the government to protect citizens from harmful and illicit conduct. These reforms would make clear that the immunity provided by Section 230 does not apply to civil enforcement actions brought by the federal government. Civil enforcement by the federal government is an important complement to criminal prosecution.

3. Promoting Competition

A third reform proposal is to clarify that federal antitrust claims are not covered by Section 230 immunity. Over time, the avenues for engaging in both online commerce and speech have concentrated in the hands of a few key players. It makes little sense to enable large online platforms (particularly dominant ones) to invoke Section 230 immunity in antitrust cases, where liability is based on harm to competition, not on third-party speech.

4. Promoting Open Discourse and Greater Transparency

A fourth category of potential reforms is intended to clarify the text and original purpose of the statute in order to promote free and open discourse online and encourage greater transparency between platforms and users.

a. Replace Vague Terminology in (c)(2). First, the Department supports replacing the vague catch-all "otherwise objectionable" language in Section 230(c)(2) with "unlawful" and "promotes terrorism." This reform would focus the broad blanket immunity for content moderation decisions on the core objective of Section 230—to reduce online content harmful to children—while limiting a platform's ability to remove content arbitrarily or in ways inconsistent with its terms or service simply by deeming it "objectionable."

b. Provide Definition of Good Faith. Second, the Department proposes adding a statutory definition of "good faith," which would limit immunity for content moderation decisions to those done in accordance with plain and particular terms of service and accompanied by a reasonable explanation, unless such notice would impede law enforcement or risk imminent harm to others. Clarifying the meaning of "good faith" should encourage platforms to be more transparent and accountable to their users, rather than hide behind blanket Section 230 protections.

c. Explicitly Overrule Stratton Oakmont *to Avoid Moderator's Dilemma*. Third, the Department proposes clarifying that a platform's removal of content pursuant to Section 230(c)(2) or consistent with its terms of service does not, on its own, render the platform a publisher or speaker for all other content on its service.
