No. _____

In The
Supreme Court of the United States

WORD OF GOD FELLOWSHIP, INC.,
d/b/a DAYSTAR TELEVISION NETWORK,

Petitioner,

v.

VIMEO, INC., VHX CORPORATION,
and LIVESTREAM, LLC,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of New York, Appellate Division

PETITION FOR WRIT OF CERTIORARI

JOHN H. CAYCE
Counsel of Record
MICHAEL D. ANDERSON
CAITLYN E. HUBBARD
JACOB A. DEKERATRY
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
john.cayce@kellyhart.com
michael.anderson@kellyhart.com
caitlyn.hubbard@kellyhart.com
jacob.dekeratry@kellyhart.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

47 U.S.C. § 230(c)(2)(A) grants certain civil immunity to interactive computer service providers who, in good faith, remove "material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." State and federal courts nationwide are split on whether a provider's right to remove "otherwise objectionable" material confers expansive immunity to censor material that the provider claims is "objectionable" only because of the speaker's subjective, political viewpoint—not for its facially obscene, immoral, violent, or harassing content.

The questions presented in this case are:

1. Does Section 230 immunity extend to the removal of viewpoint-based speech on matters of public concern when the content of the speech is neither facially obscene, excessively violent, nor harassing?

2. Does Section 230 further preempt state claims for breach of contract, thereby allowing providers to breach with impunity their self-imposed undertakings to host particular content?

PARTIES TO THE PROCEEDING BELOW

Petitioner Word of God Fellowship, Inc., d/b/a Daystar Television Network ("Daystar"), was the plaintiff in the Supreme Court of the State of New York, New York County. Daystar was the appellant in the First Department, Appellate Division proceeding, and the appellant that sought leave to appeal in the Court of Appeals of New York.

Respondents Vimeo, Inc., VHX Corporation, and Livestream, LLC (collectively, "Vimeo") were defendants in the Supreme Court proceeding. Vimeo was the appellee in the First Department, Appellate Division proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Word of God Fellowship, Inc., d/b/a Daystar Television Network has no parent corporation or publicly held company owning 10% or more of its stock.

RELATED CASES

Word of God Fellowship, Inc. v. Vimeo, Inc., No. 653735/2020, Supreme Court of New York, New York County. Judgment entered February 5, 2021.

Word of God Fellowship, Inc. v. Vimeo, Inc., No. 2021-00793, Supreme Court of New York, Appellate Division—First Department. Judgment entered March 22, 2022.

Word of God Fellowship, Inc. v. Vimeo, Inc., No. 2022-337, Court of Appeals of New York. Judgment entered July 21, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

PETITION FOR WRIT OF CERTIORARI

Petitioner Word of God Fellowship, Inc., D/B/A Daystar Television Network ("Daystar"), respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division—First Department.

OPINIONS BELOW

The opinion of the First Department, Appellate Division of the Supreme Court of the State of New York ("First Department") [App.1] is reported at 205 A.D.3d 23. The order of the Court of Appeals of New York denying Daystar's motion for leave to appeal that opinion [App.19] is reported at 38 N.Y.3d 912 (Table).

The trial court's order dismissing Daystar's Complaint [App.14] is unpublished but available at 2021 WL 483954.

STATEMENT OF JURISDICTION

The Court of Appeals of New York denied a timely motion for leave to appeal on July 21, 2022. No petition for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The statute at issue in this case is Section 230 of the Communications Decency Act (CDA). The CDA (passed as Title V of the Telecommunications Act of 1996) provides civil immunity for interactive computer service providers for certain conduct:

> . . .
>
> (c) Protection for "Good Samaritan" blocking and screening of offensive material
>
> (1) Treatment of publisher or speaker
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> **(2) Civil liability**
>
> **No provider or user of an interactive computer service shall be held liable on account of—**
>
> **(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable**,

> **whether or not such material is constitutionally protected.**
>
> . . .
>
> (e) Effect on Other Laws
>
> . . .
>
> (3) State Law
>
> Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230 (emphasis added) [App.34].

PRELIMINARY STATEMENT

This case presents narrow legal questions with wide-reaching consequences. The questions have divided courts nationwide.

Section 230 of the CDA has taken on increased importance in today's era of rapid technological advancement and informational accessibility.[1] The statute grants civil immunity to interactive computer service

[1] Indeed, this Court recently granted certiorari in two cases involving immunity under Section 230(c)(1). *Gonzalez v. Google LLC*, No. 21-1333, 2022 WL 4651229, at *1 (U.S. Oct. 3, 2022); *Twitter, Inc. v. Taamneh*, No. 21-1496, 2022 WL 4651263, at *1 (U.S. Oct. 3, 2022).

providers who, in good faith, remove a particular type of content—content that the provider or user deems "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." [App.34].

But as jurists and commentators have begun to recognize, recent case law has broadly construed the statute to confer expansive immunity for the removal of content of a fundamentally different kind—content that is objectionable *not* in a *morally indecent* sense, but objectionable, if at all, in a *political* or *subjectively epistemic* sense. Such is this case.

This case concerns whether Section 230(c)(2)(A) confers immunity to an interactive computer service provider that removes, in breach of its contractual obligations, public discourse on the controversial topic of vaccinations. Simply stated, this Court must determine whether time-honored principles of statutory construction apply to inform the meaning of Section 230—principles necessary to prevent a construction blessing censorship of controversial speech through governmental deputization. Such deputization is especially troubling when, as here, the provider seeks to suppress speech based merely on the provider's subjective opinion of the speech's truth or falsity.

The principle of *ejusdem generis* instructs that when a general "catchall" follows a specifically-enumerated list, the catchall is construed to embrace only those terms that are similar to those listed. And the canon of constitutional avoidance counsels against construing a

statute in a manner that raises grave concerns about its constitutionality. These canons apply to circumscribe a provider's right to remove content similar in kind to the indecent, obscenity-related, often sexually-charged material specifically enumerated in the statute, consistent with the CDA's basic policy goals. The statute, properly understood, bridles the service provider's power to censor content with which the provider may disagree. It does not permit the provider to deem material "objectionable" based on the provider's subjective assessment of the material's epistemic worth—*i.e.*, on the material's *truth* or *falsity*—or on the provider's religious or political viewpoints. This more narrow construction reduces constitutional concerns by curbing a private actor's special privileges to censor speech on matters of public concern.

