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In the

**SUPREME COURT OF THE UNITED STATES**

**October Term, 2020**

**HARRY J. WILLIBY**, an individual, on behalf of himself,

**Petitioner,**

**v.**

**MARK ZUCKERBERG**, CHAIRMAN/CEO FACEBOOK, INC.,

**(In his Official Governmental Capacity)**

**Respondent(s).**

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Harry J. Williby  
Petitioner, In Pro Se  
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**Attorney for: Petitioner**  
February 22, 2020

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October Term, 2020

HARRY J. WILLIBY, an individual, on behalf of himself,

Petitioner,

v.

MARK ZUCKERBERG, CHAIRMAN/CEO FACEBOOK, INC.,

(In his Official Governmental Capacity)

Respondent(s).

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

Harry J. Williby, the Petitioner, hereby petitions the Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit that affirmed the district court's denial of Petitioner's Motion to Proceed Informa Pauperis and dismissal of Petitioner's 42 U.S.C. § 1983 action as frivolous, citing Manhattan Community Access Corp. v. Halleck, 587 US \_ (2019). No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

**QUESTION(S) PRESENTED**

- A.** Is Facebook subject to suit under the Civil Rights law(s) based upon the conduct (as set forth below) of Mark Zuckerberg, Sheryl Sandberg and Chris Hughes?
- B.** Based upon Facebook's financial, campaign, technical support of President Barack Obama's election campaigns; and her Officer's employment in the Obama Administration, are District Court Judges appointed by President Obama required to recuse themselves (Sua Sponte), under 28 U.S.C. § 455(a)

in suits involving Facebook, her subsidiaries, Mark Zuckerberg, Sheryl Sandberg and Chris Hughes?

## **PARTIES BELOW**

All parties in the lower courts are not identified in the caption. Said parties are as follows:

### **1. Sheryl Sandberg**

## **RELATED CASES**

**WILLIBY v. ALPHABET, INC., ET AL., Case No. 18-17328 (Ninth Circuit)**

### **I. ORDERS BELOW**

The order of the court of appeals is not reported and is set forth in the Appendix ("Pet. App. 'A'"). The district court issued a written order and judgment. ("Pet. App. 'B'")

### **II. JURISDICTION**

The court of appeals issued its order on November 25, 2019. ("Pet. App. 'A'"). A petition for rehearing was not filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **III. U.S. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The First Amendment to the United States Constitution Provides as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 U.S.C. § 1983 provides as follows:

"Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

28 U.S.C. § 455(a) provides as follows:

"Section 455(a) of 28 U.S.C. (1994 ed.) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.""

The Fourteenth Amendment § 1 to the United States Constitution Provides as follows:

**Section. 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1331 provides as follows:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367(a) provides as follows:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

#### **IV. STATEMENT OF THE CASE.**

##### **(1) Mark Zuckerberg, Chris Hughes and Facebook's Creation**

[Respondent] Mark Zuckerberg is the founder, chairman and CEO of Facebook, Inc. [...] Facebook, Inc., [went public] in 2004. Defendant Zuckerberg is responsible for setting the overall direction and product strategy for the company. He leads the design of [...] Facebook Inc.'s service and development of its core technology and infrastructure. As the Chief Executive Officer, [Respondent] Zuckerberg is responsible for enforcing the acts, policies, practices, and/or customs of Defendant Facebook, Inc. **[U.S. Dist Ct. Dkt. #10, p. 04, ¶ 12, F.A.C.]**

Chris Hughes met [Respondent] Mark Zuckerberg [d]uring his freshman year at Harvard. Hughes was among the teenagers who created Facebook. Zuckerberg was Facebook user ID 4; Hughes, Facebook user ID 5. Hughes began to make product suggestions, "screwing around with the site," as he puts it. He became the official Facebook explainer: part anthropologist, part customer-service rep, part media spokesperson. of 2004, Hughes devoted several hours a day to [Facebook] during his senior year. He relocated to Palo Alto after graduation. Hughes was the leading product manager for the share functionality on the Facebook site. **[U.S. Dist Ct. Dkt. #10, pp. 07-08, ¶ 21, F.A.C.]**

##### **(2) Facebook's Governmental Actions**

"In the fall of 2006, as midterm elections approached, Facebook took the step of allowing political candidates to set up modified profile pages. Reggie Love, Obama's now famous body man, emailed Hughes on behalf of the then-freshman senator from Illinois, Barack Obama. Although Obama wasn't a

midterm candidate, he wanted a Facebook profile anyway. Jim Brayton, then the Senator Obama's Internet director said: "I liked the Facebook idea, but Reggie really got it immediately." After Reggie Love set up Barack Obama's Facebook profile, Brayton said: "We quickly wanted to be able to do more with it. Chris [Hughes] got it right away." Hughes is quoted as saying: "I connected to Barack as an individual first. It just so happened that he was in politics." Love arranged a phone interview for Hughes with Brayton in January 2007. During this time, the Obama campaign's exploratory site was going live. A couple of weeks before Obama's official announcement, Brayton and Hughes met in person over coffee at Union Station in D.C. Brayton is quoted as saying: "It was wonderful to hear someone outside the campaign who understood the potential for organizing on-line." [Brayton] [...] hire[d] Hughes on the spot." [U.S. Dist Ct. Dkt. #10, p. 08, ¶ 22, F.A.C.]

