NO. 20-_____

In the Supreme Court of the United States

JASON FYK,

Petitioner,

v.

FACEBOOK, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the breadth of Communications Decency Act ("CDA") immunity that "if a[n] [interactive computer service provider, "ICSP"] unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)"? SCJ Thomas' Statement in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, No. 19-1284, at 3-4 (Oct. 13, 2020), App.315a.

2. Is an ICSP (Facebook, Inc., "Facebook") CDA immune where someone (Jason Fyk, "Fyk") seeks to hold the ICSP liable for its "own misconduct," rather than for acting "'as the publisher or speaker' of [his] content . . . [or] for removing content in [bad] faith?" *Id.* at 9, App.322a (emphasis added); *see also id.* at 4-6, App.317a-318a.

3. Does the CDA text require an ICSP's "in whole or in part" development of "the publisher's" content to be "substantial" / "material" to render the ICSP a (f)(3) information content provider ("ICP") ineligible for CDA immunity? *Id.* at 6, App.319a.

4. Does (c)(1) "protect any decision to edit or remove content," "eviscerat[ing] the narrower [(c)(2)(A)] liability shield Congress included in the statute"? *Id.* at 7-8 (emphasis in original), App.319a-320a.

5. If an ICSP develops, even in part, "the" publisher's content with an anti-competitive animus, is the ICSP acting as a "Good Samaritan" eligible for CDA immunity?

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 19-16232

Jason Fyk, *Plaintiff-Appellant*, v.
Facebook, Inc., *Defendant-Appellee*.

Date of Final Opinion: June 12, 2020

Date of Rehearing Denial: July 21, 2020

United States District Court
for the Northern District of California

No. C 18-05159 JSW

Jason Fyk, *Plaintiff*, v.
Facebook, Inc., *Defendant.*

Date of Final Order: June 18, 2019

Pursuant to Supreme Court Rule 14.1(b)(iii), undersigned counsel hereby attests that there is no "proceeding … aris[ing] from the same trial court case as the case in this Court." *Id.*

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER AND MANDATE

STATUTES AND EXECUTIVE ORDER

TABLE OF CONTENTS – Continued

Page

APPELLATE CASE MATERIALS

DISTRICT CASE MATERIALS
[FROM THE APPELLANT RECORD FILE]

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OPINIONS BELOW

The opinion of the United States Ninth Circuit Court of Appeals, dated June 12, 2020 is included in the appendix below at App.1a. The order of the United States District Court for the Northern District of California, dated granting a motion to dismiss, dated June 18, 2019, is included below at App.6a, 7a-12a.

JURISDICTION

The Ninth Circuit issued its Memorandum (affirming the District Court's decision in favor of Facebook) on June 12, 2020. *See* App.1a-5a. On June 26, 2020, Fyk sought rehearing *en banc. See* App. 131a-151a. The Ninth Circuit denied Fyk's rehearing *en banc* request on July 21, 2020. *See* App.13a. On July 30, 2020, the Ninth Circuit entered its Mandate (advising, in part, that the Ninth Circuit's June 12, 2020, judgment took effect on July 30, 2020). *See id.*, App.14a.

The basis for jurisdiction in the District Court was Title 28, United States Code, Section 1332. The basis for jurisdiction in the Circuit Court was Title 28, United States Code, Section 1291. The basis for this Court's jurisdiction is Title 28, United States Code, Section 1254(1), and this Petition is timely advanced pursuant to this Court's March 19, 2020, Standing Order (" . . . the deadline to file any petition

for writ of certiorari due on or after the date of this order is extended to 150 days . . . ").

STATUTORY PROVISIONS AND EXECUTIVE ORDERS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of the following statutory provisions and executive orders are reproduced in the appendix:

- **47 U.S.C. § 230, Communications Decency Act (CDA)**[1] (App.16a)
- **Executive Order on Preventing Online Censorship 13925** (App.22a)

INTRODUCTION

The Ninth Circuit decided an important question of legislative intent relating to immunity conferred upon commercial actors under the CDA. Issues surrounding broad CDA immunity are of national (potentially global) significance and federal courts'

[1] Hereafter, germane subsections of the Communications Decency Act of 1996 ("CDA"), Title 47, United States Code, Section 230 (entitled "Protection for private blocking and screening of offensive material") are drafted in shortest form; *e.g.*, (c)(1) will refer to Title 47, United States Code, Section 230(c)(1).

inconsistent application of 230 protections have "serious consequences" for millions of users like Fyk.[2]

The Executive and Legislative branches have weighed in on the boundaries of CDA immunity, but the breadth of CDA immunity (the threshold issue of this case) has never been addressed by this Court. An urgent need exists for this Court's review.

Some district and circuit courts have adopted a broad, sweeping interpretation of CDA "immunity" that is not found in the statute or legislative history. SCJ Thomas espoused concerns over the expansive interpretation of 230 protections in his recent *Enigma* Statement respecting denial of certiorari, *see* App. 312a-323a—concerns at the heart of Fyk's case. SCJ Thomas explained, "in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms." *Id.* at 2, App.313a.

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[2] The breadth of CDA immunity is a bipartisan issue. For example, when one Googles "Biden / Trump communications decency act," top search results include:

(1) *Both Trump and Biden Have Criticized Big Tech's Favorite Law–Here's What Section 230 Says and Why They Want to Change It*, CNBC (May 28, 2020);

(2) *Section 230 Under Attack: Why Trump and Democrats Want to Rewrite It*, USA Today (Oct. 15, 2020);

(3) *Biden Wants to Get Rid of Tech's Legal Shield Section 230*, CNBC (Jan. 17, 2020);

(4) *Trump's Social Media Order Puts a Target on Communications Decency Act*, law.com (Jun. 14, 2020).

The heads of Facebook, Twitter, and Google were in front of Congress on October 28, 2020, to discuss some of the "serious consequences" flowing from unbridled CDA immunity; *e.g.*, silencing of voices (at fever pitch during an election cycle).

Fyk's case is the "appropriate case" for this Court to interpret the application and scope of CDA immunity (for the first time in its approximate twenty-four-year history), Technology and Internet platforms have evolved exponentially while the absence of Supreme Court jurisprudence governing the CDA's application has allowed private commercial actors to usurp Government agencies (*e.g.*, Federal Communications Commission, "FCC") in enforcing the CDA without transparency or accountability,[3] which at least one judge presciently warned would problematically permit CDA immunity to advance an anti-competitive agenda. *See, e.g., Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1178 (9th Cir. 2009) (Judge Fisher concurring).