Indeed, an analysis of the language, history, and intent of the Act in its entirety reveals that immunity for the removal of "otherwise objectionable" content does *not* encompass a provider's decision to remove contentious speech concerning vaccinations—a matter of public concern. Certainly, such speech was not the *type* of speech that Congress intended to include within the grant of immunity. Instead, Section 230(c)(2)(A) extends immunity only for the good faith removal of facially *immoral, obscene, violent, or harassing* content otherwise regulated by the CDA—content that Congress believed it could regulate when published through telecommunications media, as revealed by the Telecommunications Act of 1996.

Though some courts and commentators have recognized and enforced these limiting principles, the First Department reached the opposite conclusion. It construed the statute to grant immunity for a breach of contract claim predicated on Vimeo's removal of content concerning vaccinations. But Vimeo removed the content based on an idiosyncratic assessment of the content's religious, political, or *epistemic* worth—*not* on widely-accepted *moral* judgments.

The First Department, and other courts nationwide, have erred by rejecting the application of *ejusdem generis* and constitutional avoidance principles to limit the scope of Section 230(c)(2)(A) immunity. That the First Department extended Section 230's safe harbor to a breach of contract claim only heightens the need for this Court's intervention. Beyond granting providers a safe harbor to remove content based on epistemic, religious, or political objections rather than objections rooted in the facial indecency of the content, the First Department's ruling gives providers license to violate their voluntarily-assumed obligations.

In an age where the internet increasingly serves as a modern "town square" for public discourse, this unwarranted expansion of Section 230 immunity is especially pernicious. Under the lower courts' overbroad reading, Section 230 is no longer the limited safe harbor Congress designed. Rather, it has become a government-constructed bastion for dangerous and indiscriminate censorship on matters of public concern. To curb increased threats to freedom of speech, to resolve the nationwide split of authority, and to ensure that

judicial construction and application of Section 230 coheres with the statute's language and purpose, the Court should grant this petition.

STATEMENT OF THE CASE

A. DAYSTAR LAUNCHES A STREAMING INTERNET CHANNEL.

Daystar is an evangelical Christian-based television network with a mission to "reach souls with the good news of Jesus Christ." [App.48]. Daystar programming is broadcasted around the world and reaches over one billion households. [*Id.* at 48-49].

In 2013, Daystar sought to develop a platform that allowed its viewers to access (i) a live-streaming internet channel, and (ii) all of Daystar's programming on an on-demand basis. [*Id.* at 49]. To that end, Daystar formed a relationship with Brightcove, a software company with an online streaming video platform. [*Id.*].

Part of Daystar's content includes programming regarding vaccination. This programming highlights issues of public concern and personal accounts of experiences with vaccines. [*Id.*]. The programming also includes ethical discussions concerning the role that aborted fetuses play in the development and creation of vaccines, theological objections to compulsory vaccinations, the dynamic between parental rights and the state's interest in public health, and discourse related to vaccine risks and efficacy. [*See*, *e.g.*, Daystar,

Robert F. Kennedy Jr. | *Del Bigtree* | *Cedric Pisegna* (May 12, 2020), https://player.lightcast.com/zQDNwcDO]. The programming also expresses skepticism towards the financial motivations and intentions of "Big Pharma" and seeks to raise awareness amongst the audience on these issues. [*See id.*].

During the time period that Daystar utilized the Brightcove platform, its vaccine-related programming included: (i) Vaxxed—The Movie; (ii) Vaxxed—Follow-up; (iii) Vaccinations Exposed Pt. 1; (iv) Vaccinations Exposed Pt. 2; (v) a program featuring Del Bigtree, Polly Tommey, and Ryan and Julie Sadler; and (vi) a program featuring Polly Tommey, Sheila Easley, and Joel and Nina Schmidgall. [*Id.* at 49-50].

B. VIMEO SOLICITS AND PROCURES DAYSTAR'S BUSINESS.

Vimeo is a video hosting, sharing, and services platform similar to YouTube. Vimeo allows its users to upload video content to its website that can then be accessed and viewed by other users. [*Id.* at 50]. However, unlike YouTube, Vimeo does not allow companies to advertise on its platform. [*Id.*]. Consequently, to generate revenue, Vimeo requires its users to pay a nominal fee (at a baseline rate of $7.00/month) to maintain an account. [*Id.*].

For users that require capability beyond Vimeo's individual plans, Vimeo offers an Enterprise Plan. [*Id.* at 51]. The services offered vis-à-vis the Enterprise Plan are called "OTT Subscription Services" (the "OTT

Services"), which stands for "over-the-top" subscription services. [*Id.*]. The OTT Services include the ability to live-stream content (including a full internet channel) to an unlimited set of viewers and to provide content on an on-demand basis. [*Id.*]. If a user subscribes to an Enterprise Plan, Vimeo also offers a feature whereby a viewer simply visits the user's regular website or self-designated domain name to access the content. [*Id.*].

Vimeo began soliciting Daystar's business in August 2019. [*Id.* at 51]. In connection with this solicitation, Vimeo and Daystar held a series of meetings. [*Id.*]. For Vimeo, the meetings were designed to convince Daystar that it should subscribe to the OTT Services because, among other things, those services provided better functionality than Brightcove's platform. [*Id.*].

During these meetings, Vimeo personnel represented to Daystar that Daystar would make an ideal long-term strategic partner. [*Id.* at 52]. Vimeo further represented to Daystar that its content was a good fit on the Vimeo platform. [*Id.*]. At no point did Vimeo advise Daystar (i) that it had any objection to Daystar's vaccine programming, or (ii) that any of its content, including the vaccine programming, violated Vimeo's Terms of Service, to the extent applicable. [*Id.*].

Relying on these representations, Daystar agreed to transition its business to Vimeo and to subscribe to the OTT Services. [*Id.*]. On October 7, 2019, Daystar and Vimeo agreed to an Order Form (the "Order Form") that set forth the terms of the parties' written agreement. [*Id.*]. As set forth in the Order Form, Vimeo

agreed to provide the OTT Services to Daystar, including: (i) a 24/7 live stream channel; (ii) "video hosting and delivery"; and (iii) video on-demand features. [*Id.*]. In exchange, Daystar agreed to pay, and did pay, Vimeo $288,000 each year. [*Id.* at 52, 60-61].

The parties further agreed to an initial two-year term. [*Id.* at 52]. Consistent with Vimeo's representations that Daystar's content would be a good fit on their platform, the Order Form does not place any restrictions on the content that Daystar can broadcast on its live-streaming channel or through its on-demand feature. [*Id.*].