In 2007, Hughes created the [...] the on-line campaign apparatus that got Barack Obama elected as President of the United States. Hughes helped develop the most robust set of Web-based social-networking tools ever used in a political campaign. Hughes' key tool was My.BarackObama.com, or MyBO for short. [The] networking Web site, interfaced with Facebook, allowed Obama supporters to create groups, plan events, raise funds, download tools, and connect with one another. Obama's campaign manager David Plouffe said (on April 1, 2009): "Technology has always been used as a net to capture people in a campaign or cause, but not to organize." Chris saw what was possible before anyone else." Obama's campaign manager David Plouffe continued: "We were very lucky that Chris gravitated to the campaign early." Chris' father, Arlen "Ray" Hughes, recalled a meeting with Obama at the campaign center set up by Chris, he said: "My wife, Brenda, was crying too hard to speak. But I said, 'My son, Chris Hughes, works for you.' And Barack beamed, and he said, 'That's my Internet man!'" Barack Obama was elected President on November 4, 2008. [U.S. Dist Ct. Dkt. #10, pp. 09-10 , ¶ 23, F.A.C.]

**[Footnote #3]** By the time the [2008] campaign was over, [Obama campaign] volunteers had created more than 2 million [Facebook] profiles on the site, planned 200,000 offline events, formed 35,000 groups, posted 400,000 blogs, and raised \$30 million on 70,000 personal fund-raising [Facebook] pages.

On April 20, 2011, President Barack Obama made a campaign-style visit to the nexus of social communications, Facebook, Inc.'s headquarters, in Menlo Park, California, at the invitation of [Respondent]s Zuckerberg and Sandberg. President Barack Obama, Facebook CEO Mark Zuckerberg, and Facebook COO Sheryl Sandberg answered questions from users as part of a Facebook Live townhall held at the Facebook headquarters. [See Footnote #5] By visiting Facebook headquarters in Silicon Valley, Obama sought to connect to tens of millions of people who have adopted social media as a prime method of communications. [See Footnote #6] "My name is Barack Obama and I'm the guy who got Mark to wear a jacket and tie." The president said at the beginning of a live streamed town hall event with [Respondent] Zuckerberg. The president started fielding questions about how to reduce the budget deficit. The budget deficit was projected to hit \$1.4 trillion in the fiscal year (2011). President Obama promoted his plan of spending cuts and tax increases for the wealthiest Americans. Obama told the wealthy Facebook founder that both of them would have to pay more taxes to help out. Zuckerberg responded: "I'm cool with that." [U.S. Dist Ct. Dkt. #10, pp. 10-11, ¶ 24, F.A.C.]

**[Footnote #5]** Facebook Live is Defendant Facebook's Live-Streaming (real-time) video service. According to Defendants: "[Facebook] Live lets people, public figures and Pages share live video with their followers and friends on Facebook."

**[Footnote #6]** Democrats acknowledged in 2011 that Obama needed to rally many of the same forces that propelled him into the White House in order to win re-election in 2012 (an army of young, energetic voters as well as a sizable showing from independent voters). Jon Krosnick, a political science professor at Stanford University, said[,] having Obama on stage with Zuckerberg could help the president with young people. Krosnick said: "That alone is a way of trying to re-energize this young generation that might be crucial for him to be re-elected again."

In 2012, four years after [Respondent] Sandberg's arrival at Facebook, Inc., the [Respondent]s Facebook, Inc., Zuckerberg and Sandberg integrated political campaign data with Facebook's data. This integrated data change was critical to President Barack Obama's 2012 [re]election. Carol Davidsen is the former director of integration and media analytics at Obama for America. Davidsen is a data expert. She worked on the Obama campaign from

November 2011 to November 2012. On Twitter, Davidsen explained how the 2012 campaign harnessed Facebook's Application Programming Interface (API) to access the company's "social graph." Facebook's "social graph" maps the Facebook users connections. This enabled the Obama campaign to access information on users' friends when they used the Facebook log-in button to access the campaign's website. Davidsen tweeted (on March 18, 2018): "Facebook was surprised we were able to suck out the whole social graph, but they didn't stop us once they realized that was what we were doing." In a subsequent tweet on March 18, 2018, Davidsen added: "They [Facebook officials] came to office in the days following election recruiting & were very candid that they allowed us to do things they wouldn't have allowed someone else to do because they were on our side." In a following tweet on March 18, 2018, Davidsen tweeted: "I worked on all of the data integration projects at O[bama] F[or] A[merica]. This was the only one that felt creepy, even though we played by the rules, and didn't do anything I felt was ugly, with the data." (See attached Exhibit No. 10-thru-10(C).) [U.S. Dist Ct. Dkt. #10, pp. 11-12, ¶ 25, F.A.C.]

**[Footnote #7]** Obama for America (<https://www.ofa.us/>) was originally created as My.BarackObama.com by Facebook cofounder Chris Hughes [...] director of on-line organizing for Obama during the 2008 Presidential Election.

[Respondent] Facebook [...] denied that there was any favoritism toward the [Barack] Obama campaign. In a statement emailed to Fox News, [Respondent] Facebook stated: "Both the [Barack] Obama and [Mitt] Romney [Presidential] campaigns had access to the same tools, and no campaign received any special treatment from Facebook." [U.S. Dist Ct. Dkt. #10, p. 12, ¶ 26, F.A.C.]