SCJ Thomas emphasized that "if a[n] [interactive computer service provider, "ICSP"] unknowingly leaves

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[3] The original purpose of the CDA was protection of children from inappropriate material on the Internet. After initial efforts by prosecutors to use the CDA, and in response to this Court's opinion that it was overbroad as to the proscribed content, *see Reno v. American Civil Liberties Union, et al.*, 521 U.S. 844 (1997) (finding the CDA ran afoul of the First Amendment in its regulation of indecent transmissions and the display of patently offensive material), legislators enacted the Child Online Protection Act of 1998 ("COPA"), Title 47, United States Code, Section 231, to accomplish one of the Government's prosecutorial objectives of the CDA. Attorney generals / prosecutors now rely on COPA (*i.e.*, instead of the CDA) for child protection from indecency on the Internet. COPA has been litigated and considered by this Court. *See, e.g., Ashcroft v. American Civil Liberties Union, et al.*, 535 U.S. 564 (2002) (COPA's reference to contemporary community standards did not render COPA unconstitutionally overbroad under the First Amendment); *Ashcroft v. American Civil Liberties Union, et al.*, 542 U.S. 656 (2004) (commercially available filtering systems were less restrictive means to accomplish the purpose of COPA). Left unfettered by any governmental oversight for years, the CDA is now privately "policed."

up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)." SCJ Thomas' *Enigma* Statement at 3-4, App.315a (emphasis added). If (c)(1) immunity continues to be wrongly applied more broadly, such would continue to "eviscerate[] the narrower [(c)(2)(A)] liability shield Congress included in the statute." *Id.* at 7, App.319a. SCJ Thomas further emphasized that (c)(2) immunity from some civil liability is not absolute—it requires good-faith acts and it is a "limited protection." *Id.*, App.314a. Against this background, Fyk petitions this Court to examine the issues set forth in the Questions Presented section above.

Here, in affording Facebook sweeping (c)(1) immunity, the District Court held, in pertinent part, as follows in a four-page order: "Because the CDA bars all claims that seek to hold an ICSP liable as a publisher of third party content, the Court finds that the CDA precludes Plaintiff's claims." *Jason Fyk v. Facebook, Inc.*, No. C18-05159 JSW (N.D. Cal. Jun. 18, 2019), [D.E. 38] at 4 (emphasis added), App.11a. In dismissing Fyk's Verified Complaint and entering judgment, the District Court relied heavily on cases where courts read sweeping immunity into the CDA far beyond an ordinary read of the CDA's text, *e.g.*, *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009) and *Sikhs for Justice, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088 (N.D. Cal. 2015), while cursorily citing to cases with more substantive analyses, *e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.Com*, 521 F.3d 1157 (9th Cir. 2008), and completely ignoring other relevant cases cited in Fyk's briefing, *e.g.*, *e-ventures Worldwide, LLC v.*

Google, Inc., 214CV646FTMPAMCM, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017). The District Court's dismissal order endorsed a sweeping, *carte blanche* (c)(1) immunity in favor of Facebook.[4]

On September 18, 2019, Fyk appealed to the Ninth Circuit.[5] In reviewing the competing (c)(1) and (c)(2) clauses of the CDA, the Ninth Circuit held, in pertinent part, as follows:

1. "Pursuant to § 230(c)(1) of the CDA . . .'immunity from liability exists for (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider.'"

Jason Fyk v. Facebook, Inc., No. 19-16232 (9th Cir. Jun. 12, 2020), [D.E. 40-1] at 2, App.2a (emphasis added) (citing to another case quoting *Barnes*).[6] Critically, (c)(1) *prima facie* does not insulate Facebook (or any other ICSP) in the active role of "a" publisher (secondary publisher /distributor, at issue here), it conditionally insulates the ICSP when it is not "the" publisher (primary publisher, not at issue

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[4] The District Court's Order and associated Judgment are attached as composite at App.6a-12. Fyk's Verified Complaint and the parties' dismissal motion practice advanced in the District Court are included in the Excerpt of Record attached to the Opening Brief that Fyk filed in the Ninth Circuit, which such Opening Brief is noted below and also included in the Appendix.

[5] Fyk's Ninth Circuit Opening Brief is attached at App.37a-79a. Facebook's Answering Brief is attached at App.80a-103a. On January 1, 2020, Fyk filed his Reply Brief, which is attached at App.104a-130a.

[6] The Ninth Circuit's Memorandum is attached at App.1a-5a.

here). Critically, the Ninth Circuit adopted the false reframe of Fyk's allegations (initially promulgated by Facebook and then accepted by the District Court), despite being required to construe as true the allegations in Fyk's Verified Complaint and grant all reasonable inferences in the favor of Fyk on a 12(b)(6) motion.

Simply put, Fyk has never claimed that Facebook undertook actions as "the" publisher of his content. This one-word distinction ("the" versus "a") is a difference that expressly defines the conditional nature of an ICSP's entitlement to statutory immunity. The Ninth Circuit either missed the distinction entirely or misinterpreted the statute. One explanation is that the Ninth Circuit cited to and relied on another court's inaccurate paraphrasing of CDA language rather than citing to actual CDA language. *Id.* at 2, App.2a (citing *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019), quoting *Barnes* at 1100-1101).

2. "Fyk, however, does not identify how Facebook materially contributed to the content of the pages. . . . We have made clear that republishing and disseminating third party content 'in essentially the same format' 'does not equal creation or development of content."

Fyk, No. 19-16232, [D.E. 40-1] at 3, App.3a. First, the CDA itself does not require a measure of "material[] contribut[ion]" to the creation or development of information. In fact, material contribution is the antithesis of "responsible . . . in part," in (f)(3), and is an example "of reading extra immunity into statutes where it does not belong," SCJ Thomas' *Enigma* Statement at 4, App.315a, to confer overbroad (c)(1) immunity.

