No. 23-_____

In The

Supreme Court of the United States

ADRIENNE SEPANIAK KING
Petitioner,

v.

META PLATFORMS, INC., fka FACEBOOK, INC.,
a Delaware corporation,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court 1) adopt the opinion of Justice Thomas in his concurrence to the denial of certiorari in *Malwarebytes v. Enigma Software Group USA, LLC*, 592 US ___, 141 S.Ct. 13, 208 L.Ed.2d 197 (2020), that *Barnes v. Yahoo!, Inc.*, 570 F.3d 1102 (9th Cir. 2009), was wrongly decided in holding that 47 USC 230(c)(1) provides interactive computer services (like Respondent Facebook in this case) with immunity for *removing* content in addition to immunity for hosting content by "adopting the all too common practice of [courts'] reading extra immunity into statutes where it does not belong," 2) reverse the *Barnes* decision by holding that 47 USC 230(c)(1) does not provide immunity for *removing* content, and 3) reverse the holding of the Ninth Circuit Court of Appeals in this case, based on *Barnes*, which affirmed the holding of the District Court that Facebook was immune, pursuant to 47 USC 230(c)(1), from King's cause of action against Facebook for breach of contract for removing content from and disabling King's Facebook Account without having required Facebook to show immunity pursuant to 47 USC 230(c)(2)(A) for removal of content from King's Facebook Account?

PARTIES TO THE PROCEEDING

The only parties to this proceeding are Petitioner Adrienne Sepaniak King and Respondent Meta Platforms, Inc., fka Facebook, Inc., a Delaware corporation.

CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement does not apply to Petitioner who is an individual Plaintiff.

RELATED PROCEEDINGS

There is presently a California state court proceeding pending in *Adrienne Sepaniak King v. Meta Platforms, Inc., fka Facebook, Inc.* in the Superior Court of California, County of San Mateo, 23-CIV-0010, in which Plaintiff seeks from Defendant "her request for specific performance based on her claim for breach of the implied covenant [of good faith and fair dealing] in [Facebook's] failing to explain why her account was disabled" as permitted by the Dismissal Order filed April 20, 2022, by the lower federal District Court Judge in this case, Judge Edward M. Chen (*see* Appendix D, 599 F.Supp.3d 901, 913 (N.D.Cal. 2022)).

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The Ninth Circuit's Memorandum and Order Denying Plaintiffs' Petition for Rehearing *En Banc* (Pet. App. 1a and Pet. App. 72a, respectively) are attached. The District Court's Orders Granting Defendant's Motions to Dismiss First Amended Complaint and Second Amended Complaint (Pet. App. 29a and Pet. App. 6a, respectively) are attached.

JURISDICTION

The Ninth Circuit entered its Order Denying Petition for Rehearing *En Banc* on September 13, 2023 (Pet. App. 72a). This Court has jurisdiction pursuant to 28 USC 1254(1).

STATUTORY PROVISIONS

The relevant statutory provision is 47 USC 230 (relevant provisions of subsections (a), (b), (c), (e), and (f) of Sec. 230 are reproduced at Pet. App. 74a).

STATEMENT OF THE CASE

The Complaint and the First Amended Complaint (FAC). Petitioner Adrienne Sepaniak King ("King" or "Ms. King") and her son, Christopher Edward Sepaniak King ("CKing") filed their original Complaint in this case on June 14, 2021. They alleged the following causes of action against Respondent

which was at the time named Facebook, Inc.[1]: breach of contract/specific performance; violation of 47 USC 230(c)(2)(A); intentional or reckless infliction of emotional distress; negligent or grossly negligent infliction of emotional distress; intentional, reckless, grossly negligent, and/or negligent infliction of emotional distress, and loss of consortium (as to CKing); and declaratory and injunctive relief. Facebook responded with a 12(b)(6) motion to dismiss the Complaint on August 30, 2021. King and CKing then filed their First Amended Complaint ("FAC") on September 10, 2021. The FAC stated that the jurisdiction in federal court was based on diversity of citizenship and more than $75,000 in damages (28 USC 1332(a)(1) and 28 USC 1367(a)) and the existence of a substantial federal question (claiming an implied federal cause of action pursuant to 47 USC 230(c)(2)(A)) (28 USC 1331). Facebook then filed a 12(b)(6) motion to dismiss the FAC on September 24, 2021 ("Motion1"). The lower court eventually dismissed the FAC by its Order Granting Defendant's Motion to Dismiss First Amended Complaint ("Order1") filed on November 12, 2021 (*see* Appendix C). Order1 sets out the "Factual & Procedural Background" of the FAC as follows with some material from the FAC added in brackets:

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[1] During litigation Respondent Facebook, Inc. changed its name to Meta Platforms, Inc. Because Respondent was referred to as "Facebook" throughout the litigation in this case and by the District Court Judge in his two dismissal Orders (*see* Appendix B and Appendix C), Respondent is referred to as "Facebook" in this Petition.

Ms. King had a personal account with Facebook for about ten years until November 17, 2020, when she discovered that it had been disabled. *See* FAC ¶¶ 1, 12. Prior to the account['s] being disabled, Ms. King had accumulated about 1,000 "friends." She had shared both political and nonpolitical information. (According to Ms. King, most political information reflected a conservative point of view.) *See* FAC ¶¶ 1, 13-14.

Ms. King discovered her Facebook account had a problem on or about November 17, 2020, when she tried to log into her account but was not successful. [In attempting to communicate with Facebook to discover why she was unable to log in to her account, o]n November 19, [2020,] she received a message from Facebook stating that her account had been disabled, but no reason was provided as to why. *See* FAC ¶ 1. Below is the full message she received.