After the parties agreed to the Order Form, Daystar worked actively to launch its streaming channel and on-demand content on Vimeo's platform. [*Id.* at 52-53]. In doing so, Daystar obtained the domain name www.daystar.tv to host its streaming channel and on-demand content. [*Id.* at 53]. In December 2019, Daystar launched its streaming channel and on-demand content using Vimeo's platform and made it accessible via www.daystar.tv. [*Id.*]. None of Daystar's content is published or otherwise accessible on Vimeo's website. [*Id.*]. In other words, Daystar is the sole publisher of its content. [*Id.*].

C. VIMEO REMOVES DAYSTAR'S VACCINE CONTENT.

During the first few months of the parties' relationship, Daystar was pleased with its streaming channel. [*Id.*]. During that time period, Vimeo never

contended that any of Daystar's content was "objectionable" or violated any purported Terms of Service. [*Id.* at 53-54].

On May 12, 2020, Daystar uploaded another video, entitled, *Robert F. Kennedy Jr. | Del Bigtree | Cedric Pisegna*. This program included discussions on the COVID-19 pandemic and individual freedom. The participants also conversed about the wisdom and impact of the 1986 National Childhood Vaccine Injury Act, the prudence of COVID "lockdowns" and their broader social repercussions, and the ongoing phenomena of social media companies censoring contentious speech. [https://player.lightcast.com/zQDNwcDO]. On multiple occasions, the participants encouraged listeners to "do their own research." [*E.g.*, *id.* at 42:40].

But on July 17, 2020, nearly a year after agreeing to the Order Form, but only roughly two months after the video was uploaded, Vimeo advised Daystar that it intended to remove the *"Robert F. Kennedy Jr. | Del Bigtree | Cedric Pisegna"* program, *plus* four other vaccine-related videos. [App.116]. Vimeo maintained that these videos violated Vimeo's Terms of Service. [*Id.* at 117]. According to Vimeo, these videos purportedly "ma[de] false or misleading claims about vaccination safety" by "draw[ing] . . . a link" between vaccines and autism. [*Id.* at 117-18].

Daystar took issue with Vimeo's position for several reasons. First, Vimeo actively solicited Daystar and convinced Daystar to transition its business from Brightcove's platform to Vimeo's. [*Id.* at 53]. When

Vimeo engaged in these solicitation efforts, six of Daystar's vaccination programs were already streamed via the Brightcove platform, and Vimeo never indicated that it objected to any of Daystar's programming. [*Id.* at 53-54].

Second, the Order Form does not place any restrictions on what content Daystar can publish or broadcast, and the vaccination programming was only published on Daystar's website. [*Id.* at 54]. It cannot be accessed on Vimeo's website. [*Id.*]. Understandably, Daystar did not believe that Vimeo would (nor legally could) attempt to regulate the content Daystar published on its own website. [*Id.*].

Third, Daystar's vaccine programming was largely opinion-based, consisting of varying commentary, thoughts, and ideas on a subject of ongoing scientific, theological, and legal interest and debate. Moreover, the programming featured firsthand, personal testimonies of experiences with vaccinations. [*E.g.*, Daystar, *Vaxxed | The Movie* (May 5, 2016), https://player.lightcast.com/zQTN1MTN at 9:25, 11:40].

Nonetheless, during the parties' discussions, Vimeo took the view that its internal "trust and safety team" determined that any content regarding vaccinations violated the individual users' (*i.e.*, those whose content is published on Vimeo's website, unlike Daystar) Terms of Service. [App.55]. Based on this conclusion, and ignoring its contractual obligations under the Order Form, Vimeo removed five of Daystar's vaccination programs on July 24, 2020. [*Id.* at 55]. The five

programs that Vimeo removed are: (i) the program featuring Robert F. Kennedy, Jr., Del Bigtree and Cedric Pisegna; (ii) Vaccinations Exposed Pt. 1; (iii) Vaccinations Exposed Pt. 2; (iv) Vaxxed | The Movie; and (v) Vaxxed | Follow-up (collectively, the "Vaccine Programming"). [*Id.*].

D. THE NEW YORK STATE COURT PROCEEDINGS.

As a result of Vimeo's removal of Daystar's Vaccine Programming, Daystar filed suit on August 11, 2020 and asserted claims for breach of contract and unjust enrichment. [*Id.* at 45-59].

On September 25, 2020, Vimeo filed a Motion to Dismiss (the "Motion") pursuant to N.Y. CPLR 3211(a)(1) and (7). [*See* App.14-15]. The Motion contended that Daystar's complaint should be dismissed because (i) its claims were, purportedly, barred by Section 230 of the CDA, and (ii) the complaint failed to state a claim for which relief could be granted. [*See id.* at 16-17].

The lower court held a hearing on Vimeo's Motion on February 5, 2021. [*Id.* at 14]. On February 8, 2021, the lower court entered its Decision granting Vimeo's Motion. [*Id.* at 17].

In its Decision, the lower court held that the Motion should be granted because (i) Vimeo was "cloaked with immunity under the Communications Decency Act, 47 U.S.C. § 230(c)(2)," and, even if it wasn't

(ii) Daystar failed to state a claim for breach of contract or unjust enrichment. [*Id.* at 14-17].

Daystar disputed both grounds and thus appealed to the Supreme Court Appellate Division, First Department. The First Department affirmed the trial court's dismissal on the narrow grounds that (1) Section 230 confers immunity even against breach of contract claims and (2) immunity applied to Vimeo's removal of the Vaccine Programming because Vimeo subjectively determined that the Programming was "otherwise objectionable" under the statute. [*Id.* at 6-9]. The First Department did not reach Vimeo's alternative argument that Daystar failed to state a breach of contract claim. [*See id.*].

Daystar moved for leave to appeal the Appellate Division's judgment, but the Court of Appeals of New York denied leave. [*Id.* at 19].

REASONS FOR GRANTING THE PETITION

The Court should grant review because the First Department's judgment decided improperly an important question of federal law that has divided courts across the country. The First Department's overly broad interpretation of Section 230(c)(2)(A) conflicts with the language, purpose, and policies of the CDA, bestowing immunity where none is legally proper or practically prudent.

The First Department's judgment gave short shrift to the canons of *ejusdem generis* and constitutional avoidance. The appellate court failed to appreciate that the enumeration of certain "objectionable" content in Section 230(c)(2)(A) refers to patently obscene, indecent, violent, or harassing content made the subject of Title V of the Telecommunications Act of 1996. Daystar's Vaccine Programming is not of that ilk. Moreover, the appellate court failed to consider the constitutional dangers of such a broad construction, whereby the government effectively sponsors censorship of religious speech or speech on matters of public concern. The First Department's construction *encourages* political and religious censorship and the monopolization of the public sphere as a marketplace of ideas, thereby jeopardizing the internet's status as a "forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3).