Second, the Ninth Circuit's ruling lumps re-publishing and dissemination (*i.e.*, acting as "a" publisher / "secondary publisher" / "distributor") into the CDA that only speaks to insulating the ICSP from being "treated as the publisher" (*i.e.*, "the" primary publisher). Fyk never characterized Facebook as "the" publisher responsible for his actions. The Ninth Circuit's conflating "a publisher" (Facebook's re-publishing action) with "the publisher" (Fyk's initial publishing actions), when (c)(1) only speaks to the latter, was another instance "of reading extra immunity into statutes where it does not belong." *Id.*, App.315a.

Third, the Ninth Circuit in Fyk's case paid short-shrift to the careful articulation in *Fair Housing* of the distinction between a content "creator" and a content "developer" and the effect of that distinction under (f)(3) in transforming an ICSP into an ICP ineligible for any CDA protections. Throughout the Ninth Circuit's Memorandum, "creator" and "developer" are improperly conflated, despite Fyk's allegations that Facebook actively (and unlawfully) developed Fyk's content, in whole or in part, for Facebook's pecuniary gain. This case is not about Fyk's content per se (notably because the content itself remained largely, if not entirely, the same throughout), it is about Facebook's tortious business misconduct in manipulating (developing) Fyk's content, under color of CDA authority, for another user (Fyk's competitor's) but not Fyk.

3. "That Facebook allegedly took its actions for monetary purposes does not somehow transform Facebook into a content developer."

Fyk, No. 19-16232, [D.E. 40-1] at 3-4, App.4a. The Ninth Circuit missed Fyk's entire point as to Facebook's underlying anti-competitive motivations

for its selective actions as alleged by Fyk. The point Fyk made in his briefing (and endorsed by the Ninth Circuit in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.* 946 F.3d 1040 (9th Cir. 2019)) is that an ICSP (such as Facebook) is not a "Good Samaritan" where, as one example, the ICSP's actions are motivated by an anti-competitive animus (*i.e.*, for monetary purposes as an unfair and direct competitor). The CDA confers upon private actors (Facebook) the right / privilege to enforce the CDA (instead of the FCC, for example), so long as it acts in good faith via the Internet's version of Good Samaritan laws (the CDA). Fyk's appeal and this Petition accordingly posit that Facebook's monetary motivations, at the onset, determine whether or not Facebook is entitled to any "Good Samaritan" protections.

4. "[T]he fact that [Fyk] generated (published / provided) the content at issue does not make § 230(c)(1) inapplicable."

Fyk, No. 19-16232, [D.E. 40-1] at 4, App.4a. As discussed in detail below, it does—where the ICSP (here, Facebook) serves as "a" publisher of the content of "the" publisher (*i.e.*, engages as a secondary publisher or distributor of content in addition to "the" primary publisher, oftentimes in an in whole or in part development capacity), (c)(1) does not protect the ICSP so engaged. This Ninth Circuit holding "read[s] extra immunity into statutes where it does not belong," SCJ Thomas' *Enigma* Statement at 4, App.315a, creating absolute (c)(1) immunity where none exists in the plain text of the CDA.

5. "We reject Fyk's argument that granting § 230(c)(1) immunity to Facebook renders § 230(c)(2)(A) mere surplusage. . . . 'The 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)(A).'"

Fyk, No. 19-16232, [D.E. 40-1] at 4-5, App.5a (citing to *Barnes*). This circular argument is untenable as is underscored by the last sentence recognizing when (c)(2)(A) might be available as an additional "shield" from liability "perhaps because they developed, even in part, the content at issue" (*i.e.*, acting as an ICP) taking the ICSP outside the realm of (c)(1) immunity. (c)(2)(a) does not provide additional protections for the development of information in part and the Ninth Circuit is simply wrong.

The Ninth Circuit's dismissal affirmation, the Executive Order (App.22a-32a), and the Department of Justice's ("DOJ") CDA Review (App.33a-36a) prompted Fyk to file a Petition for Rehearing *En Banc* on June 26, 2020, attached at App.131a-151a. On July 21, 2020, the Ninth Circuit summarily denied the Petition for Rehearing *En Banc, see* App.13a (which such Appendix entry also includes the Ninth Circuit's July 30, 2020, Mandate).

This Petition ensues. This Court should grant the writ to provide guidance on this issue of significant national importance about which existing jurisprudence is inconsistent to the point of incoherent application, that has garnered the attention of SCJ Thomas, the President, the DOJ, Congress, and the public.

STATEMENT OF THE CASE

Fyk is the owner-publisher of WTF Magazine. For years, Fyk used social media to create and post humorous content on Facebook's purported "free" social media platform. Fyk's content was extremely popular and, ultimately, Fyk had more than 25,000,000 documented followers at peak on his Facebook pages / businesses. According to some ratings, Fyk's Facebook page (WTF Magazine) was ranked the fifth most popular page on Facebook, ahead of competitors like BuzzFeed, College Humor, Upworthy, and large media companies like CNN. Fyk's large Facebook presence resulted in his pages becoming income generating business ventures, generating hundreds of thousands of dollars a month in advertising and lead generating activities, which such value was derived from Fyk's high-volume fan base distribution.

Between 2010 and 2016, Facebook implemented an "optional" paid for reach program. Facebook began selling distribution, which it had previously offered for free and, in doing so, became a direct competitor of users like Fyk. This advertising business model "create[d] a misalignment of interests between [Facebook] and people who use [Facebook's] services," Mark Zuckerberg, *Understanding Facebook's Business Model* (Jan. 24, 2019),[7] which incentivized(s) Facebook to selectively and tortiously interfere with users' ability to monetize by removing content from non-paying / low-paying users in favor of higher paying "high[er] quality participants in the ecosystem." Mark

[7] This article is attached at App.324a.

Zuckerberg Interview / Public Discussion With Mathias Döpfner (Apr. 1, 2019).[8] A high-ranking Facebook executive bluntly told Fyk that Fyk's business was disfavored compared to other businesses that opted into paying Facebook extraordinary sums of advertising money. Although Fyk reluctantly opted into Facebook's commercial program at a relatively low amount of money (in comparison to others, such as Fyk's competitor), Facebook reduced the reach / distribution / availability of Fyk's pages / businesses by over 99% overnight. Then, in October 2016, Facebook fully deactivated several of Fyk's pages / businesses, totaling over 14,000,000 fans cumulatively, under the fraudulent aegis of "content policing" pursuant to (c)(2)(a). Facebook's content policing, however, was not uniformly applied or enforced as a result of Facebook's insatiable thirst for financial gain.