> Your Account Has Been Disabled
>
> For more information please visit the Help Center.
>
> > Your account was disabled on November 17, 2020. If you think your account was disabled by mistake you can submit more

> information via the Help Center for up to 30 days after your account was disabled. After that, your account will be permanently disabled and you will no longer be able to request a review.

FAC ¶ 16.

Mr. King — Ms. King's son ... tried to reinstate her account. They subsequently received a message [on or about November 19, 2020,] from Facebook that the account had been disabled because "'it did not follow our Community Standards. This decision can't be reversed.'" FAC ¶ 1; *see also* FAC ¶ 17 (full text of message)[2]. No

[2] The full text of the message was:

> **My Personal Account Was Disabled**
>
> If you think your account was disabled by mistake, please enter the following information and we will consider your profile for review. You can submit more information here for up to 30 days after your account was disabled. After that, your account will be permanently disabled and you will no longer be able to request a review.
>
> Only submit this form if your account has been disabled for violating Facebook's Community Standards. If you can't access your account for a different reason, please return to the Help Center to find the appropriate contact channel.

specifics were provided about the purported violation of Community Standards, and, although the Kings thereafter made further inquiry, Facebook did not respond. *See* FAC ¶¶ 1, 18.

Mr. King persisted still over the next few months. He received the following message from [an employee of] Facebook [who was attempting to assist Mr. King] on or about March 9, 2021:

> I am told that the review (I placed) was rejected and that the user (your mother) should have been told what is the policy area they were violating. Unfortunately I do not have much else to add. As for the downloading of data, it seems there should be a way to ask for your data. There should be a flow somewhere, but the person dealing with the problem was not sure what that was. Maybe a search can help? Let me know otherwise.
>
> Sorry man, sorry it took so long

We Cannot Review the Decision to Disable Your Account

Your Facebook account was disabled because it did not follow our Community Standards. This decision can't be reversed.

> and sorry we don't know much more, I suppose for FB to share with me would be absurd and not proper, so I suspect I cannot help you much more than this (which I am sure is not very satisfactory). [followed by a frowning emoji]

FAC ¶ 19. According to the Kings, Ms. King did not violate any Facebook Community Standards [,neither in violation of her contract with Facebook nor in violation of 47 USC 230(c)(2)(A)]. *See* FAC ¶¶ 20-21.

[Ms. King alleged that Facebook did not act in "good faith" in disabling her account by claiming that Ms. King violated Facebook's Community Standards, by applying restrictions on her account not permitted by 47 USC 230(c)(2)(A), and by refusing to state any reasons why her Facebook account had been disabled. *See* FAC ¶¶ 22-24.

Ms. King alleged extreme emotional distress at having her Facebook account disabled and losing all her content and being ignored by Facebook.] Apparently, not only is Ms. King's account gone but also any reference to her "anywhere in facebook.com is . . . gone." FAC ¶ 26.

[Mr. King also alleged severe emotional distress in being treated by Facebook as alleged and in seeing his

mother being abused by Facebook and in not being able to assist her in recovering her Facebook account.]

Based on, *inter alia*, the above allegations, the Kings have asserted the following causes of action:

(1) Breach of contract[/specific performance] [alleging damages in excess of $75,000] (brought by Ms. King only).

(2) Violation of the Communications Decency Act ("CDA"), 47 U.S.C. § 230(c)(2)(A) (brought by Ms. King only).

(3) Intentional or reckless infliction of emotional distress (brought by Ms. King only).

(4) Negligent or grossly negligent infliction of emotional distress (brought by Ms. King only).

(5) Intentional, reckless, grossly negligent, and/or negligent infliction of emotional distress and loss of consortium (brought by Mr. King only).

(6) Declaratory and injunctive relief (brought by Ms. King only).

(7) Breach of the implied covenant of good faith and fair dealing (brought by Ms. King only).

(8) Conversion (brought by Ms. King only).

Dismissal of the FAC by Order1. In support of Motion1, Facebook asked the District Court to take judicial notice of Facebook's "Terms of Service" ("TOS")

which constituted the contract between Facebook and King regarding King's Facebook Account. King had no objection to Facebook's request for judicial notice of the TOS. Paragraph 4.2 of the TOS stated:

> **Account suspension or termination**
> We want Facebook to be a place where people feel welcome and safe to express themselves and share their thoughts and ideas.
>
> If we determine that you have clearly, seriously or repeatedly breached our Terms or Policies: including in particular our Community Standards, we may suspend or permanently disable access to your account. We may also suspend or disable your account if you repeatedly infringe other people's intellectual property rights or where we are required to do so for legal reasons.
>
> Where we take such action we'll let you know and explain any options you have to request a review, unless doing so may expose us or others to legal liability; harm our community of users; compromise or interfere with the integrity or operation of any of our services, systems or Products; or where we are restricted due to technical limitations; or where we are prohibited from doing so for legal reasons.

You can learn more about what you can do if your account has been disabled and how to contact us if you think we have disabled your account by mistake.

If you delete or we disable your account, these Terms shall terminate as an agreement between you and us, but the following provisions will remain in place: 3, 4.2-4.5.