In 2012, Facebook, Inc. started co-sponsoring presidential debates in the Republican primaries. [U.S. Dist Ct. Dkt. #10, p. 12, ¶ 27, F.A.C.]

On March 14, 2014, Defendant Zuckerberg wrote on his Facebook page: "I've called President Obama to express my frustration over the damage the government is creating for all of our future, As the world becomes more complex and governments everywhere struggle, trust in the Internet (sic) is more important today than ever. This is why I've been so confused and frustrated by the repeated reports of the behavior of the U.S. government.

When our engineers work tirelessly to improve security, we imagine we're protecting you against criminals, not our own government. The U.S. government should be the champion for the Internet, not a threat. They need to be much more transparent about what they're doing, or otherwise people will believe the worst. Unfortunately, it seems like it will take a very long time for true full reform." The White House spokesperson at the time, Caitlin Hayden, confirmed that President Obama and Defendant Zuckerberg spoke on Wednesday night regarding "recent reports in the press about alleged activities by the US intelligence community[.]" [U.S. Dist Ct. Dkt. #10, p. 13, ¶ 28, F.A.C.]

In 2015, Facebook, Inc., at the direction of [Respondent]s Zuckerberg and Sandberg, rolled out features to allow advertisers to target "political influencers." Political influencers are Facebook users who like lots of political pages, click on political ads and share content from political organizations. [U.S. Dist Ct. Dkt. #10, pp. 13-14, ¶ 29, F.A.C.]

During the 2016 presidential election, [Respondent] Sandberg, using Facebook's website, was a vocal supporter of Hillary Clinton's Presidential Campaign. [Respondent] Sandberg was even mentioned as a possible treasury secretary [under Hillary Clinton]. [U.S. Dist Ct. Dkt. #10, p. 14, ¶ 30, F.A.C.]

**[Footnote #9]** Before working at Google, Sandberg was chief of staff for Bill Clinton's treasury secretary Larry Summers.

On June 24, 2016, President Obama attended the seventh Global Entrepreneurship Summit (GES) at Stanford University, with over 1200 entrepreneurs from 170 countries. [Respondent] Zuckerberg was present as well. President Obama is quoted as saying: "Part of this summit's job is to make sure we are putting more tools, more resources into the hands of these folks who are changing the world." At each summit, the White House has announced programs and initiatives in partnership with the host country, including commitments of venture capital and policies to support new businesses. (joint action) Immediately after making remarks at the 7th (GES) summit, [Respondent] Zuckerberg invited the President (for the second time) to be part of a panel discussion on Facebook Live. [Respondent] Zuckerberg did an interview with Obama, [which] was broadcast on Facebook Live for all

to see. (See attached Exhibit(s) No. 3, 2, and 1.) [U.S. Dist Ct. Dkt. #10, p. 14-15, ¶ 31, F.A.C.]

**[Footnote #11]** This was President Obama's 3rd time on Facebook Live. On Monday (16 May 2016) during the interview, the Facebook Live feed direct from the White House stalled. The "BuzzFeed" Facebook user attempted a Facebook Live interview with the President that lasted two minutes before it failed. At this point White House staff instead shifted the interview stream over to their YouTube channel so the 35,000 viewers could continue watching the broadcast.

As a direct and proximate result of the December 2015 mass shooting in San Bernardino, California, President Obama dispatched members of his national security team to meet & confer with leading Silicon Valley executives over ways to thwart the Islamic State's practice of using U.S.-based technology platforms to recruit members and inspire attacks. The result was a summit held on January 8, 2016. Members of the President's National Security team including Chief of Staff Denis McDonough, Homeland Security Secretary Jeh Johnson and top counter-terrorism adviser Lisa Monaco and [Respondent], Facebook Chief Operating Officer, Sheryl Sandberg attended the summit. According to the Obama administration, the summit paid off. Facebook agreed to set up a special unit to develop tools for finding Islamic State messages and blocking their dissemination. [U.S. Dist Ct. Dkt. #10, p. 15, ¶ 32, F.A.C.]

**[Footnote #12]** "Specifically, "[t]he Supreme Court has articulated four tests for determining whether a private party's actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test." (Citations omitted)

**[Footnote #13]** The governmental nexus test refers to a pursuit undertaken by a private person in concert with a governmental entity or state official. It results from a private person performing public functions and thereby being subject to claims under the civil rights laws. It is also known as joint activity.