In February and March of 2017, Fyk contacted a prior business colleague (and now competitor) who was favored by Facebook, having paid over $22,000,000.00 in advertising. Fyk's competitor had dedicated Facebook representatives (whereas Fyk was not offered the same services) offering additional assistance directly from Facebook. Fyk asked his competitor if they could possibly have their Facebook representative restore Fyk's unpublished and / or deleted pages for Fyk. Facebook's response was to decline Fyk's competitor's request unless Fyk's competitor was to take ownership of the unpublished and / or deleted content / pages. Facing no equitable solution, Fyk fire sold his pages / businesses to the competitor. Facebook thereafter

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[8] This interview can be found at https://www.youtube.com/watch?v=zUbzcDUXzr4&t=1s.

restored (contributing to the development of, at least in part) the exact same content that Facebook had restricted and maintained was purportedly violative of its purported "offensive" content Community Standard rules (*i.e.*, purportedly violative of (c)(2)(A)) while owned by Fyk. Facebook's preferred (*i.e.*, higher paying) customers did not suffer the same consequences as Fyk, simply because they paid more.

On August 22, 2018, Fyk sued Facebook in the District Court, alleging fraud, unfair competition, extortion, and tortious interference with his economic advantage based on Facebook's anti-competitive animus. Facebook filed a 12(b)(6) motion, based largely (almost entirely) on (c)(1) immunity. The District Court (Hon. Jeffrey S. White presiding) continued the proceedings, then vacated oral arguments and granted Facebook's motion on the papers, without affording Fyk leave to amend the Verified Complaint. Fyk's appeal to the Ninth Circuit ensued.

On May 28, 2020, while Fyk's appeal was still pending, President Trump entered Executive Order 13925 ("EO"), challenging social media companies' ability to shield their misconduct behind 230 immunity. *See* App.22a-32a. In conjunction with this EO, the DOJ stated:

> 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."

DOJ CDA Review at 1-2, App.132a-133a.

The Ninth Circuit panel affirmed the District Court decision without oral argument in a cursory five-page Memorandum. *See* App.1a-5a. Fyk filed a Petition for Hearing *En Banc*, *see* App.131a-151a, which was summarily denied on July 21, 2020, *see* App.13a.

On October 13, 2020, following the *en banc* denial, SCJ Thomas rendered a Statement in the *Enigma v. Malwarebytes* denial of certiorari, welcoming consideration of that which is at issue in this case. *See* App. 312a-323a ("Without the benefit of briefing on the merits, we need not decide today the correct interpretation of § 230. But in an appropriate case, it behooves us to do so"). This case is the "appropriate case."

Fyk's case is not about treating Facebook as the primary publisher of Fyk's content, and his case does

not hinge entirely on the primary versus secondary publisher issue. As discussed throughout this Petition (and outlined in this "Statement of the Case"), there are several ways in which Facebook lost any CDA immunity.

First, Facebook's manipulation of Fyk's content took it outside of CDA protections since Facebook became a secondary publisher / distributor / "a" publisher / ICP after Fyk published his content. Facebook's only glancing (and patently false) allegation of inappropriate content identified in its Answering Brief was its assertion that a page (www.facebook.com/takeapissfunny) was "dedicated to photos and videos of people urinating." *Fyk*, No. C 18-05159 JSW, [D.E. 20] at 1, App.253a. As described in Fyk's briefing, Fyk's content never exceeded a good faith understanding of offensive content restrictions described in (c)(2)(a). *See, e.g.*, Verified Complaint at ¶ 24, App.163a-165a (describing how Facebook crushed one of Fyk's pages / businesses due to his purported racism for posting a screenshot of the Disney children's movie *Pocahontas*, which such Facebook misconduct is but one example of policing not done in "good faith" per (c)(2)(A)). Indeed, quite often, Facebook permits identical content by a preferred user. *See, e.g., id.* at ¶ 23 and n. 8, App.163a.

Second, Facebook's conduct was not that of a "Good Samaritan." Facebook directly competes (unfairly) with its own users' content (*e.g.*, sponsored advertising), like Fyk's. Facebook has had an active, self-motivated publisher role ("secondary publisher") in all content on its platform. Facebook restricted Fyk's content under fraudulent pretext, actively solicited a higher paying user, and actively redistributed Fyk's content

contingent upon Facebook's promise to make Fyk's content available a second time (development without his involvement) for Fyk's competitor. Facebook was not simply a "passive conduit" of information, it actively developed and manipulated Fyk's content to enrich itself.

Facebook asserts that it is a passive "platform for all ideas," Mark Zuckerberg Congressional Testimony (Apr. 10, 2018),[9] where "the most important thing about [the user's] Newsfeed is who [the user] chooses to engage with and the pages [the user] chooses to follow," Tessa Lyons (Facebook Product /Newsfeed Manager) Presentation (Apr. 13, 2018),[10] but that is demonstrably false. As Facebook's CEO, Mark Zuckerberg, said, "we're showing the content on the basis of us believing it is high quality, trustworthy content rather than just ok you followed some publication, and now you're going to get the stream of what they publish." Mark Zuckerberg Interview / Public Discussion With Mathias Döpfner (Apr. 1, 2019).[11] Even Facebook's own counsel identifies Facebook's active secondary publisher role: "we decide what content to make available through our platform, a right protected by Section 230 . . . . [W]e rely on the discretion protected by this law to police bad behavior on our service." Natalie Naugle (Facebook's Associate General Counsel for Litigation), The Guardian, *Is Facebook a*

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9 This testimony can be found at https://www.youtube.com/watch?v=-VJeD3zbZZI.

10 This presentation can be found at https://www.youtube.com/watch?v=X3LxpEej7gQ&t=209s.

11 *See* n. 8, *supra*.