Paragraph 4.3 of the TOS stated:

Limits on liability
We work hard to provide the best Products we can and to specify clear guidelines for everyone who uses them. Our Products, however, are provided "as is," and we make no guarantees that they always will be safe, secure, or error-free, or that they will function without disruptions, delays, or imperfections. To the extent permitted by law, we also DISCLAIM ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT. We do not control or direct what people and others do or say, and we are not responsible for their actions or conduct (whether online or offline) or any content they share

> (including offensive, inappropriate, obscene, unlawful, and other objectionable content).
>
> We cannot predict when issues might arise with our Products. Accordingly, our liability shall be limited to the fullest extent permitted by applicable law, and under no circumstance will we be liable to you for any lost profits, revenues, information, or data. or consequential, special, indirect, exemplary, punitive, or incidental damages arising out of or related to these Terms or the Facebook Products, even if we have been advised of the possibility of such damages. Our aggregate liability arising out of or relating to these Terms or the Facebook Products will not exceed the greater of $100 or the amount you have paid us in the past twelve months.

The issues raised by Motion1 were fully briefed by the parties, and after a hearing on November 4, 2021, the District Court issued Order1 (*see* Appendix C). Order1 dismissed with prejudice King's claim of an implied federal cause of action for violation of the Community Decency Act ("CDA"), 47 USC 230(c)(2)(A), stating that this provision of the CDA did not provide for a separate implied federal right of action. 572 F.Supp.3d at 782-784. Order1 dismissed with prejudice King's claims for declaratory and injunctive relief stating that these were not independent causes of action. *Id*. at 784-785. Order1 dismissed with

prejudice the Kings' claims for intentional, reckless, or grossly negligent infliction of emotional distress stating that Facebook's conduct in disabling King's account did not constitute "outrageous conduct" by Facebook. *Id*. at 785-786. Order1 dismissed with prejudice the Kings' claims for negligent infliction of emotional distress stating that Facebook had no duty to protect the content of King's Facebook Account. *Id*. at 786.

After dismissing these counts of the FAC, the District Court said it "turns to the main claims in the instant case - *i.e.*, Ms. King's claims for breach of contract and the implied covenant of good faith and fair dealing," *id*. at 787. The District Court first dismissed with prejudice any claim by King that Facebook had a duty pursuant to the TOS not to destroy content of a Facebook account (or, conversely, no duty to retain content), even following the disabling of an account (which "does not injure a user's core contractual right – the right to use Facebook's social media platform"). *Id*. at 78-788.

The District Court then held that King "has a viable theory for breach of contract and/or the implied covenant [of good faith and fair dealing] based on Facebook's disabling of her account," *id*. at 788. The District Court also held that King stated "a viable theory for breach of the implied covenant [of good faith and fair dealing] based on Ms. King's contention that Facebook failed to give her an adequate explanation as to how she purportedly violated Community Standards," *id*. at 789. The District Court then dismissed both causes of action for disabling King's

Facebook Account and failing to give an adequate explanation (the question of whether the dismissals would be *with or without prejudice* was left for further consideration as set forth below) because King had alleged only "emotional distress or injury to reputation" damages which are "generally not compensable for a breach of contract," *id*. at 790. The District Court held that if the damages alleged by King were "peculiar" to her pursuant to Cal. Civ. Code Sec. 3355, the "peculiar" damages were not "economic," and Facebook had no duty to preserve King's content anyway, *id* at 790-791. As for King's argument that her breach of contract/implied covenant claims should not be dismissed because she could claim a remedy for specific performance if she had an inadequate damages claim, the District Court held that King had failed to respond to Facebook's argument that King did not show she met all the requirements for specific performance remedies, *id*. at 791. The District Court then dismissed "the claim for breach of contract or the implied covenant – predicated on the disabling of Ms. King's account and the failure to provide a specific explanation . . .," *id*. In passing, the District Court also stated that it dismissed with prejudice King's claim for conversion because, as the Court had already held, Facebook had no contractual duty to maintain the content of King's Facebook Account.

Finally, as noted above the District Court had to decide whether it would dismiss King's claims for "breach of contract/implied covenant based on the disabling of Ms. King's account and the failure to provide a specific explanation" *with or without prejudice*, *id*. at 792. As for King's claim for breach of

contract/implied covenant against Facebook for disabling of her Facebook Account, the District Court, based on *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), rejected King's argument that the CDA, 47 USC 230(c)(1), did not in general provide immunity to an "interactive computer service" like Facebook for a breach of contract claim. The District Court held that *Barnes*' holding about the absence of immunity for an interactive computer service for a breach of contract claim only applied to cases where there was a special relationship between a plaintiff and defendant which justified the plaintiff's claim of "promissory estoppel" which did not exist in King's case. *Id*. at 792-795. The District Court then held, **"Accordingly, the Court holds that Facebook has CDA immunity for the contract/implied covenant claim to the extent that claim is based on Facebook's disabling of Ms. King's account. Because there is CDA immunity, it would be futile for Ms. King to try to amend the claim."** *Id*. at 795. In other words, the breach of contract/implied covenant claim for disabling King's Facebook account was dismissed *with prejudice*.

As for King's claim of breach of contract/implied covenant for failing to provide an explanation for the disabling of her Facebook Account, the District Court held:

> However, to the extent Ms. King's contract/implied covenant claim is based on Facebook's failure to provide an explanation for the disabling of her account, the Court finds that CDA does not apply. This specific claim is tied to

> an implied promise, one that does not depend on Facebooks' status as a publisher to make "'paradigmatic editorial decisions not to publish particular content.'" *Id*. [*Murphy*, 60 Cal.App.5th at 29, 274 Cal.Rptr.3d 360]. Instead, the implied promise is to explain its decision. Although Facebook contends that "a claim seeking to limit the *manner* in which a publishing decision was made, still seeks to treat Facebook as a publisher," Reply at 14 (emphasis in original), the Court is not persuaded. That Facebook has the editorial discretion to post or remove content has little to do with the implied promise to explain why content was removed.