On Tuesday, November 8, 2016, Donald Trump was elected President of the United States. On Thursday, November 10, 2016, Facebook chief executive, [Respondent] Mark Zuckerberg, dismissed as "crazy" the idea that fake news on his company's social network played a key role in the U.S. election. On

Saturday, November 19, 2016, President Barack Obama pulled [[Respondent] Zuckerberg] aside and delivered what he hoped would be a wake-up call. President Obama and Zuckerberg huddled in a private room on the sidelines of a meeting of world leaders in Lima, Peru. The meeting took place two months before Trump's inauguration. Obama made a personal appeal to Zuckerberg to take the threat of fake news and political disinformation seriously. Obama told Zuckerberg that unless "Facebook and the government did more to address the threat," Obama warned, "it would only get worse in the next presidential race." [Respondent] Zuckerberg acknowledged the problem posed by fake news. However, he told President Obama those messages weren't widespread on Facebook and that there was no easy fix. The conversation between President Obama and [Respondent] Zuckerberg on November 19, 2016, was a flashpoint in a tumultuous election year. One outcome of the efforts by President Obama was Zuckerberg's admission Facebook had indeed been manipulated. Defendant Zuckerberg stated that Facebook would now turn over to Congress more than 3,000 politically themed advertisements that were bought by suspected Russian operatives. [...] Immediately following this November 19, 2016 meeting between [Respondent] Zuckerberg and President Obama, [Respondent] Facebook, Inc., announced and implemented its "election integrity" project/policy on the Facebook website. [U.S. Dist Ct. Dkt. #10, pp. 15-17, ¶ 33, F.A.C.]

Elliot Schrage is Defendant Facebook's Vice President for Public Policy and Communications. He is publicly quoted as stating (in response to [Respondent] Zuckerberg and President Obama's November 19, 2016 meeting): "We believe in the power of democracy, which is why we're taking this work on elections integrity so seriously, and have come forward at every opportunity to share what we've found." On Thursday, September 21, 2017, [Respondent] Zuckerberg said during a live broadcast on his Facebook page: "I care deeply about the democratic process and protecting its integrity. I don't want anyone to use our tools to undermine our democracy." [Respondent] Zuckerberg continued this live broadcast on his Facebook page, outlining nine steps that Facebook would take to "protect election integrity" and "make sure Facebook is a force for good in democracy." (See attached Exhibit No. 8.) The relevant steps outlined by [Respondent] Zuckerberg, are as follows:

1. “We are actively working with the US government on its ongoing investigations into Russian interference. We have been investigating this for many months, and for a while we had found no evidence of fake accounts linked to Russia running ads. When we recently uncovered this activity, we provided that information to the special counsel. We also briefed Congress -- and this morning[.] I directed our team to provide the ads we've found to Congress as well. As a general rule, we are limited in what we can discuss publicly about law enforcement investigations, so we may not always be able to share our findings publicly. But we support Congress in deciding how to best use this information to inform the public, and we expect the government to publish its findings when their investigation is complete.”

2. “We will continue our investigation into what happened on Facebook in this election. We may find more, and if we do, we will continue to work with the government. We are looking into foreign actors, including additional Russian groups and other former Soviet states, as well as organizations like the campaigns, to further our understanding of how they used our tools. These investigations will take some time, but we will continue our thorough review.”

(Paragraphs #3 and #4, omitted as irrelevant to complaint.)

5. “We are increasing our investment in security and specifically election integrity. In the next year, we will more than double the team working on election integrity. In total, we'll add more than 250 people across all our teams focused on security and safety for our community.”

6. “We will expand our partnerships with election commissions around the world. We already work with electoral commissions in many countries to help people register to vote and learn about the issues. We'll keep doing that, and now we're also going to establish a channel to inform election commissions of the online risks we've identified in their specific elections.”

(Paragraph #7, omitted as irrelevant to complaint.)

8. “We are working proactively to strengthen the democratic process. Beyond pushing back against threats, we will also create more services to protect our community while engaging in political discourse. For example, we're looking at adapting our anti-bullying systems to protect against political harassment as

well, and we're scaling our ballot information tools to help more people understand the issues."

(Paragraph #9, omitted as irrelevant to complaint.)

[Respondent] Zuckerberg, continued during the live broadcast on his Facebook page, stating:

"At the same time, it's important not to lose sight of the more straightforward and larger ways Facebook plays a role in elections -- and these effects operate at much larger scales of 100x or 1000x bigger than what we're discussing here. In 2016, people had billions of interactions and open discussions on Facebook that may never have happened offline. Candidates had direct channels to communicate with tens of millions of citizens. Campaigns spent tens of millions organizing and advertising online to get their messages out further. And we organized "get out the vote" efforts that helped as many as 2 million people register to vote who might not have voted otherwise. Many of these dynamics were new in this election, or at much larger scale than ever before in history, and at much larger scale than the interference we've found."

**[Footnote #15]** <https://www.facebook.com/business/m/one-sheets/ads-with-political-content-us>

[U.S. Dist Ct. Dkt. #10, pp. 17-19, ¶ 34, F.A.C.]

On Monday September 4, 2017, [Respondent] Zuckerberg condemned President Donald Trump's administrative decision to end a program preventing the deportation of immigrants illegally brought to the US as children. A group known as Dreamers. [Respondent] Zuckerberg wrote on his social media service, Facebook page/profile: "This is a sad day for our country. The decision to end DACA is not just wrong. It is particularly cruel to offer young people the American Dream, encourage them to come out of the shadows and trust our government, and then punish them for it." On March 8, 2016, [Respondent] Zuckerberg signed his name, title and corporation on an amicus brief supporting President Barack Obama's executive orders protecting certain immigrants without documentation from deportation. [Respondent] Zuckerberg is one of the three founders of FWD.us. The organization is a lobbying group focused on immigration reform that was started in 2013. The brief was part of a Supreme Court case. The the amicus brief reads in relevant

part: "The business community would benefit from policies that afford undocumented individuals—approximately 11 million of whom live in the United States—lawful opportunities to contribute to the American economy. Conversely, the failure of our political system to make progress on modernizing our nation's immigration system has made it harder for U.S. businesses to compete in the global marketplace." [...] The main thrust for [Respondent] Zuckerberg's involvement with immigration reform lies in the Silicon Valley's huge reliance on foreign software developers. These developers come to the United States with a H1B visa and get paid a cheaper salary. [U.S. Dist Ct. Dkt. #10, pp. 19-21, ¶ 35, F.A.C.]