The First Department's expansive construction of Section 230 did not end there. It held that Section 230 confers immunity *even if* the providers censor content that they *agreed* to host and only later claim is subjectively "objectionable." This outcome—holding that Section 230 preempts simple breach of contract claims—does not square with this Court's precedent or Congressional intent.

Like other courts, the First Department erred in its broad construction of Section 230(c)(2)(A). This Court should grant certiorari to correct this error and

to reduce the dangers inuring from such an unbridled and illogical statutory construction.

I. THE FIRST DEPARTMENT ERRED WHEN IT HELD THAT VIMEO WAS ENTITLED TO IMMUNITY UNDER SECTION 230(c)(2)(A).

"[M]any courts have construed [47 U.S.C. § 230] broadly to confer sweeping immunity on some of the largest companies in the world." *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13, (2020) (mem. op.) (Thomas, J., concurring in denial of certiorari). The First Department in this case did precisely that, in conflict with other authorities correctly limiting Section 230 to its clear text and intent.[2]

---

[2] The following courts have wisely resisted an unbounded reading of "otherwise objectionable." *NetChoice, L.L.C., et al. v. Ken Paxton*, No. 21-51178, at *43 & n.23, ___ F.4th ___ (5th Cir. Sept. 16, 2022) (applying *ejusdem generis*); *Song fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 883-84 (N.D. Cal. 2015) (same); *Goddard v. Google, Inc.*, No. C 08-2738JF(PVT), 2008 WL 5245490, at *6 (N.D. Cal. Dec. 17, 2008) (similar); *Nat'l Numismatic Certification, LLC v. eBay, Inc.*, No. 6:08-CV-42-ORL-19GJK, 2008 WL 2704404, at *25 (M.D. Fla. July 8, 2008) ("Accordingly, the Court concludes that 'objectionable' content must, at a minimum, involve or be similar to pornography, graphic violence, obscenity, or harassment.").

Other courts have declined to apply *ejusdem generis* to limit the scope of Section 230(c)(2)(A): *Berenson v. Twitter, Inc.*, No. C 21-09818 WHA, 2022 WL 1289049, at *2 (N.D. Cal. Apr. 29, 2022); *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1051 (9th Cir. 2019); *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 603-04 (S.D.N.Y. 2020), *aff'd*, 991 F.3d 66 (2d Cir. 2021); *Daniels v. Alphabet Inc.*, No. 20-CV-04687-VKD, 2021 WL 1222166, at *13 (N.D. Cal. Mar. 31, 2021); *Smith v. Trusted Universal Standards in Elec. Transactions, Inc.*, No.

Indeed, the Fifth Circuit's recent opinion in *NetChoice* created a circuit split on this very issue.[3] This case presents an opportunity to resolve this split and to correct erroneous constructions that have extended immunity "far beyond anything that plausibly could have been intended by Congress." 1 R. Smolla, Law of Defamation § 4:86, p. 4-380 (2d ed. 2019); *see also Enigma*, 141 S. Ct. at 18 (noting that "in an appropriate case, it behooves [this Court]" to "decide [ ] the correct interpretation of § 230").

The First Department construed "otherwise objectionable" content to include speech on the topic of vaccinations—a matter of religious and public concern. *Word of God Fellowship*, 205 A.D.3d at 26-28. In so doing, the court declined to apply the principle of *ejusdem generis*, reasoning that the differences between "obscene, lewd, lascivious, filthy, excessively violent, [and] harassing" content meant that "the broad final term"—"otherwise objectionable"—"need not have anything in common with the narrower . . . terms." *Id.* at 27. Contrary to the First Department's reading, the enumerated categories share a common thread, and Section 230's text, Congressional intent, and the First Amendment render the First Department's construction erroneous.

CIV09-4567RBKKMW, 2010 WL 1799456, at *6 (D.N.J. May 4, 2010); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007).

[3] *Compare NetChoice*, No. 21-51178, at *43 & n.23, *with Enigma*, 946 F.3d at 1051.

A. Congress designed Section 230 to safeguard children from facially indecent material while promoting political and religious expression.

The legislative intent behind Section 230 sheds light on its meaning. "Congress enacted [Section 230] as part of the Communications Decency Act of 1996 for two basic policy reasons: to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material"—particularly material inappropriate for children. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003); *see also Enigma*, 946 F.3d at 1047 ("The history of § 230(c)(2) shows that access to pornography was Congress's motivating concern. . . ."); *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) (superseded by statute in part) ("The primary goal of the [CDA] was to control exposure of minors to indecent material.").

Indeed, the statute itself contains Congressional findings and policy statements expressing the desire to promote free speech while minimizing children's exposure to inappropriate, adult content. For example, Congress found that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(2). The statute further recognizes that "[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services." *Id.* at (a)(5).

And, as an explicit policy goal, Congress sought to incentivize "blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." *Id.* at (b)(4).

To achieve these policy goals, Section 230 provides two forms of immunity. Relevant here, Section 230(c)(2)(A) immunizes "Good Samaritan[s]" who, "in good faith," "block" or "restrict access" to content they consider "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable."

B. Section 230(c)(2)(A) immunity does not extend to Vimeo's removal of Daystar's Vaccine Programming.

Vimeo does not, and cannot, consider Daystar's Vaccine Programming to be "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing." [*See* Brief for Appellee at 19-21, *Word of God Fellowship, Inc. v. Vimeo, Inc.*, 205 A.D.3d 23 (2022), No. 15460]. Instead, Vimeo maintains that it is entitled to immunity because it deemed Daystar's content "otherwise objectionable" for purportedly being "false or misleading." [*See id.*]. But "otherwise objectionable" material is limited to content similar in kind to "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing" material—it does not encompass material that Vimeo may deem false or misleading.

i. "Otherwise Objectionable" is not a broad "catchall," but instead refers to content Congress believed to be regulable when expressed via telecommunications media.

"Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991). This canon instructs that the term "otherwise objectionable" "should itself be controlled and defined by reference to the enumerated categories of [content] which are recited just before it." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115, (2001). Otherwise, the general "catchall" swallows the enumerated list. *See id.*

The content listed in Section 230(c)(2)(A) is similar. As law professors Adam Candeub and Eugene Volokh have pointed out in a recent and insightful publication, "'obscene, lewd, lascivious, filthy, excessively violent, [and] harassing' . . . [a]ll refer to speech regulated in the very same Title of the [CDA], because they all had historically been seen by Congress as regulable when distributed via electronic communications." Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175, 181 (2021) [App.122, 124].