Id.

The District Court went on to reject King's final argument regarding why CDA immunity for King's breach of contract/implied covenant claim for disabling her Facebook account did not apply to Facebook, *id*. at 795-796. King had argued, citing to Justice Thomas' concurrence in a the denial of a writ of certiorari in *Malwarebytes v. Enigma Software Group USA, LLC*, 592 U.S. ___, 141 S.Ct. 13, 15, 208 L.Ed.2d 197 (2020), that CDA "immunity" pursuant to 47 USC 230(c)(1) is only provided to an "interactive computer service" like Facebook for material that is put "up" on its platform but not for material that an "interactive computer service" "takes down" (removes). King had argued that for the latter "take down" action, an "interactive

computer service" was not protected by 47 USC 230(c)(1) but, if at all, by 47 USC 230(c)(2)(A), and then only for material that was not "constitutionally protected" as 47 USC 230(c)(2)(A) stated. The District Court had the following to say about Justice Thomas' analysis:

> The Kings, however, acknowledge that Justice Thomas's concurrence is simply that – a concurrence – and thus not binding. More to the point, the Kings acknowledge that binding Ninth Circuit authority [the *Barnes* case] holds that Sec. 230(c)(1) covers both a decision to publish content or a decision to remove content. **(Indeed, Justice Thomas cited the Ninth Circuit's decision in *Barnes* as reaching an improper holding. *See id.* at 17 ("[B]y construing Sec. 230(c)(1) to protect *any* decision to edit or remove content, courts have curtailed the limits Congress placed on decisions to remove content.") (emphasis in original).)** The Kings have simply made their argument to preserve it for appeal.

Id. at 796.

The District Court concluded Order1 by allowing King to file an amended complaint for "breach of the implied covenant [of good faith and fair dealing] based on Facebook's failure to provide an explanation for the disabling of her account.

> This claim for failure to provide an explanation is dismissed without prejudice. However, the claim as currently pled is not viable because Ms. King has not sufficiently pled any cognizable damages as a result of Facebook's conduct. Furthermore, Ms. King has waived any claim for specific performance. The Court gives Ms. King leave to amend this singular cause of action with respect to damages and for specific performance (in spite of her arguable waiver) to the extent that she can do so in good faith. Any amendment must also take into account whether there is a reasonable basis to assert diversity jurisdiction (in particular, the amount in controversy) given the ruling made by the Court herein.

Id. at 796.

Dismissal of the SAC by Order2. Because it was not clear to King from the wording of Order1 whether she could allege both breach of contract and breach of the implied covenant of good faith and fair dealing in her amended complaint or just breach of the implied covenant, King filed a Second Amended Complaint ("SAC") on December 10, 2021, in which King alleged both causes of action along with a claim for specific performance of the requirement that Facebook supply her with information regarding why her Facebook Account was disabled because of an alleged "failure to follow Facebook's Community

Standards." King also set out in great detail in paragraph 24 of the SAC why she had suffered in excess of $75,000 in damages as a result of Facebook's alleged misconduct.

Facebook filed a 12(b)(6) Motion to Dismiss the SAC ("Motion2") on January 28, 2022. The issues raised by Motion2 were fully briefed by the parties, and after a hearing on March 24, 2022, on April 20, 2022, the District Court filed Order2 dismissing the SAC and on the same date filed the Judgment in favor Facebook. In Order2, the District Court noted that it had already dismissed King's breach of contract claim for disabling her Facebook account with prejudice based on CDA immunity and again ruled that King had failed to allege more than $75,000 in damages (thereby defeating her diversity jurisdiction). The Court again dismissed King's claim for a breach of the implied covenant of good faith and fair dealing for Facebook's failure to state the reasons why her Facebook Account was disabled, but this dismissal was "without prejudice to her pursuit of the claim in state court for her request for specific performance based on her claim for breach of the implied covenant in failing to explain why her account was disabled." (*See Appendix B*, 599 F.Supp.3d 901, 913).

Appeal. Plaintiffs filed their timely Notice of Appeal from the April 20, 2022, Judgment (which included an appeal of Order1 and Order2) on April 24, 2022. Regarding the issue which King seeks this Court to review on certiorari, whether Facebook had immunity pursuant to the CDA, 47 USC 230(c)(1), from a claim of breach of contract for disabling King's

Facebook Account, the Ninth Circuit stated in its Memorandum Opinion filed August 18, 2023 (*see* Appendix A), "2. The district court also properly concluded that King's breach of the implied covenant of good faith and fair dealing claim relating to her account termination was foreclosed by *Barnes*." (Appendix at 4a). The Ninth Circuit denied King's request for a rehearing *en banc* which asked the Ninth Circuit to consider overruling *Barnes* immunity holding *en banc* on September 13, 2023 (*see* Appendix D). This Petition for Certiorari is timely filed within 90 days of the September 13 denial for a rehearing *en banc*.

State Court Proceedings. While the appeal in this case was pending in the Ninth Circuit, as noted in the "Related Proceedings" statement above, King filed her action in California to require Facebook to give her reasons why her Facebook Account was disabled. **King was unable to file her cause of action for breach of contract by Facebook for disabling her Facebook Account because the District Court had ruled that Facebook was "immune" from a cause of action for breach of contract for disabling her Facebook account pursuant to the CDA, 42 USC 230(c)(1).** Facebook filed a demurrer to King's Complaint in California state court which was denied based on Judge Chen's dismissal Orders allowing King to file her action in state court to require Facebook to give reasons why her Facebook Account was disabled. King is presently awaiting Facebook's response to interrogatories as to why her Facebook Account was disabled.