Publisher? In Public It Says No, but in Court It Says Yes (Jul. 3, 2018).[12]

Third, Facebook's Newsfeed manager, Tessa Lyons, openly admits Facebook's fraudulent / extortionate "strategy" is to tortiously interfere with users' (like Fyk's) prospective economic advantages when "reducing [user's] distribution, removing their ability to monetize removing their ability to advertise is part of our strategy." Tessa Lyons (Facebook Product / Newsfeed Manager) Presentation (Apr. 13, 2018).[13] Fyk seeks to hold Facebook liable for its "own" business tort "misconduct," *see* SCJ Thomas *Enigma* Statement at 9, App.322a, that would be unlawful absent judicial misconstruction of CDA immunity.

Fourth, (c)(1) simply cannot be interpreted /applied (as the Ninth Circuit did here) in a way that renders (c)(2)(A) mere surplusage. Such is violative of ordinary canons of statutory construction. As SCJ Thomas observes: "if a[n] [interactive computer service provider, "ICSP"] unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230 (c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)." *Id.* at 3-4, App.315a. "Courts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress." *Id.* at 4, App.316a (internal citation omitted). "It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability [via a sweeping application of purported (c)(1)

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[12] This article is attached at App.329a-334a.

[13] *See* n. 10, *supra*.

immunity] in the very Act in which Congress explicitly imposed it." *Id.* at 5, App.317a.

> "[I]f Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in § 230(c)(1): No provider 'shall be held liable' for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content. § 230(c)(2). Where Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful."

Id., App.317a-318a. To have (c)(1) and (c)(2)(A) immunities interacting any other, broader way would "eviscerate[] the narrower [(c)(2)(A)] liability shield Congress included in the statute," *id.* at 7, App.319a; *i.e.*, would render (c)(2)(A) superfluous to (c)(1).

REASONS FOR GRANTING THE PETITION

This is the "appropriate case" for this Court to interpret CDA immunity for the first time in the approximate twenty-four-years since its enactment to provide guidance on the interpretation of the intended immunity to be conferred upon private actors enforcing the CDA's purpose.

A. THE QUESTION PRESENTED (PROPER INTERPRETATION / APPLICATION OF CDA IMMUNITY) IS OF EXCEPTIONAL IMPORTANCE.

When a Supreme Court Justice, U.S. President, U.S. Presidential candidate, Congress, DOJ, and FCC have all weighed in regarding the proper interpretation / application of CDA immunity because "courts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress," we must consider this question to be of exceptional national importance and we respectfully suggest that Fyk's case is appropriate for the Court's consideration for such an analysis. Is anti-competitive / monopolistic behavior / "own misconduct" (*id.* at 9, App.322a) entitled to CDA immunity?

Unchecked abuse of CDA immunity has resulted in unlawful behavior for commercial profit without recourse, inconsistent with legislative intent and the plain language of the statute. Because Internet platforms being principally located within the Ninth Circuit's jurisdiction, with corresponding choice of law clauses in the user agreements, Ninth Circuit law predominates regardless of where the user resides

across the country or in the world. It would "behoove," *id.* at 10, App.323a, the interests of the hundreds of millions (if not billions) of users of Internet platforms for this Court to accept this case and consider the interpretation of CDA immunity as suggested by SCJ Thomas' *Enigma* Statement, and / or in the ways suggested by President Trump (*see* EO, App.22a-32a), the DOJ (*see* DOJ CDA Review, App.33a-36a), Presidential candidate Biden (*see* n. 3, *supra*), and / or Fyk in his briefing below. It would be timely and critical for this Court, as a majority, to definitively interpret the breadth of CDA immunity for all users of interactive computer services, and for the ICSPs to establish clear guidelines for the immunities conferred.

B. Federal Courts Are Inconsistent on the Interpretation / Application of CDA Immunity.

The case citations and related discussions found in SCJ Thomas' *Enigma* Statement make clear that federal courts across this county have been consistently inconsistent for many years. A few courts identified in SCJ Thomas' *Enigma* Statement have interpreted CDA immunity correctly within certain contexts; *e.g.*, *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008), *Enigma Software Group USA, LLC v. Malwarebytes, Inc.* 946 F.3d 1040 (9th Cir. 2019), and *e-ventures Worldwide, LLC v. Google, Inc.*, 214CV646FTMPAM CM, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017). But many other courts (including lower courts in this case) have made a convoluted mess of CDA immunity; *e.g.*, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (9th Cir. 2017), *aff'g* 144 F. Supp. 3d 1088

(N.D. Cal. 2015), and *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

When inconsistencies in federal court decisions (district and circuit) result in incoherent jurisprudence on an issue, it "behoove[s]" this Court to provide guidance to all courts. The exceptional nature of this issue compels granting this writ to address the scope of CDA immunity.

C. THE NINTH CIRCUIT'S DECISION IN THIS CASE IS INCORRECT.

We address the several ways in which Facebook can (and did) lose CDA immunity in Fyk's case and why the Ninth Circuit decision was wrong

1. The Ninth Circuit Erred in Deviating from the "Modest" Nature of CDA Immunity Pronounced in Question Presented #1.

The "modest understanding [of CDA immunity] is a far cry from what has prevailed in court," SCJ Thomas' *Enigma* Statement at 3-4, App.315a, in identifying (in)actions by ICSPs that are immunized under (c)(1) and (c)(2)(A). Once more, that "modest understanding" is as follows: "if a[n] [interactive computer service provider, "ICSP"] unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)." *Id.*, App.315a.

Neither of these CDA immunity situations apply to Fyk's case as pleaded; *i.e.*, Facebook is not eligible for CDA immunity in this case if the breadth of CDA is (as it should be) "modest" and consistent with the

CDA's text. "Courts have long emphasized nontextual arguments when interpreting § 230, leaving questionable precedent in their wake." *Id.* at 2, App.313a. Courts have "read[] extra immunity into statutes where it does not belong," *id.* at 4, App.315a, creating sweeping immunity for large technology companies like Facebook. Here, the lower courts went too far beyond the above "modest" (and correct) interpretation of CDA immunity in holding that Facebook is (c)(1) immune as to anything it does. *See, e.g., Fyk*, No. C 18-05159 JSW, [D.E 38] at 4, App.11a ("the CDA bars all claims that seek to hold an interactive computer service liable as a publisher of third party content," emphasis added). And we are here because the Ninth Circuit rubberstamped dismissal.