Consider first content that is "obscene, lewd, lascivious, [and] filthy." Beyond their similarity as

indecent and often sexually-charged, these materials were the subject of federal obscenity statutes, codified at 18 U.S.C. § 1461 (outlawing the mailing of "obscene, lewd, lascivious, indecent, filthy, or vile article[s]") and 18 U.S.C. § 1462 (similar). *See also Roth v. United States*, 354 U.S. 476, 489-90 (1957) (upholding 18 U.S.C. § 1461 and approving the trial court's instruction that "[t]he words 'obscene, lewd, and lascivious' as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful thoughts' ").[4] Moreover, Section 502 of the Telecommunications Act proscribed interstate communications that were "*obscene, lewd, lascivious, filthy, or indecent*, with intent to annoy, abuse, threaten, or *harass* another person." 47 U.S.C. § 223 (emphasis added). In short, Congress had long believed it had the authority to regulate "obscene, lewd, lascivious, [and] filthy" content when communicated across the airwaves. [App.130-33].

"[E]xcessively violent" material was also regulated by the CDA. As Candeub and Volokh persuasively point out, Section 230 appeared in Title V of the Telecommunications Act of 1996, entitled "OBSCENITY AND VIOLENCE." [App.131]. Subtitle B of that statute, entitled "Violence," established a ratings system

---

[4] Congressional regulation of such content dated back to at least the Comstock Act of 1873, which, to prevent the corruption of "public morals," banned the mailing of any "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character." *An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use*, ch. 258, S 2, 17 Stat. 598, 599 (1873).

for television programming on the basis of its violent content. Pub. L. No. 104-104, § 551(b)(1)(w)(1). And "[t]he Television Program Improvement Act of 1990 exempted from antitrust laws any discussions or agreements related to 'voluntary guidelines designed to alleviate the negative impact of violence in telecast media.'" [App.134] (citation omitted). The regulation of excessively violent content was thus a major component of the CDA.

Finally, as shown above, the CDA elsewhere regulated "harassing" content, and such regulation formed part of a broader Congressional tradition. Section 502 of the CDA further criminalized the harassing use of telecommunications devices. 47 U.S.C. § 223. Such harassment had been regulated since 1968. Pub. L. No. 90-299, May 3, 1968, 82 Stat. 112.

But nowhere in the CDA did Congress seek to limit or otherwise regulate the communication of content the provider deemed false or misleading, or that the provider disagreed with on political or religious grounds. Indeed, speech on matters of public concern was not the type of speech that Congress viewed as regulable under the CDA. [App.136-39]. Section 551 of the Act *specifically rejected* the creation of a television ratings system that rated programming "on the basis of its political and religious content." *Id.* at 184-85; § 551(b)(1)(w)(1). Thus, Daystar's Vaccine Programming—properly characterized as speech on matters of public concern—is not the type of speech that falls within the grant of immunity under Section 230(c)(2)(A).

Reading Title V of the Telecommunications Act as a whole, Section 230(c)(2)(A)'s enumerated list refers to content that Congress believed it had the power to regulate when transmitted through telecommunications technologies. "Using this understanding, 'otherwise objectionable' might thus cover other materials discussed elsewhere in the CDA, for instance anonymous threats (§ 502), unwanted repeated communications (§ 502), nonlewd nudity (§ 506), or speech aimed at 'persuad[ing], induc[ing], entic[ing], or coer[cing] minors into criminal sexual acts (§ 508).'" [App.136-37]. Under any other construction, "otherwise objectionable" would render meaningless the specifically-enumerated categories. *See Yates v. United States*, 574 U.S. 528, 545-46 (2015). Therefore, contrary to the First Department's reading, *ejusdem generis* applies to limit the meaning of "otherwise objectionable."[5]

[5] The Department of Justice agrees that "otherwise objectionable" should not be given an unbounded reading. In a 2020 publication, the Department supported "replacing the vague catch-all 'otherwise objectionable' language in Section 230(c)(2) with 'unlawful' and 'promotes terrorism.' This reform would focus the broad blanket immunity for content moderation decisions on the core objective of Section 230—to reduce online content harmful to children—while limiting a platform's ability to remove content arbitrarily or in ways inconsistent with its terms of service simply by deeming it 'objectionable.'" U.S. Dep't of Just., *Section 230—Nurturing Innovation or Fostering Unaccountability?: Key Takeaways and Recommendations* (2020).

ii. "Otherwise Objectionable" refers to *facially obscene, indecent, violent, and harassing* rather than *epistemic* content.

As the Fifth Circuit has recognized, the categories of content listed in Section 230(c)(2)(A) are united in another sense: each are facially indecent and do not depend on a speaker (or provider's) viewpoint. *See NetChoice, L.L.C.*, No. 21-51178, at *43 & n.23. Again, it bears emphasizing that Vimeo objected to Daystar's content on the grounds that Vimeo claimed the material was "false or misleading." [*See* Brief of Appellees at 20-21]. In other words, Vimeo's objection was an *epistemic* one, rooted in a concern that Daystar's content was factually incorrect.

Vimeo is entitled to its own views on vaccination safety and efficacy. But, at a broad level, this sort of *epistemic* objection to the Vaccine Programming is fundamentally different in kind from the *morally* objectionable content enumerated in statute. The latter content refers to *indecency* and is an affront to the moral sensibilities of reasonable persons, while the former is politically-charged and concerns knowledge, truth, and falsity. Thus, even if this Court disagrees that the specifically-enumerated content was regulated elsewhere in the CDA, the categories remain united because they are morally repugnant to reasonable persons.

Consider at an abstract level the overlap between the first four terms that Section 230(c)(2)(A)

enumerates: "obscene, lewd, lascivious, filthy." The terms are largely synonymous. "Obscene" content refers to that which is "[e]xtremely offensive under contemporary community standards of morality and decency; grossly repugnant to the generally accepted notions of what is appropriate." *Obscene*, Black's Law Dictionary (11th ed. 2019); *see also Miller v. California*, 413 U.S. 15, 24 (1973) (defining unprotected, obscene speech as "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value"); *Roth*, 354 U.S. at 487 ("Obscene material is material which deals with sex in a manner appealing to prurient interest.").

Likewise, "lewd" content is that which is "*[o]bscene or indecent*; tending to moral impurity or wantonness." *Lewd*, Black's Law Dictionary (11th ed. 2019) (emphasis added). And "lascivious" material is that which "tend[s] to excite lust; *lewd; indecent; obscene*." *Lascivious*, Black's Law Dictionary (11th ed. 2019) (emphasis added). Similarly, "filthy" describes content that is "underhand, vile; *obscene*. FILTHY, Merriam-Webster, https://www.merriam-webster.com/dictionary/filthy (emphasis added). This overlap between terms explains why Congress grouped them together when regulating facially *indecent* and often sexually-charged content. *See*, *e.g.*, 18 U.S.C. § 1461.