REASON FOR GRANTING THE WRIT

Introduction. Free Speech is dead in this country because of cases like *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), which was recently criticized by Justice Thomas in *Malwarebytes, Inc. v. Software Group USA, LLC*, 592 U.S. ___ (2020), in Justice Thomas' concurring opinion rejecting a *cert* petition in that case. This cert petition seeks to have this Court overrule the holding in *Barnes* that 47 USC 230(c)(1) provides broad immunity for interactive computer services (which includes all the "Big Tech" companies like Facebook, Google, YouTube (now owned by Google), and Twitter (now known as "X")) not just for material which is uploaded onto the platforms of these services, but *also for decisions to block material from being uploaded or for decisions to remove or take down material*. By being allowed to block or remove material posted to their platforms with impunity, Big Tech has been allowed by the federal courts to kill Free Speech.

As this Court is aware, a very large percentage of Free Speech discourse now takes place on the internet through Big Tech platforms. Because Big Tech companies are "private entities" and not "government actors," they have free reign to block or remove any speech they desire *as a constitutional matter*. (*See Prager University v. Google, LLC*, 951 F.3d 991, 997-998 (9th Cir. 2020), citing *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. ___, 139 S.Ct. 1921, 1930 (2019)). Big Tech has been allowed to become abusive of Free Speech through the immunity granted to it, as presently interpreted by the federal

appellate courts, by 47 USC 230(c)(1). As explained below, Congress never intended to grant interactive computer services the immunity for *removing* content which cases like *Barnes* have found in 47 USC 230(c)(1). The proper interpretation by the federal appellate courts of the combination of the provisions of 47 USC 230(c)(1) and (c)(2)(A), as further explained below, will resurrect Free Speech.

In this case, King is one of the victims of Big Tech abuse of Free Speech. On November 17, 2020, King awoke to find that her Facebook Account had been disabled by Facebook and all of the content she had accumulated for over ten years had been destroyed. Facebook refused to tell her what she uploaded that caused such drastic action. King filed suit in the Northern District of California to make Facebook divulge what she had uploaded which "did not follow Facebook's Community Standards," as Facebook claimed. King specifically stated in her Complaint that she did not upload any material which did not follow Facebook's Community Standards or could be taken down without a violation of 47 USC 230(c)(2)(A). King alleged that Facebook's disabling of her Facebook Account constituted breach of contract by Facebook based on Facebook's Terms of Service ("TOS"). Facebook succeeded on a 12(b)(6) motion in having King's rights pursuant to 47 USC 230(c)(2)(A) denied based on *Barnes*' holding that an interactive computer service like Facebook is immune pursuant to 47 USC 230(c)(1) from a cause of action for breach of contract in taking down content that a user had uploaded and disabling a user's account. King had alleged in her First and Second Amended Complaints

that what she had uploaded to her Facebook Account did not fail to follow Facebook's Community Standards and was "constitutionally protected" speech which Facebook could not take down pursuant to 47 USC 230(c)(2)(A). The Ninth Circuit affirmed the holding by the District Court that Facebook had immunity from a breach of contract action for removing her content and disabling her Facebook account pursuant to 47 USC 230(c)(1), and denied a request by King to overrule *Barnes en banc*. This cert petition on this issue now follows. Because, as set forth below, this Court should overrule *Barnes* and hold that Facebook does not have immunity pursuant to 47 USC 230(c)(1) from King's claim of breach of contract against Facebook for removing her content and disabling her Facebook Account, the dismissal of King's breach of contract claim *with prejudice* should be set aside and her claim for breach of contract and specific performance to reinstate her Facebook Account should be dismissed *without prejudice* in federal court and permitted to proceed in state court.

***The Enactment of 47 USC 230(c) and the Improper Interpretation of Sec. 230(c)(1) in* Barnes.** At one time, back in the 90s when the Big Tech companies were trying to get started and were Little Tech companies, they were threatened with extinction as the *Barnes* case explains, 570 F.3d at 1101. In *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995) (unpublished), the Court held that "an internet service provider could be held liable for defamation" uploaded to its platform based on the fact that the internet provider was taking on the responsibility to provide

any editing function of the content uploaded to its platform at all, even if the editing had basically previously been limited to excluding the uploading of material the company claimed was "offensive" to families. This holding by the *Oakmont* Court, if followed by other courts, threatened the extinction of Little Tech as Little Tech would be sued into extinction by persons claiming various uploaded material constituted defamation. Congress saved the Little Tech companies by passage of Sec 230 of the CDA in 1996 and allowed them to become Big Tech companies. In so doing, Congress specifically stated its desire to *promote Free Speech* on the internet in its Findings and Policy statements set out in 47 USC 230(a) & (b):

> (a) Findings – The Congress finds the following:
> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent *an extraordinary advance in the availability of educational and informational resources to our citizens*.
> . . . . . .
> (3) *The 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*.
> . . . . . .
> (5) *Increasingly Americans are relying on interactive media for a variety of political,*

> *educational, cultural, and entertainment services*.
> (b) Policy
> It is the policy of the United States—
> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
> (2) to *preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services*, unfettered by Federal or State regulation;
> . . . . . .
> [Emphasis added.]