Key to the Ninth Circuit's and District Court's rulings was their heavy (almost entire) reliance on the far-reaching *Barnes* ruling that "construe[d] § 230(c)(1) to protect any decision to edit or remove content" and "curtailed the limits Congress placed on decisions to remove content." SCJ Thomas *Enigma* Statement at 7, App.320a (emphasis in original). If this Court interprets CDA immunity as "modest[,]" read in the ordinary way of the CDA text, users of social media platforms and ICSPs will have transparency into actions underlying ICSP's CDA actions, and Fyk's case will be remanded to the District Court to proceed on the merits. This Court should examine the scope of immunity actually supported by the actual language of the statute and determine whether (c)(1) immunity that courts have held subsumes (c)(2)(A) immunity contravenes ordinary cannons of statutory construction.

Fyk respectfully requests that this Court grant his Petition to determine the breadth of CDA immunity based on the statute. If this Court determines that the Ninth Circuit decision "read[] extra immunity into [the CDA] where it does not belong," *id.*, App.315a, it should remand this case to proceed on the merits, giving Fyk his deserved "chance to raise [his] claims in the first place . . . [and] prove the merits of [his] case . . . ." *Id.* at 9, App.322a.

2. The Ninth Circuit Erred In Expanding (c)(1) Immunity to Encompass Actions Taken by Facebook as a "Secondary Publisher" / "Distributor" / "A Publisher," in Contravention of (c)(1)'s Express "The Publisher" Language.

In affirming the District Court's dismissal, the Ninth Circuit held, in pertinent part: "Pursuant to § 230(c)(1) of the CDA . . . 'immunity from liability exists for (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider.'" *Fyk*, No. 19-16232, [D.E. 40-1] at 2, App.2a (emphasis added) (citing to the *Dyroff* case quoting *Barnes*). This one-word distinction ("a" versus "the" publisher) is fundamental to properly defining the scope of (c)(1) immunity. (c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* (emphasis added).

An oft-repeated refrain is "you cannot treat a service provider as 'a' publisher because they did not create the content." Wrong. (c)(1) says nothing about

shielding ICSPs acting as "a publisher" (*i.e.*, "secondary publisher" / "distributor") of another's content. (c)(1) simply says that ICSPs can enjoy some protection when liability arises from content / posts of another publisher, "the publisher." Several courts (including the Ninth Circuit here) have misconstrued (c)(1) by revising "the publisher" to "a publisher" and proceeding to wrongly hold that (c)(1) shields an ICSP from being held liable for its own conduct when serving as "a" publisher or speaker of any content. One explanation (here, at least) is that the Ninth Circuit cited to and relied on another court's inaccurate paraphrasing of CDA language rather than citing to the actual language of the CDA. *See id.*

James Madison once argued that the most important word relating to "the right to free speech" is the word "the." "The right" implied that free speech pre-existed any potential abridgement, whereas "a right" would have been far less powerful in application of a right of such great importance. One simple word makes a huge difference. Changing "the" to "a" (as the Ninth Circuit did here) changes how (c)(1) immunity works. If an ICSP cannot be treated as "a publisher," then it cannot be held responsible for its own actions / conduct relating to the content of another or otherwise. The difference between "a publisher" and "the publisher" is the difference between who actively provided the content online. "A" versus "the" is perhaps "the" primary source of the confusion surrounding a simple (when interpreted and applied properly) law that was enacted to protect this country's youth from Internet filth, which has wrongly led to ICSPs being able to act as "a publisher" of another's content with legal impunity.

3. The Ninth Circuit Erred in Determining That an ICSP Who Has Developed Content, in Whole or in Part, Is Not an ICP Unless the Development Was "Substantial" or "Material".

The Ninth Circuit erred in determining that the "in part" language of (f)(3) means "substantial" or "material" development of content. More specifically, the Ninth Circuit wrongly held as follows: "Fyk, however, does not identify how Facebook materially contributed to the content of the pages. . . . We have made clear that republishing and disseminating third party content 'in essentially the same format' 'does not equal creation or development of content." *Fyk*, No. 19-16232, [D.E. 40-1] at 3, App.3a-4a. This is another example of a court reading too much into a statute:

> Only later did courts wrestle with the language of § 230(f)(3) suggesting providers are liable for content they help develop 'in part.' To harmonize that text with the interpretation that § 230(c)(1) protects 'traditional editorial functions,' courts relied on policy arguments to narrowly construe § 230(f)(3) to cover only substantial or material edits and additions. . . . To say that editing a statement and adding commentary in this context does not 'create or develop' the final produce, even in part, is dubious.

SCJ Thomas *Enigma* Statement, at 6-7, App.319a (emphasis added) (internal citations omitted).

Here, by injecting "material contribution" into the (f)(3) development assessment (notwithstanding (f)(3)'s "in whole or in part" language), the Ninth

Circuit went too far. Put differently, here the Ninth Circuit's injection:

> departed from the most natural reading of the text by giving [Facebook] immunity for [its] own content. . . . Nowhere does [(c)(1)] protect a company that is itself the information content provider. . . . And an information content provider is not just the primary author or creator; it is anyone 'responsible, in whole or in part, for the creation or development' of content. § 230(f)(3).

Id. at 6 (emphasis in original) (internal citations omitted).

Here, as Fyk has alleged, Facebook developed his content (in a "secondary publisher" / "distributor" role) by deleting his content, orchestrating the sale of his pages / businesses to a competitor after Facebook's deletion of same, steering / soliciting the subject pages / businesses (and the content therein) to Fyk's competitor who paid Facebook millions, and then reposting Fyk's identical pages / businesses (and, naturally, the content therein) for Fyk's competitor. Active manipulation (rather than passive conduit) fits several ordinary definitions of development, and such development rendered Facebook an ICP, under (f)(3), ineligible for any CDA immunity whatsoever.

The Ninth Circuit erred in the development analysis by injecting a "material" / "substantial" component in contravention of the "in whole or in part" language of (f)(3)'s "development" language. Such a departure from a natural reading of the CDA warrants this Court's review of the lower courts' expansive reading

of (c)(1) immunity (especially at an initial pleading stage) on Facebook.

4. The Ninth Circuit Erred in "Eviscerat[Ing] the Narrower [230(c)(2)(A)] Liability Shield Congress Included in the Statute".