"Harassing" and "excessively violent" are also indecent. Beyond the common connotation of "harassment" with "sexual harassment," "harassment" refers

to "purposeful vexation." *Harassment*, Black's Law Dictionary (11th ed. 2019). Such content is patently objectionable—it is indecent on its face. *See*, *e.g.*, *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 749 & n.27 (1978) (recognizing that an "indecent" phone call may be harassing). Finally, "*excessively* violent" material, though distinguishable from forms of obscenity in that the former is constitutionally protected, *see Brown v. Entm't Merchants Ass'n*, 564 U.S. 786 (2011), remains subject to a profound *moral* objection. *E.g.*, *id.* at 817-20 (raising ethical concerns about violent video games) (Alito, J., concurring); Pub. L. No. 104-104, § 551(b)(1)(w)(1) (establishing a television ratings system for "programming that contains sexual, *violent, or other indecent material*. . . .") (emphasis added).

Thus, the content enumerated in Section 230(c)(2)(A) is united in another, more fundamental sense than the one Candeub and Volokh identify: the statute describes facially indecent and morally offensive content—not content "objectionable" based on a subjective assessment of its epistemic worth. *Cf. United States v. Alvarez*, 567 U.S. 709, 719 (2012) ("[T]he Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment."). Stated differently, the subsection addresses only content which reasonable people view as an affront to public morals. Under the statute's plain text, illuminating First Amendment principles, and Congressional intent, immunity extends no further.

iii. Daystar's Vaccine Programming does not fit within this textually limited meaning of "otherwise objectionable."

Daystar's Vaccine Programming was speech of public concern related to vaccinations—fundamentally different from the types of facially indecent speech described above. This fundamental difference places Daystar's content beyond the purview of Section 230(c)(2)(A).

As noted, Vimeo objected to Daystar's speech only because it viewed the content as "false or misleading." But this *epistemic* objection bears no relationship to the indecent content listed in Section 230(c)(2)(A). Instead, Daystar's Vaccine Programming both "relat[es] to any matter of political, social, or other concern to the community" and "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (quotation marks and citation omitted). Daystar's Vaccine Programming addressed important public issues, including theological discussions on the necessity of vaccinations, ethical dialogue on the permissibility of vaccination mandates, and discourse on the powers and motivations of the pharmaceutical industry and its lobby. Indeed, the very topic of vaccines—and their impact on public health—concerns the community. None of this fits within Section 230(c)(2)(A)'s scope.

Accordingly, because the "overall thrust and dominant theme" of Daystar's Vaccine Programming "sp[eaks] to broader public issues," it is classified as speech of public concern, worthy of the most robust constitutional protections.[6] *Id.* at 454; *see also Core Political Speech*, Black's Law Dictionary (11th ed. 2019) ("Conduct or words that are directly intended to rally public support for a particular issue, position, or candidate; expressions, proposals, or interactive communication concerning political change.").[7]

Because the Vaccine Programming falls within this category—speech of public importance that Congress *did not* believe it had the power to regulate in the CDA (indeed, speech "occup[ying] the highest rung of the hierarchy of First Amendment values, and [] entitled to special protection")—Vimeo could not remove it with impunity. *See Connick v. Myers*, 461 U.S. 138,

---

[6] Indeed, by explicitly rejecting the regulation of speech based on its political or religious content, Congress acceded to the special status of this speech.

[7] Daystar remains steadfast in its contention that the Vaccine Programming is *not* false or misleading. But *even if* a jury (rather than a judge at the motion to dismiss stage) concluded otherwise, such a conclusion would not strip the speech of its public-concern classification. *See Alvarez*, 567 U.S. at 727 (striking down the Stolen Valor Act of 2005); *see also Thomas v. Collins*, 323 U.S. 516, 545 (1945) ("But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.") (Jackson, J., concurring).

145 (1983). An objection to speech on the basis of a belief that it is false or misleading is fundamentally different from an objection based on the speech's indecent qualities—qualities that Congress sought to regulate when it passed the CDA.

In sum, because Daystar's speech was not objectionable in any *facially indecent* or immoral sense, and further because Daystar's speech was not of the type regulated elsewhere by the CDA, the First Department erred when it held that Section 230(c)(2)(A) bestowed Vimeo with immunity. Vimeo's disagreement with Daystar's vaccine messages, by which Daystar sought to inform and mobilize its viewers in support of a particular cause, does not give Vimeo license to breach its contractual obligations.

iv. The canon of constitutional avoidance weighs against the First Department's construction of Section 230(c)(2)(A).

The First Department's broad interpretation of Section 230(c)(2)(A) is erroneous for another reason: it runs afoul the canon of constitutional avoidance. Under this doctrine, "[n]o court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433, 448-49 (1830); *see United States v. Davis*, 139 S. Ct. 2319, 2332 (2019) (same). Relatedly, "[a] statute must be construed, if

fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916).

The First Department's construction, under which Vimeo—a private actor—is immune for its removal of speech on matters of public concern based on its epistemic or political objections, raises grave doubts on the statute's constitutionality. Specifically, the First Department's unbridled reading of Section 230(c)(2)(A) likely abridges freedom of speech. Such a construction, extending immunity to claims for breach of contract when the interactive computer service provider censors speech of public concern, grants the provider special privileges to suppress otherwise-protected (indeed, specially-protected) speech—all with the government's imprimatur.

While "the First Amendment . . . ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech," this Court has recognized exceptions to this rule. *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 737, 766 (1996). Analogous here, *Denver Area* struck down a *permissive statute* allowing cable operators to prohibit programming "which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." *Id.* at 760-66; *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, October 5, 1992, 106 Stat. 1460, § 10(c); *see also* Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L.

139, 167-70 (2021). By granting a unique, otherwise-unavailable immunity for private actors, allowing them to skirt their contractual obligations and censor political speech not-otherwise censorable,[8] the federal statute disadvantages speech. "In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed." *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 232 (1956). Thus, Vimeo's status as a private actor does not alleviate any free-speech concerns.