So given that Congress intended to pass a law to promote Free Speech how did we get to the situation as it exists today where Big Tech cites this very law as justification to remove any speech with which it disagrees and to disable accounts which gags account holders in perpetuity? The fault lies completely with the federal courts.

Cases like *Barnes*, have misconstrued Sec. 230(c)(1) to hand Big Tech on immunity *for taking down or removing content* which immunity Congress never intended to supply. This has led to the perversion of the Findings and Policy cited above as set out in Secs. 230(a) & (b) with Big Tech stifling, limiting, and controlling Free Speech in any manner it chooses. The federal courts have failed to recognize that Sec. 230(c)(1) *only applies to content which has been uploaded* to Big Tech internet platforms and left

up by Big Tech. Immunity for *taking down or removing content* is covered by Sec. 230(c)(2)(A).

Justice Thomas summarized this two-part structure of Sec. 230(c) in his Statement supporting denial of cert in *Malwarebytes, Inc. v. Software Group USA, LLC*, 592 U.S. ___ (2020) (pp. 3-4), as follows: "In short, the statute suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by Sec. 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by Sec. 230(c)(2)(A)." Justice Thomas went on to say about this simple, straightforward, textual summary of Sec. 230's two-part structure, "This modest understanding is a far cry from what has prevailed in court. *Adopting the all too common practice of reading extra immunity into statutes where it does not belong* . . ., courts have relied on policy and purpose arguments to grant sweeping protection to Internet platforms [emphasis added]." Justice Thomas opined later in his *Malwarebytes* Statement:

> The decisions that broadly interpret §230(c)(1) to protect traditional publisher functions also eviscerated the narrower liability shield Congress included in the statute. Section 230(c)(2)(A) encourages companies to create content guidelines and protects those companies that "in good faith . . . 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." Taken together, both provisions in §230(c) are most naturally read to protect companies when they unknowingly *decline* to exercise editorial functions to edit or remove third-party content [that is, when they leave content "up"], §230(c)(1), and when they *decide* to exercise those editorial functions [that is, take content "down"] in good faith, §230(c)(2)(A).

But by construing §230(c)(1) to protect *any* 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 (MD Fla., Feb. 8, 2017) (rejecting the interpretation that §230(c)(1) protects removal decisions because it would "swallo[w] 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. *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (CA9 2017), aff'g 144 F. Supp. 3d 1088, 1094 (ND Cal. 2015) (concluding that "'any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is

perforce immune'" under §230(c)(1)).

As can be seen, Justice Thomas specifically referred to the *Barnes* decision as being the leading contender as an example of a case which reads "extra immunity into statutes where it does not belong."

To summarize, Sec. 230 is a two-part statute. Sec. 230(c)(1) only properly applies to material that is left "up" by Big Tech, which is not the issue in the King case. Sec. 230(c)(2)(A) which applies when the issue involves material that is "not up" (either because Big Tech blocks the material or takes the material down). The issue in the King case involves material which was taken down (it is now "not up;" it was removed), so Sec. 230(c)(1)'s immunity which is applicable to material that is "up" does not apply. The question in the King case is whether Sec. 230(c)(2)(A) immunity applies to protect Facebook on a 12(b)(6) motion with respect to King's claim of breach of contract by Facebook for removing content which she had uploaded and for disabling her Facebook Account.

With respect to this last issue, Facebook's Sec. 230 immunity defense regarding the taking down of content from King's Facebook Account in a 12(b)(6) motion succeeds only if Facebook clearly meets the two qualifications for immunity for removing content set out in Sec. 230(c)(2)(A). Sec. 230(c)(2)(A) states:

> (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

Based on this statutory language, the first qualification for protection from civil liability is that Facebook must have acted in "good faith" in its decision to remove content from King's Facebook Account. The second qualification for protection from civil liability is that the "good faith" determination must be made in part based on a consideration of whether the "not up" material was "constitutionally protected." On this second qualification, another way to state the issue is that if the "not up" material is *clearly* material that would be "constitutionally protected" by the Free Speech clause of the First Amendment if a government actor was involved (for example political or religious speech), then it would be difficult, if not impossible, for a private interactive service provider to claim "good faith" in disallowing the material to be "up." In other words, the Free Speech Clause of the First Amendment applies to Big Tech, *not as a constitutional issue directly* (because Big Tech companies are "private" entities) but as a *statutory construction* issue. Put another way, the "trade-off" provided to Big Tech by Congress in Sec. 230 was that Congress would protect Big Tech from law suits for

"up" material as long as Big Tech did not block or remove "constitutionally protected" material in the "not up" category. This would be an interpretation of Sec. 230 completely consistent with the intent of Congress as stated in Secs. 230(a) & (b) set forth above. This is also the interpretation called for by Justice Thomas.