**[Footnote #16]** United States v. Texas, U.S. Supreme Court Case No. 15-674, Brief of Amici Curiae Members of the Business Community In support of Petitioners by FWD.us.

**[Footnote #17]** Obama's executive orders on immigration, most notably, the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and the expanded Deferred Action for Childhood Arrivals (DACA), were challenged by the state of Texas. The case was heard by the Supreme Court. The United States v. Texas, as the case is was called, sought to determine whether the president has the constitutional authority to implement such executive actions.

### **(3) Facebook's Global Reach**

"[Respondent] Facebook, Inc. is [now] a Global, American based, on-line social media [giant ] and social networking service company. [Respondent] Facebook, Inc., had 1.47 billion daily active users on Facebook, on average for June 2018. [Respondent] Facebook, Inc., averaged 2.23 billion monthly active users on Facebook as of June 30, 2018. [<https://newsroom.fb.com/company-info/>]. In [f]act, [each month] Facebook is used by one-third of the world's population[.] [...] Facebook, Inc., was at all times mentioned herein, a privately owned property [...]." [U.S. Dist Ct. Dkt. #10, p. 07, ¶ 20, F.A.C.]

### **(4) Suppression of Petitioner's Free & Political Speech**

"On, or about October 3, 2018, P[etitioner] posted on his Facebook pages (The Attorney Depot™ and Corrupt Justice™) a [national] news story regarding an

incident concerning a New York City Police Officer. The post read as follows: "TN (Photo) NYPD officer Michael Reynolds, 24, faces official charges of felony aggravated burglary and misdemeanor assault. In July 2018, Reynolds was on vacation and staying at an Airbnb in a popular Nashville neighborhood. Reynolds went to the wrong Airbnb house after a night of heavy drinking. He didn't have any keys for the house. Reynolds broke into the home of Conese Halliburton. Halliburton and her two sons yelled at Reynolds to get out of the house. However, instead of leaving, Reynolds shouted at the family saying: "Try to shoot me, I'll break every bone in your fucking neck. You fucking nigger." (See attached Exhibit(s) No. 9, 7, 6, 5, and 4.)" [U.S. Dist Ct. Dkt. #10, p. 05, ¶ 14, F.A.C.]

"On October 4, 2018, Defendant Facebook, Inc., notified Plaintiff regarding the foregoing Facebook post as follows: "Only you can see this because it goes against our standards on hate speech." (See attached Exhibit(s) No. 9, 7, 6, 5, and 4.)" [U.S. Dist Ct. Dkt. #10, p. 05, ¶ 15, F.A.C.]

"On the same day, October 4, 2018, as a result of Plaintiff's Facebook Posts, Defendant Facebook informed Plaintiff of the following: "You're Temporarily Blocked From Posting. This temporary block will last for 30 days, and you won't be able to post until it is finished. If you post something that goes against our standards again, your account will be blocked for another 30 days." (See attached Exhibit(s) No. 9, 7, 6, 5, and 4.)" [U.S. Dist Ct. Dkt. #10, p. 05, ¶ 16, F.A.C.]

"Between mid-January and February 2018, [Respondent] Facebook, Inc., successfully, suppressed P[etitioner]'s speech by removing a Facebook post from P[etitioner]'s page. [Respondent]s accused Plaintiff of "harassment & bullying." (See attached Exhibit No. 9.) P[etitioner] was blocked from posting for 30 days." [U.S. Dist Ct. Dkt. #10, p. 06, ¶ 17, F.A.C.]

On, or about June 22, 2018, [Respondent] Facebook, Inc., again successfully, suppressed Petitioner's view-point, factually based speech by removing a Facebook post from P[etitioner]'s page. [Respondent]s accused P[etitioner] of "posting spam." In fact, the post was a video outlining President Obama's policy of illegal immigrant, parent-child separation at the U.S. border. (See attached Exhibit No. 4.) P[etitioner] was blocked from posting for 30 days. [U.S. Dist Ct. Dkt. #10, p. 06, ¶ 18, F.A.C.]

## **(5) Pendent State Law Negligence Claim**

P[petitioner]'s Facebook profile has been hacked, or accessed without the proper authorization, or consent, of the P[petitioner], on multiple occasions. Upon further information and belief, P[petitioner] allege[d] that the most recent hack of his account occurred in early 2018. P[petitioner] was informed by [Respondent] Facebook that unknown parties, or persons in the country of Russia, attempted to access, or accessed P[petitioner]'s Facebook account. P[petitioner] was required to, and instructed to change his access code. [U.S. Dist Ct. Dkt. #10, p. 21, ¶ 38, F.A.C.]