Second, even considering the unique context, speech does not lose its constitutionally-protected status merely because it is expressed across telecommunications media—*especially* when the content is on matters of public concern. *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 382-83 (1984) (striking down Section 399 of the Public Broadcasting Act of 1967 and emphasizing the importance of protecting speech on matters of public concern); *see also Pacifica*

[8] If the First Department was correct that Section 230(c)(2)(A) preempts claims for breach of contract, *see infra*, that would be an additional factor weighing in favor of state action and the applicability of the First Amendment. *Compare Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) ("In addition, it has mandated that the railroads not bargain away the authority to perform tests granted by Subpart D. These are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment.") *and Hanson*, 351 U.S. at 232 ("In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed."), *with* 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

Found., 438 U.S. at 746 ("If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required."); *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 544 (1980) (holding unconstitutional a state law prohibiting political speech by a public utility). Indeed, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick*, 461 U.S. at 145; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.") (Stevens, J., concurring). Thus, Section 230(c)(2)(A) remains susceptible to a constitutional challenge, and the viability of such a challenge is strengthened given the nature of Daystar's speech.

As argued above, applying *ejusdem generis* to limit the scope of Section 230(c)(2)(A) and exclude immunity for the removal of content on political, religious, or epistemic grounds is not only reasonable, but correct. The First Department's contrary interpretation, under which the government blesses and encourages the censorship of political speech, implicates the First

Amendment and erects additional constitutional hurdles that the First Department's holding cannot surmount.[9] *Id.*; *cf. Skinner*, 489 U.S. at 615 ("The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct."); *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("[A] state may not induce, encourage, or promote private persons to accomplish what is constitutionally forbidden to accomplish."); (citation and quotation marks omitted); *see also* Jed Rubenfeld, *Are Facebook and Google State Actors?*, LAWFARE (November 4, 2019, 8:20 AM), https://www.lawfareblog.com/are-facebook-and-google-state-actors (arguing that the CDA unconstitutionally delegates censorial powers to private actors).

The First Department's construction presents an impermissible end-run around the First Amendment by delegating to private actors a power that the government itself may not exercise—the power to censor

---

[9] Vimeo may point to Section 230(c)(2)(A)'s language granting immunity for the removal of content "whether or not such material is constitutionally protected" to suggest that any constitutional concerns are already present, irrespective of the construction of "otherwise objectionable." But if a private actor may remove even constitutionally-protected speech, *a fortiori*, the removal of *speech on public affairs*—"occup[ying] the highest rung of the hierarchy of First Amendment values, and [] entitled to special protection"—magnifies such constitutional concerns. *See Connick*, 461 U.S. at 145.

outright speech of public concern. *See Snyder*, 562 U.S. at 458; *Skinner*, 489 U.S. at 615. Accordingly, the canon of constitutional avoidance weighs against the First Department's judgment, and in favor of a grant of certiorari.

C. The First Department's broad interpretation jeopardizes the fundamental policy goals of Section 230.

The First Department's unbridled reading also undermines Section 230(c)(2)(A)'s stated intent to foster "a forum for a true diversity of political discourse." 47 U.S.C. § 230(a)(3). Judge Fisher of the Ninth Circuit recognized this danger when he remarked that "extending immunity . . . could pose serious problems if providers of blocking software were to be given free license to *unilaterally* block the dissemination of material by content providers under the literal terms of § 230(c)(2)(A)." *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1178 (9th Cir. 2009) (Fisher, J., concurring). Echoing these concerns, the Ninth Circuit later "recognize[d] that interpreting the statute to give providers unbridled discretion to block online content would, as Judge Fisher warned, enable and potentially motivate internet-service providers to act for their own, and not the public, benefit." *Enigma*, 946 F.3d at 1051.[10] But under the unbounded reading that several courts have given the statute, permissive *self-regulation*

[10] The Ninth Circuit declined to "determine the precise relationship between the term 'otherwise objectionable' and the seven categories that precede it." *Id.* at 1052.

would devolve into unconstitutional *delegation*, whereby the government deputizes private actors, giving them special privileges to abridge freedom of speech—antagonistic to the statute's goals. Indeed, interactive computer service providers have long argued that Section 230 is necessary to protect freedom of speech—a view at irreconcilable odds with a construction that privileges the censorship of public discourse.

Daystar's construction, on the other hand, coheres with the CDA's policies. Plainly, protecting public discourse furthers viewpoint diversity in the modern town square. Moreover, the CDA sought to shift the regulatory onus away from the government and towards self-policing—a goal consistent with Daystar's reading of the statute. Valerie C. Brannon & Eric N. Holmes, Congr. Rsch. Srv., R46751, *Section 230: An Overview* (2021) at 5. A more narrow, *ejusdem generis* approach permits the delegation of only that power that Congress believed itself to possess, which did *not* include the power to censor outright speech on matters of public concern—as the CDA later implicitly recognized in Section 551(b)(1)(w)(1). In short, if the encouragement of self-policing was a goal of the CDA, then private parties could only police that which Congress believed it could regulate, and not more.

II. THE FIRST DEPARTMENT ERRED BY FURTHER EXPANDING SECTION 230 IMMUNITY TO BREACH OF CONTRACT CLAIMS.

This Court should grant the petition for another reason: to clarify that Section 230 does not preempt claims for breach of contract. This Court has held in other contexts that preemption does not extend to simple breach of contract claims that seek to enforce self-imposed undertakings. But as for Section 230's preemptive scope, the lower courts are again split. By expanding Section 230 to immunize providers for breaches of their own voluntary undertakings, the First Department (and like courts) have stretched Section 230 too far.

A. Section 230 preempts state-imposed obligations, not self-imposed undertakings.

Section 230(c) prohibits courts from treating providers as publishers or speakers of another party's content and extends immunity to a provider who "voluntarily . . . in good faith" restricts the statutorily-enumerated indecent material as a "Good Samaritan." Section 230(e)(3), a preemption clause, then purports to clarify those grants of immunity by stating that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). Reading these provisions together, Section 230 makes clear that it preempts *laws*, not *contracts*. The

scheme immunizes providers from extra-contractual claims based on conduct taken without duty but in the capacity of a "Good Samaritan"—*i.e.*, one with no particular contract obligation. The statute does not immunize those providers for actions taken in breach of their voluntarily-assumed obligations.

This outcome and reading is consistent with this Court's precedent in other contexts. In *American Airlines Co. v. Wolens*, for example, this Court refused to "read the ADA's[11] preemption clause . . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." 513 U.S. 219, 228 (1995). And in *Cipollone v. Liggett Grp., Inc.*, a plurality of this Court agreed that a "common-law remedy for a contractual commitment voluntarily undertaken" was not a requirement "imposed under State law" for purposes of preemption under the Federal Cigarette Labeling and Advertising Act. 505 U.S. 504, 526 (1992). The upshot is that when the "basis" for the action is "the parties' agreement," preemption does not apply. 513 U.S. at 233. Rather, a "remedy confined to a contract's terms simply holds parties to their agreements[.]" *Id.* at 229.