Up to now, litigants have been objecting to Big Tech's abuse of Free Speech in the wrong way – litigants have been claiming Big Tech is so Big it has become "like a governmental entity" to which the Free Speech Clause should apply. This argument has consistently failed. The correct argument is that Congress set a standard *by statute* which incorporates by reference the law applicable to the First Amendment's Free Speech Clause (material that is "constitutionally protected") banning Big Tech from barring Free Speech material from being "up." Free Speech case law applies to Big Tech *not through the Constitution directly* (because Big Tech companies are "private entities") but through Sec. 230(c)(2)(A) indirectly as a *statutory* dictate and constraint. Little Tech gets to be Big Tech, but only by complying with the statutory mandates that allowed Little Tech to get Big. Sec. 230(c)(2)(A) only protects Big Tech from "Civil Liability" as long as Big Tech acts in "good faith" with respect to "constitutionally protected" material which it takes down. If Big Tech takes down "constitutionally protected" material in "bad faith," Big Tech is not protected from "civil liability." Because Facebook has refused in this case to provide discovery, we do not know what material which was uploaded to King's Facebook Account caused Facebook to disable

King's Facebook Account. If the material uploaded to King's Facebook Account was "constitutionally protected," then Facebook was not authorized to take it down. King's breach of contract action against Facebook for disabling her Facebook account was dismissed on a 12(b)(6) motion. The only "facts" applicable to a 12(b)(6) motion are "facts" which are "well-pled" in the Complaint. In this case, King has clearly pled in her First Amended Complaint and her Second Amended Complaint that she did not upload any material that violated Facebook's Community Standards, and *she did not upload any content in violation of 47 USC 230(c)(2)(A). See* FAC paragraphs 22-24, 33-38, & 52; SAC paragraphs 19, 23, & 28. King also alleged that Facebook acted in "bad faith" (not in "good faith") in disabling her Facebook Account because she did not violate Facebook's Community Standards and because Facebook was refusing to state what King uploaded that allegedly did violate its Community Standards. *See, Smith v. Trusted Universal Standards in Elec. Transactions*, No. 09-4567 (RBK/KMW), 2011 WL 900096, at *25-26 (D.N.J. March 15, 2011) (failing to respond to a request for an explanation can considered "bad faith"). For purposes of this cert petition arising from a 12(b)(6) motion, King's allegations must be taken as true (the facts of this case have to be considered in the light most favorable to King) – she never uploaded any material that violated Facebook's Community Standards, she never uploaded any material that was not "constitutionally protected," and Facebook acted in bad faith (not in "good faith") by taking down "constitutionally protected" material that she uploaded by refusing to tell King what material Facebook

considered "objectionable," and by disabling her Facebook Account.

Why 47 USC 230(c) was Enacted as a Two-Part Statute and the Correct Interpretation of Sec. 230(c)(1). In 1996, Congress recognized that the future forum for "true diversity of political discourse" (in other words, "Free Speech" or "constitutionally protected" speech) was going to be the Internet. Congress also recognized that cases like *Oakmont* threatened the existence of the companies which would be the hosts of this burgeoning new forum for constitutionally protected Free Speech. Congress had three problems to solve: 1) how to resolve the issue raised in *Oakmont*, namely, how to protect Internet providers who were hosting Free Speech platforms from lawsuits for slander, etc.; 2) how to get Free Speech discourse up on to the Internet and keep it there (put another way, how to prevent Internet providers from seeking to "restrict access" of Free Speech to the Internet, either by not allowing Free Speech content to be uploaded in the first place or by removing content once it was uploaded); and 3) how to deal with the "decency" problem (the statute, after all, was entitled the "Community *Decency* Act". This required a two-part statute, 47 USC 230(c).

The first part of 47 USC 230(c), 47 USC 230(c)(1), solved Congress' first problem of how to protect Internet providers – by defining an Internet provider *not* to be a "publisher or speaker of any information provided by another information content provider," an Internet provider could not be sued for slander, etc. based on content being hosted.

The second part of 47 USC 230(c), 47 USC 230(c)(2)(A), solved Congress' second and third problems of how to guarantee the uploading of constitutionally protected Free Speech while making an exception for content that did not satisfy citizens' concept of "decency." It was clearly stated by Congress in its Findings and Policy statements in 47 USC 230(a) & (b) that *all* (a *diversity* of) Free Speech was to be hosted on the Internet, and this was further guaranteed with 47 USC 230(c)(1) by protecting Internet providers for hosting uploaded material. If Internet providers blocked or removed constitutionally protected Free Speech, they could be sued for violating the guarantee of the statute that constitutionally protected Free Speech should be allowed to be uploaded. All Congress had to do with the enactment of 47 USC 230(c)(2)(A) was carve out one exception to guaranteeing the uploading of constitutionally protected Free Speech – there would be no other exception to the guaranteed uploading of constitutionally protected Free Speech.

Congress provided for the one exception in 47 USC 230(c)(2)(A) which states that an Internet provider cannot be sued for blocking or removing content which does not meet the "decency" test. The test was that an Internet provider could "restrict access" to (block or remove) material which was "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." As Congress was encouraging Internet providers to "screen" for "offensive material," Congress also had to provide for the case of an Internet provider that mistakenly restricted constitutionally protected Free Speech

material which the Internet provider was not authorized to restrict. Congress did this by stating that an Internet provider could not be sued if it "in good faith . . . considers" restricted material to be in the defined class of "offensive" material even if it turned out that the restricted material was actually in the class of material that the Internet provider was not authorized to restrict, that is, "constitutionally protected" material.