## **V. SUMMARY OF THE U.S. CONSTITUTIONAL QUESTIONS PRESENTED**

To understand the constitutional questions that are presented here, it is necessary to review the settled issues of law regarding the First Amendment under the United States Constitution; Private Actors, the "state action" and "joint action" doctrine; and the principal statutes dealing with judicial recusal.

### **A. The First Amendment.**

The First Amendment expressly guarantees a right to free speech. Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) [...] "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (emphasis added). "The Free Speech Clause prohibits the government from abridging a person's speech[.]" Manhattan Community Access Corp. v. Halleck, 587 US \_\_\_ (2019). Just as the government lacks the authority "to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules," R.A.V. v. St. Paul, 505 U.S. 377, 392 (1992), it cannot subject one side of a debate to burdensome disclaimer mandates while leaving the other side free to design its own message.

The desire to burden private expression that some may consider offensive, biased, or rude is rarely, if ever, a legitimate basis for government regulation. Boy Scouts of Am. v. Dale, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, be it of the popular variety or not."). In Turner Broad. Sys.

v. FCC, 512 U.S. 622, 641 (1994), the Supreme Court held, "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Laws [requiring the utterance of a government-favored message] pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." The Court held "the Ordinance" improperly "manipulate[d] the public debate through coercion rather than persuasion," see *id.*, without being the least restrictive means of achieving a compelling government interest and, therefore, violates the First Amendment.

### **B. Private Actors, "Joint Action," and "State Action"**

The First Amendment bars the government from restricting freedom of speech. This bar does not generally apply to private actors, or corporations. However, private actors can be held liable for violating the First Amendment when they are acting on behalf of the government, or perform functions that are normally performed by the government. This doctrine known is known as the "state action" doctrine. "[T]he Court's state-action doctrine determines whether an actor is the government, subject to the First Amendment, or a private entity, who is not. Under established doctrine, a private entity may qualify as a state actor if it exercises "powers traditionally exclusively reserved to the State," but admittedly "very few" functions fall into that category." Manhattan Community Access Corp. v. Halleck, 587 US \_ (2019).

““Action taken by private individuals may be ‘under color of state law’ where there is ‘significant’ state involvement in the action.” (Citations omitted.) Although section 1983’s under-color-of-state-law requirement is technically separate from the Fourteenth Amendment’s state-action requirement, the two inquiries are closely related. (Citations omitted.) Because [a] Plaintiff [is] required to establish state action for purposes of their constitutional claims, [the court] treat[s] the under-color-of-state-law requirement and the state-action requirement as equivalent.

### **C. The Appearance of Impropriety**

"The two principal statutes dealing with judicial recusal are 28 U.S.C. § 144, "Bias or prejudice of judge," and 28 U.S.C. § 455, "Disqualification of justice, judge, or magistrate." [S]ection 144 is triggered by a party's affidavit[.] [S]ection 455 not only may be invoked by motion[,] but also requires judges to recuse *sua sponte* where appropriate. [S]ection 144 applies only to district judges while section 455 covers "any justice, judge, or magistrate of the United States." [A federal judge's failure to recuse himself under section 455] may have serious consequences. First, it can deprive citizens of their right to a "neutral and detached judge." Ward v. Village of Monroeville, 409 U.S. 57 (1972). The D.C. Circuit has stated that "[t]he Code of Conduct is the law with respect to the ethical obligations of federal judges." (Citations omitted.) Second, it can diminish public trust in the judicial system, which requires confidence in the impartiality of judges."

## VI. Proceedings Below

This action proceeded in the District Court on Petitioner's First Amended Complaint for Damages arising from allegations that Respondents violated Petitioner's First Amendment Rights on several occasions. Specifically, **1) Facebook, Inc. invited candidates for U.S. political office to create Facebook pages; 2) Facebook founder Chris Hughes created Senator Obama's Facebook page and the website Obama for America (which was instrumental in securing campaign donations and voters); 3) then-Senator Barack Obama through his agent, Reggie Love, recruited Facebook founder Chris Hughes to work in the Barack Obama, 2008 Presidential Campaign; 4) Facebook, Inc., by and through Mark Zuckerberg and Sheryl Sandberg allowed Obama to campaign for President (in 2008 and 2012) at Facebook's headquarters; 5) Facebook, Inc., provided financial support for Obama's Presidential campaigns; 6) Facebook, Inc. created Facebook user and tracking "Apps" at the direction of President Barack Obama; 7) Facebook allowed President Obama to hack Facebook user profiles during the 2012 election campaign; and 8) Facebook's Election Integrity Program was created at the suggestion and direction of President Barack Obama [and] [upon the invocation of] "the supplemental jurisdiction of this Court, under 28 U.S.C. § 1332, since [Petitioner's claims] [were] so related to the afore stated federal claims."** (See ECF No. 16, ¶¶ 30-35.)

On June 18, 2019, the district court dismissed, with prejudice, Petitioner's First Amended Complaint, pursuant to Federal Rule of Civil Procedure, Rule 41(b). ("Pet. App. 'B'" Order of the District Court, 06/18/19, pp. 1-2.) The district court issued judgment on June 18, 2019. ("Pet. App. 'C'" Judgment of the District Court, 06/18/19, pp. 1-2.)