Here, both the District Court and Ninth Circuit embraced the *Barnes* notion that (c)(1) immunizes ICSPs from "all" / "any" actions. Despite that insuperable (c)(1) immunity philosophy, the Ninth Circuit construed (c)(2)(A) as an additional immunity, a construction that SCJ Thomas finds conceptually dissonant:

> [H]ad Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in § 230(c)(1): No provider 'shall be held liable' for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content. § 230(c)(2). Where Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume the difference is meaningful.

Id. at 5, App.317a-318a. Moreover:

> But by construing § 230(c)(1) to protect <u>any</u> decision to edit or remove content, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (CA9 2009), courts have curtailed the limits Congress placed on decisions to remove content, *see e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029, *3 (M.D. Fla. Feb. 8, 2017)

> (rejecting the interpretation that § 230(c)(1) protects removal decisions because it would 'swallow the more specific immunity in (c)(2)"). With no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content. . . .

Id. at 7, App.320a (emphasis in original) (some internal citations omitted).

This is exactly what the District Court and the Ninth Circuit did here relying heavily on *Barnes*, to find that (c)(1) protected Facebook from "all" of its own actions. If (c)(2) means anything, this interpretation of (c)(1) immunity cannot be correct. This Court should grant this writ to consider and clarify (c)(1) and (c)(2).

5. The Ninth Circuit Erred in Misconstruing Fyk's Case as Something Other than Pursuing Facebook for Its Own Misconduct Outside Content.

Fyk never sought to treat Facebook as "the publisher" of his content; *i.e.*, to somehow treat Facebook as himself. Fyk has at all times sought to hold Facebook accountable for its "own misconduct," SCJ Thomas' *Enigma* Statement at 9, App.322a: tortious interference, unfair competition, fraud, and extortion. As SCJ Thomas' *Enigma* Statement properly points out, claims (like Fyk's) resting on a defendant's "own misconduct . . . rather than the content of the information," *id.,* App.322a, should not be eligible for CDA immunity.

The wrongdoing for which Fyk seeks to hold Facebook accountable does not fall within the confines of any CDA immunity. Paragraph 20 of Fyk's Verified Complaint alleges Facebook "own misconduct":

> Facebook's misconduct . . . included, for examples, unilateral, systematic, systemic,. . . page and content outlawing, Facebook Messenger disconnection, page and content banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, deletion of individual Facebook administrative profiles, and/or splitting of posts into four categories (text, picture, video, and website links) and systematically directing its tortious inference the hardest at links because links were what made others (like Fyk) the most money and Facebook the least money. This misconduct was grounded, in whole or in part, in Facebook's overarching desire to redistribute reach and value (*e.g.*, wiping out Fyk and orchestrating the handing over of his businesses/pages to a competitor, discussed in greater detail below) through the disproportionate implementation of "rules" (*e.g.*, treating Fyk's page content differently for Fyk than for the competitor to whom Fyk's content was redistributed). Part and parcel with Facebook's disproportionate implementation of "rules" was a disproportionate implementation of Facebook's appeal and/or customer service programs for Fyk . . . punctuated by [] Facebook arranging meetings between

> its representatives and other businessmen and businesswomen, not named Fyk, in order to assist them but not Fyk).

Id., App.160a-161a; *see also, e.g.,* ¶ 18, App.158a-159a (discussing the illegal, CDA-irrelevant underpinnings of Facebook's paid for reach program); ¶¶ 25-40, App. 165a-173a (describing Facebook's misconduct within an illegal "claim jumping" parallel); ¶¶ 42-47, App.174a-178a (discussing Facebook's discriminatory treatment of Fyk compared to Fyk's competitor). This Court should determine that CDA immunity is not available to Facebook under the facts alleged by Fyk and remand this case to the District Court to proceed on the merits.

If every word of the law is important, we must avoid redundancies or duplications in the law wherever possible and interpret the law in a manner most fitting of the legislature's original intent. The legislature never intended for 230 to be an absolute blanket immunity. Its original purpose was to protect our country's children (ironic that Facebook would restrict #savethechildren).

The legislature created a second legal protection ((c)(2)(A)) for an ICSP when it took "any action" as "a publisher" / "secondary publisher" / "distributor" to "restrict materials," so long as it acted voluntarily, in good faith, without monetary motivation, and otherwise legally; *i.e.*, acted as a Good Samaritan. This interpretation is true to the CDA's express language because if an ICSP could not be treated as "a publisher" and "removing content is something publishers do," (*Fyk*, No. 19-16232, [D.E. 40-1] at n. 2, App.3a (internal citation omitted)), (c)(1) would swallow the protections of (c)(2)(A).

The Ninth Circuit (in Fyk's case and others) exacerbated the confusion over 230 protections. Here, the Ninth Circuit held that (c)(1) does not render (c)(2)(A) "redundant," as (c)(2)(A) "provides an additional shield from liability." *Id.* at 5. More specifically, holding that:

> The 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. at 4-5, App.5a (emphasis added). Standing alone, that sub-holding does not overtly appear to create a redundancy between (c)(1) and (c)(2). But that sub-holding does not stand alone—in the greater context, the Ninth Circuit applied (c)(1) to immunize all action while simultaneously recognizing that (c)(2)(A) immunity might be available to an ICSP where the ICSP is no longer eligible for (c)(1) immunity because it became an ICP by "develop[ing], even in part, the content at issue . . . ." *Id.*, App.5a. Fyk's Verified Complaint alleges that Facebook developed his content (at least in part) and thus, the courts below should not have extended (c)(1) immunity to Facebook (especially at the pleading stage).

The May 28, 2020, EO, observes that:

> 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.

EO 13925 at 3, App.136a-137a; *see also* SCJ Thomas' *Enigma* Statement at 7, App.319a ("decisions that broadly interpret § 230(c)(1) to protect traditional publisher functions also eviscerated the narrower [(c)(2)(A)] shield Congress included in the statute").

(c)(1) does not protect "all" / "any" publishing actions taken by an ICSP. The moment an ICSP actively manipulates, develops, modifies content in any way, it transforms into "a publisher" / "secondary publisher" / "distributor" and is left with (c)(2)(A) protections if done to police (but not provide) content, in good faith, and absent monetary motivation. an ICSP cannot be an ICP and enjoy either (c)(1) or (c)(2)(A) immunity. an ICSP can only be a content "restrictor" to possibly enjoy (c)(2)(A) protections; but, for any information it is responsible for providing (as "a publisher" / "information content provider" /"secondary publisher" / "distributor"), it is not eligible for any CDA immunity.