The District Court's Order That King's Cause of Action Against Facebook for Breach of Contract/Implied Covenant be Dismissed With Prejudice Should be Vacated. Based on this legislative history and the text of Section 230(c), *Barnes*' reading of 47 USC 230(c)(1) is incorrect, and Justice Thomas' reading of Section 230(c)(1) as discussed above is clearly correct. It was error for the Ninth Circuit in this case to hold that King's breach of contract/implied covenant cause of action against Facebook for removing her content and disabling her Facebook account was properly dismissed with prejudice by the District Court because Facebook was "immune" from a suit for King's breach of contract/implied covenant cause of action pursuant to 47 USC 230(c)(1). Sec. 230(c)(1), properly interpreted, does not provide immunity for *removal* of content. Immunity for *removal* of content (as in King's case) would only be available to Facebook as an affirmative defense pursuant to 47 USC 230(c)(2)(A) and only *if* the material which King uploaded did not meet the "decency" test set out in 47 USC 230(c)(2)(A). Because King denied in her pleading that she uploaded anything which did not meet the "decency" test of 47

USC 230(c)(2)(A) and Facebook has to date refused to say what King uploaded that might meet the test, it was error to dismiss King's breach of contract/implied covenant claim with prejudice on Facebook's 12(b)(6) motion. The Ninth Circuit should have accepted King's invitation to overrule *Barnes en banc*, but declined. The remedy now is for this Court to grant certiorari in this case, reverse the *Barnes* decision, and order the Ninth Circuit to remand this case to the District Court with an order that the District Court vacate its dismissal *with prejudice* of King's breach of contract/implied covenant claim. The District Court should then dismiss King's breach of contract/implied covenant claim against Facebook for removing her content and disabling her Facebook account *without prejudice* so King can pursue this claim in state court.

CONCLUSION

To summarize Petitioner's position, Congress passed Section 230 of the Community Decency Act in part to protect interactive computer services from being sued for content that is uploaded to their platforms (47 USC 230(c)(1)). The purpose of this protection was to promote "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 USC 230(a)(3). Congress noted that "Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services," 47 USC 230(a)(5). Congress recognized the growth of the Internet as "an extraordinary advance in the availability of educational and informational resources to our

citizens," 47 USC 230(a)(1). Congress stated that its policy was "(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; and (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services," 47 USC 230(b)(1) and (2). In short, Congress realized that the Internet was going to be the forum for Free Speech in the coming decades, and Congress wanted to promote Free Speech in this forum by protecting the platforms which would be providing the forum. On the other hand, Congress was not giving these platforms carte blanche and wanted to restrict the ability of these forums to interfere with the Free Speech Congress wanted to promote, so Congress enacted the second part of Section 230, 47 USC 230(c)(2)(A). Based on the Policies and Findings of Section 230 set out above, Congress sought to *limit content that could be removed by Internet providers with impunity*. Congress only allowed Internet providers to remove the content set out in 47 USC 230(c)(2)(A) – that is, "material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." The question for Congress then became, what if an Internet provider in good faith removed material the provider believed to be within the definition of Section 230(c)(2)(A), but that material was in fact the very "constitutionally protected" Free Speech that Congress wanted to promote? Congress made the choice (the policy judgment) to give the Internet provider immunity in such a situation by providing immunity "whether or not such material is constitutionally protected" as long as the Internet

provider acted in "good faith." Otherwise, the Internet provider was not free to remove content if the content was "constitutionally protected" Free Speech.

The above interpretation makes sense in light of the entire Findings and Policies stated at the beginning of Section 230. For example, if it was not the policy of Congress to *limit* content which Internet providers could remove, then there would be no reason to enact Sec. 230(c)(2)(A) at all. Internet providers could simply claim immunity for what was uploaded on to their platforms pursuant to Sec. 230(c)(1) and then remove whatever they felt like removing claiming a constitutional right to be able to do so. This would hardly be a statute which would promote a diversity of ideas and Free Speech. By enacting Sec. 230(c)(2)(A), Congress was stating the *limit* being put on what material Internet providers could remove with impunity.

If the intent of Congress was to promote Free Speech with CDA Section 230, then how did we end up with Big Tech citing this very law as justification to remove any speech with which it disagrees and to disable accounts which gags account holders in perpetuity? The answer is that the courts are the problem. Cases like *Barnes* are absolutely wrong when they claim that Internet providers are protected by Sec. 230(c)(1) not only for what they allow to go "up" but also for what they decide to take "down." As Justice Thomas stated in his *Malwarebytes* Statement, "The decisions that broadly interpret Sec. 230(c)(1) to protect traditional publisher functions [which include removing or limiting material] also eviscerate the

narrower liability shield [emphasis added] Congress included in the statute [in Sec. 230(c)(2)(A)]. . . . But by construing Sec. 230(c)(1) to protect *any* [Justice Thomas' emphasis] decision to edit or remove content [citing *Barnes*], courts have *curtailed the limits Congress placed on decisions to remove content* [emphasis added] [citing a case "rejecting the interpretation that Sec. 230(c)(1) protects removal decisions because it would 'swallo[w] the more specific immunity in (c)(2)'"]." If the courts are the problem, then it is up to this Court, the highest court in the land, to fix the problem and reign in the courts that are misinterpreting CDA Section 230.

Petitioner is asking this Court to grant this cert Petition and overrule *Barnes*. This Court should hold that an interactive computer service cannot, *as a matter of statutory construction*, take down "constitutionally protected" material that has been uploaded to its platform. If this Court reverses *Barnes*, then the dismissal by the District Court of King's breach of contract claim regarding the removal of her content and the disabling of her Facebook Account *with prejudice* should be vacated, and King's breach of contract claim should be remanded to the District Court for dismissal of King's breach of contract claim *without prejudice* so she can pursue this claim in California state court.

As Justice Thomas noted at the beginning of the introduction to his *Malwarebytes* statement, "When Congress enacted the statute, most of today's major internet platforms did not exist. And in the 24 [it has now been 27] years since, we have never interpreted

this provision [47 USC 230]. But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world." Justice Thomas closed the *Malwarebytes* introduction by stating, "I write to explain why, *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." The case now presented to this Court in this cert Petition is the *appropriate case*.

Respectfully submitted,

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