Petitioner filed timely notice of appeal to the Ninth Circuit. On September 12, 2019, the clerk of the Ninth Circuit ordered Petitioner to show cause as to why said appeal should not be dismissed as frivolous. On October 10, 2019, Petitioner submitted a statement of why the appeal should go forward. The clerk received the statement on October 15, 2019. ("Pet. App. 'D'" Statement that appeal should go forward, October 15, 2019, pp. 1-3.)

On November 25, 2019, the Ninth Circuit issued an order stating: "Upon a review of the record and the response to the court's September 12, 2019 order, we conclude this appeal is frivolous. See Manhattan Cnty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928-30 (2019) (with limited exceptions, a private entity is not a state actor subject to the First Amendment); Price v. Hawaii, 939 F.2d 702, 707-08 (9th Cir. 1991) (private parties generally do not act under color of state law). We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 3), see 28 U.S.C. § 1915(a), and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious)."

## **VII. REASONS FOR GRANTING THE WRIT**

**The Decision Below Constitutes an Overbroad Application of This Court's Decision in Manhattan Community Access Corp. v. Halleck, 587 US \_ (2019) and Presents Extremely Important Questions of Law, affecting millions of citizens' rights under the First Amendment of the United States Constitution.**

### **(A) Overview**

**Supreme Court Rule 10(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.**

## **(B) Argument**

Petitioner does not (and has never) dispute[d] that Respondents are private actors. Petitioner factually alleged [in his First Amended Complaint] that the conduct of Respondents Facebook, Inc., Mark Zuckerberg, Sheryl Sandberg and Chris Hughes and her corporate officers (with respect to fmr. President and Senator Barack Obama) amounts to conduct by “state actors,” or “state action,” under the “joint action,” test.

To state a claim against [a defendant] under § 1983, [a plaintiff] must allege two essential elements: (1) deprivation of a right secured to him by the Constitution or laws of the United States; and (2) that defendants committed the deprivation while acting under color of state law. In order to recover damages, the plaintiff must show that he can recover damages for violations stemming from defendants' alleged unconstitutional activity.”

“It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.” Hudgens v. N.L.R.B., 424 U.S. 507, 513 (1976). However, in some circumstances, a private entity can be a state actor for constitutional purposes.

This Court has recently held, “[p]roviding a forum for speech does not, standing alone, make a private entity a state actor: “After all, private property owners and private lessees often open their property for speech. Grocery stores put up community bulletin boards. Comedy clubs host open mic nights.”” Manhattan Community Access Corp. v. Halleck, 587 US \_ (2019)

In dismissing Petitioner's First Amended Complaint, the District Court relied on *Halleck*. In its order upholding the dismissal, the Ninth Circuit, relied on *Halleck* as well. However, *Halleck* is not controlling in the matter herein. Neither court examined the four tests for determining whether a private party's actions amount to state action.

Specifically, “[t]he Supreme Court has articulated four tests for determining whether a private party's actions amount to state action: (1) the public function test; (2) the joint action test; (3) the state compulsion test; and (4) the governmental nexus test.” [Citations omitted]. The joint action test for state action is met where private persons are “willful participant[s] in joint activity with the State or its agents” that effects a constitutional deprivation. [Citations

omitted] An agreement between government and a private party can create state action. [Citations omitted]. “The state cannot free itself from the limitations of the Constitution in the operation of its governmental functions merely by delegating certain functions to otherwise private individuals. If private actors assume the role of the state by engaging in these governmental functions then they subject themselves to the same limitations on their freedom of action as would be imposed upon the state itself.” (Citations Omitted.) The Supreme Court has found state action present “in the exercise by a private entity of powers traditionally exclusively reserved to the State.” Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974).

This court held in Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991), “Although the conduct of private parties lies beyond the Constitution’s scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints.”

One such power that the Supreme Court has recognized as traditionally exclusively sovereign is the power to conduct elections for public officials. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 157-58, 98 S.Ct. 1729, 1733-34, 56 L.Ed.2d 185 (1978).

In 2008 and 2012, Respondents Facebook, Inc. Zuckerberg, Hughes and Sandberg, knowingly and willfully, converted their private corporation into a forum to elect a sitting U.S. Senator, Barack Obama, to the Presidency of the United States. Respondents Facebook, Inc., Zuckerberg, Hughes and Sandberg, w[ere] successful on both occasions. For a period of eight years, Respondents, as corporate leaders worked for, with, [and] on behalf and at the direction of the President of the United States. This Court has held: Finally, under the nexus test, we must consider whether there is a “sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.” Jackson, 419 U.S. at 351, 95 S.Ct. at 454.

Respondent Facebook balked at removing misinformation after the 2016 election out of concern it would alienate conservatives. The decision came as Respondent Facebook struggled to address the findings of Project P. The

project was an internal anti-propaganda project that found the leading sources of false news reports were foreign-based pages. The pages sought profit by peddling conservative content. The decision against quick removal was based upon Respondent's desire to appease increasingly vocal Republican critics, including President Trump. The result was that a company led mainly by Democrats in Northern California repeatedly has tilted rightward to deliver policies, hiring decisions and public gestures sought by Republicans. These facts were publicly attested to by current and former employees, as well as others who have worked closely with the Respondent's company.