(f)(3) gives us the legal definition of what an ICP is: "[t]he term information content provider means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* Again, canons of statutory construction instruct that every word of the law is

important—"[w]here Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful." SCJ Thomas' *Enigma* Statement at 5, App. 318a. So, an ICP is "any entity . . . responsible . . . in part . . . for the development of information provided online." By legal definition, very little is required in order to be classified as an ICP—the words "in part" make this abundantly clear. If the ICSP developed the information (even in part), it does not receive CDA protections because it is providing, not restricting (which such restriction, again, would only be eligible for (c)(2)(A) immunity, if any) materials.[14]

As an example of development, if an ICSP is paid to increase the availability of information and actively provide that information to users, it is responsible, at least in part, for the development of—not the creation of—that content. As another example, if an ICSP pays a partner to rate content false and create additional context that the ICSP actively makes available to its users, it is responsible for both creation and development of that information, at least in part, and is not protected by 230. As another example (particularly apropos here), if an ICSP deletes / unpublishes (thus becoming "a publisher") "the publisher's"

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[14] We intentionally left "creation" out of this analysis. (f)(3) specifically says creation "or" development. Creation implies that information is being brought into existence. Development, on the other hand, does not require any aspect of creation. The content at issue could be entirely created by "another" content provider; but, if an ICSP actively manipulates the content, it is responsible (at least in part) for the development of that content and transforms the ICSP into an ICP not eligible for any CDA immunity. *See, e.g., Fair Housing*, 521 F.3d 1157 (9th Cir. 2008).

content, solicits another owner of the publisher's content, actively orchestrates the sale of "the publisher's" content to the competitor of "the publisher" because the competitor pays the ICSP more advertising money, makes "the publisher's" content available again for a competitor contingent upon "the publisher" no longer owning the content, then re-publishes "the publisher's" identical content for the competitor without "the publisher's" involvement, then the ICSP has become "a publisher"/"secondary publisher" / "distributor" / "ICP" ineligible for any CDA immunity. It cannot be that the rules change based on the user's value to Facebook.

6. The Ninth Circuit Erred in Determining an ICSP Is Eligible for CDA Immunity Where (As Here) Its Conduct Is Motivated by an Anti-Competitive Animus Because Such Does Not Fit the Mold of an Internet "Good Samaritan".

Does an ICSP's motive matter when it takes action or deliberately does not act to restrict harmful content? Here, the Ninth Circuit said that "unlike . . . (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." *Fyk*, No. 19-16232, [D.E. 40-1] at 4, App.4a. In stark contrast, the title of 230(c) says "Protections for 'Good Samaritan' blocking and screening of offensive materials." "Good Samaritan" is in quotes because the legislature intended (interpreting a law by looking to the "backdrop against which Congress" enacted same, *see, e.g.,* SCJ Thomas' *Enigma* Statement at 2, App.314a, internal citation omitted) to emphasize the application of Good Samaritanism to any action or omission;

thus, (c)(1) and (c)(2) are both subject to a measure of Good Samaritan motive.

"Good Samaritanism" is very important and has been largely overlooked by the courts, including our lower courts. To maintain "Good Samaritan" protections, an ICSP must act in good faith, without compensatory benefit, without gross negligence, and without wanton or willful misconduct. If an ICSP is acting in bad faith or for its own economic, ideological, or political motivation, it certainly is not being a "Good Samaritan" and should lose its liability protections.

The Ninth Circuit panel in *Enigma* determined that actions driven by an anti-competitive animus render an ICSP ineligible for enjoyment of Good Samaritan 230(c) protections. The Ninth Circuit panel in Fyk's case acknowledged the anti-competitive animus of our unfair competition cause of action and related Verified Complaint averments, but inexplicably did not adhere to its own *Enigma* and *Fair Housing* holdings. Fyk carefully articulated the Good Samaritan nature of 230(c) at pages 7-15 of his Ninth Circuit Reply Brief (App.113a-119a), but the lower courts ignored it.

D. THIS CASE IS A SUPERIOR VEHICLE FOR ADDRESSING THE ISSUES PRESENTED.

In this "appropriate case," it would "behoove" this Court to provide guidance to all courts on the breadth of CDA immunity (*see* SCJ Thomas' *Enigma* Statement at 10, App.323a) so that there is consistency in the way the immunity is applied. Indeed:

> Paring back the sweeping immunity courts have read into § 230 would not necessarily

> render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail. . . . Extending § 230 immunity beyond the natural reading of the text can have serious consequences. Before giving companies immunity from civil claims. . . [this Court] should be certain that is what the law demands.

Id. at 9-10, App.322a-323a (emphasis added).

This is the case by which this Court can / should "par[e] back the sweeping immunity courts have read into § 230." This is the case by which this Court can / should "give plaintiff[] a chance to raise [his] claims in the first place." This is the case by which this Court can / should avoid the "serious consequences" emanating from "[e]xtending § 230 immunity beyond the natural reading of the [CDA] text." This is the case by which this Court can / should provide certainty as to "what the law demands."

More than two decades after the CDA's enactment, a few monolithic technology companies dominate the entire digital landscape. Was the legislature's purpose for 230 to protect a company from any and all anti-trust or tort claims? Was 230 enacted to protect an ICSP from any and all of its "own" publishing actions? Was 230 enacted to allow the economic, ideological, or political manipulation of information? Was 230 enacted to provide an anti-competitive, anti-political, and / or anti-ideological weapon for Big Tech and to relinquish the enforcement of the CDA to those commercial actors without any transparency or accountability?

"I don't think it should be up to any given company to decide what the definition of harmful content is." Mark Zuckerberg Interview / Public Discussion With Mathias Döpfner (Apr. 1, 2019).[15] "When you give everyone a voice and give people power, the system usually ends up in a really good place. So, what we view our role as, is giving people that power." Mark Zuckerberg Quote Compilation (May 15, 2012).[16] We concur, and this Court should too—this Court should grant this Petition.

Respectfully submitted,

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15 *See* n. 8, *supra*.

16 This compilation can be found at https://www.youtube.com/watch?v=1pyJazLfBcs.

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