The First Department should have reached the same conclusion here. Instead, it brusquely held that Section 230 applies to this suit, reasoning that "even if

---

[11] The Airline Deregulation Act of 1978 (the "ADA") prohibited States from "enact[ing] or enforc[ing] any law . . . relating to [air carrier] rates, routes, or services. . . ." 48 U.S.C. § 1305(a)(1).

there were an exception for contractual obligations, such an exception would not apply when a contract unambiguously authorizes one party to remove the type of content at issue." [App.5]. But, just as in *Wolens*, this analysis assumes its conclusion—a conclusion the First Department did not and could not make at this early pleading stage.[12] *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 234 (1995) ("American's argument is unpersuasive, for it assumes the answer to the very contract construction issue on which plaintiffs' claims turn. . . . That question of contract interpretation has not yet had a full airing. . . ."); *see also Teatotaller, LLC v. Facebook, Inc.*, 173 N.H. 442 (N.H. 2020) ("To the extent that the parties argue the merits of

---

[12] Vimeo is sure to contend that an alternative ground not relied upon by the First Department—that Daystar failed to state a claim for breach of contract—supports dismissal. Daystar disputes that contention. Daystar specifically averred, in non-conclusory fashion, that the Vaccine Programming was not false or misleading and was instead truthful or opinion content based on personal experiences. The face of the pleadings do not show otherwise, so dismissal for failure to state a claim would be improper. *See Landon v. Kroll Lab. Specialists, Inc.*, 22 N.Y.3d 1, 6 (2013); *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001).

In any event, the First Department did not reach that alternative ground; instead, it held only that Section 230(c)(2) bestowed Vimeo with immunity. Thus, this Court ought not consider any possible alternative bases for affirmance that Vimeo may raise. *See Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

Teatotaller's breach of contract claim, they do so prematurely" at this motion to dismiss stage.).

And like in *Wolens*, *Cipollone*, and the host of federal circuit authorities following those decisions in various contexts, preemption should rarely, if ever, apply to breach of contract claims. To hold otherwise would, as here, permit a provider to contract for the hosting of a particular content—or even to disclaim reliance on Section 230 in any future dispute—only to then skirt that contractual promise with impunity. Liberty to remove particular content is not license to breach one's contractual obligations. *Cf.* John Locke, *Second Treatise of Civil Government*, Chapter II (J. Gough ed. 1947).

B. The lowers courts are split on Section 230's application to breach of contract claims, with the First Department falling on the wrong side of the ledger.

Despite this Court's guidance in other contexts, the lower courts have split on whether Section 230 applies to simple breach of contract claims—and this split extends to the question of immunity under Section 230(c)(2)(A). Some have held correctly that Section 230 does not have such an expansive reach. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009), *as amended* (Sept. 28, 2009) ("Contract liability here would come not from Yahoo's publishing content, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of

material from publication."); *Berenson*, 2022 WL 1289049, at *2 (declining to find Section 230(c)(2) immunity for breach of contract claims because a contract claim seeks to impose liability based on a promise and not on "the defendant's status or conduct as a 'publisher or speaker' ") (citations omitted); *Teatotaller*, 173 N.H. at 452 ("However, to the extent that Teatotaller's claim is based upon specific promises that Facebook made in its Terms of Use, Teatotaller's claim may not require the court to treat Facebook as a publisher.").

But still others, like the First Department, have reached the opposite conclusion. *See Murphy v. Twitter, Inc.*, 274 Cal. Rptr. 3d 360, 371-72 (Cal. Ct. App. 2021) (collecting authorities). These latter authorities have erroneously expanded Section 230 immunity on another plane—not just with respect to the type of content at issue, but to all varieties of claims. This additional interpretative wrong heightens the need for this Court's review. Consistent with its text, Section 230 is designed to free providers from liability predicated on their status as a "publisher" or "speaker," when the provider acts only as a "Good Samaritan"—a "stranger" without a contractual duty—to remove indecent content. This Court should grant review to hold that nothing in Section 230 immunizes providers for breaches of their own contractual undertakings.

———♦———

CONCLUSION

The First Department erred when it held that Section 230(c)(2)(A) cloaked Vimeo with unfettered immunity to censor Daystar's speech on matters of public concern, in breach of Vimeo's contractual obligations.

* * *

"Extending § 230 immunity beyond the natural reading of the text can have serious consequences." *Enigma*, 141 S. Ct. at 18. Most dangerously, an unbridled, non-*ejusdem generis* reading of Section 230 encourages the unfettered censorship of speech on public affairs, a result antithetical to Congressional intent and the First Amendment. This concern is heightened when considered against the backdrop of an ongoing debate regarding the dangers of "Big Tech" censorship, governmental pressure to stifle dissent,[13] and the one-sided, skewed application of policies concerning "misinformation."[14] It is unacceptable when, as here, the

---

[13] *See* Complaint, *Missouri et al. v. Biden et al.*, Case No. 3:22-cv-01213 (W.D. La. 2022) (citing examples in which the government has colluded with social media companies to suppress perceived misinformation).

[14] *See*, *e.g.*, Kaitlyn Tiffany, *A Prominent Vaccine Skeptic Returns to Twitter*, THE ATLANTIC (August 24, 2022), https://www.theatlantic.com/technology/archive/2022/08/alex-berenson-twitter-ban-lawsuit-covid-misinformation/671219/; Vivek Ramaswamy and Jed Rubenfield, *Twitter Becomes a Tool of Government Censorship*, WALL STREET JOURNAL OPINION (August 17, 2022, 1:47 PM), https://www.wsj.com/articles/twitter-becomes-a-tool-of-government-censors-alex-berenson-twitter-facebook-ban-covid-misinformation-first-amendment-psaki-murthy-section-230-antitrust-11660732095.

provider contractually agreed to host the content for which it later claims an unchecked right to censor.

This Court should grant this petition for a writ of certiorari to resolve the nationwide split on Section 230's scope, to correct those erroneous holdings that confer "sweeping immunity" where none was intended by Congress, *see Enigma*, 141 S. Ct. at 13, and to safeguard freedom of expression.

Respectfully submitted,

JOHN H. CAYCE
Counsel of Record
MICHAEL D. ANDERSON
CAITLYN E. HUBBARD
JACOB A. DEKERATRY
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
john.cayce@kellyhart.com
michael.anderson@kellyhart.com
caitlyn.hubbard@kellyhart.com
jacob.dekeratry@kellyhart.com