The United States Supreme Court has formulated an approach to the protection of free speech based largely on the type of forum involved. (See Perry Educ. Ass'n v. Perry Local Educ. Ass'n, , 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).) The classification of the forum identifies the applicable standard of judicial scrutiny to apply. (Id. at 44, 103 S. Ct. 948.) In Perry, the Supreme Court identified and defined three types of forums. The first is the "quintessential public forum." (Id. at 45, 103 S. Ct. 948.) A traditional public forum encompasses "places which by long tradition or government fiat have been devoted to assembly and debate," such as streets and parks. (Id.) At the other end of the spectrum is the "nonpublic forum," which consists of public property that is neither by tradition nor designation a forum for public discourse . (See id. at 46, 103 S. Ct. 948.) In between these two types of forums, Perry further identifies "public property which the state has opened for use by the public as a place for expressive activity." (Id. at 45, 103 S. Ct. 948.)

The Ninth Circuit ignored these suggested means by which courts could accommodate the federal and state interests that are at stake in cases such as this. Instead, while honoring the federal and state governmental interests of Respondents, the lower courts obliterated those of the Petitioner. But, beyond this overall result that seriously undermines principles of First Amendment federal law, as we now show, the rulings below also run counter to decisions of this Court. Accordingly, the Court should grant certiorari to prevent the gross and wholly unnecessary infringements of state power that were wrought by the decision below.

**(C) Failure to Exercise Sua Sponte Recusal**

On June 20, 2013, President Obama nominated Judge Donato to serve as a United States District Judge of the United States District Court for the Northern District of California. Many people—including legal scholars, judicial commentators, and legal practitioners—have raised concerns about the federal judiciary's current legitimacy crisis. Members of the public increasingly perceive federal courts as unfair, particularly to underrepresented groups, and as entities that favor corporate interests over the public good. In particular, federal judges—especially Supreme Court justices—are increasingly viewed as political actors, while the courts are viewed as partisan institutions. This is due in part to hyperpartisanship in the judicial nomination process and recent appointments of overtly partisan judges. In the instant case, Petitioner factually alleged in his First Amended Complaint that Respondents and her corporate officers, financed, campaigned for, and were directly employed by Senator Barack Obama (in the 2008 and 2012 Presidential campaigns). Petitioner further alleged that said Respondents, were in fact employed by President Obama's 2008 and 2012 transition teams, and in fact were employed in the Obama administration, ... while simultaneously serving as corporate leaders in the Facebook Corporate structure. The appearance of impropriety exists with respect to judges appointed by President Obama, presiding over cases in which Respondents, or any of her subsidiaries, are Plaintiffs, or Defendants. Section 455 not only may be invoked by motion, but also requires judges to recuse sua sponte where appropriate. Sections 455(a) spells out certain situations in which partiality is presumed and recusal is required. It is no longer the case that a judge should recuse where "in his opinion" sitting would be improper, but rather where his or her impartiality "might reasonably be questioned." Any circumstance in which a judge's impartiality might reasonably be questioned, whether or not touched on in section 455(b), requires recusal under section 455(a). See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 n.8 (1988). "... [t]he Code of Conduct is the law with respect to the ethical obligations of federal judges." (Citations omitted.) [Plaintiff has a Constitutional] right to a "neutral and detached judge." Ward v. Village of Monroeville, 409 U.S. 57 (1972). The wording of section 455 now parallels that of Canon 3C of the Code. Accordingly, certiorari should be granted to consider this question as set forth above.

#### VIII. CONCLUSION

In the 2016 election campaign, employees of Respondent Facebook donated \$5,171 to President Trump's campaign. Other Facebook employees donated \$1.1 million to fundraising committees affiliated with Democrat Hillary Clinton. Fifty-percent of this \$1.1 million dollars came from two of Respondent Zuckerberg's closest confidantes, chief operating officer Sheryl Sandberg and then-chief product officer Chris Cox. Andrew Bosworth, a top corporate executive considered a confidant of Zuckerberg, said in December that Facebook was "responsible for Donald Trump getting elected" in 2016 through his effective advertising campaign. Facebook's power is coveted by American politicians,. These government actors know that the vast majority of U.S. voters have [Facebook] accounts. Trump already has spent more than \$32 million on the platform for his reelection effort. Democratic candidates, collectively, have spent more than \$107 million, according to Respondent Facebook's Ad Library, one of its transparency initiatives. [T]he United States Supreme Court stated in Marsh v. Alabama, 326 U.S. 501, 507–09 (1946) that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506.

Thus, the lower court rulings are in conflict with Supreme Court Authority. The lower courts have applied an overbroad interpretation of this court's holding in Halleck. In doing so, the lower courts completely ignored the principle of stare decisis. In doing so, the lower courts have concluded the First Amendment is not implicated. The Ninth Circuit (and the District Court) ignored this Court's analysis in Halleck. At this point, only this Court can rescue litigants in the Ninth Circuit from the persistent refusal of the court below to come to terms with First Amendment case law. We urge the Court to grant certiorari to bring that court back into line with the law of federal jurisdiction. Accordingly, certiorari should be granted to consider the questions set forth above.

**Wherefore** Petitioner prays that the petition for a writ of certiorari be granted and counsel be appointed to represent petitioner on certiorari.

Respectfully submitted,

Harry J. Williby

Harry J. Williby

In Pro Se

Attorney for Petitioner

February 21, 2020