No. 23-647

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

PETITIONER'S PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

I. Introduction. Pursuant to Supreme Court Rule 44.2, Petitioner requests that this Court rehear Petitioner's Petition for Writ of Certiorari. After this Court issued its Order denying Petitioner's Petition on February 20, 2024, a circumstance of substantial effect has intervened within the 25 day period allowed for Petitioner to submit this Petition for Rehearing. The substantial intervening circumstance was the joint-argument heard by this Court on February 26, 2024, in the *NetChoice* cases (Case Nos. 22-277 and 22-555). For the reasons set forth below based on the questions asked by this Court and arguments made in the *NetChoice* cases, Petitioner requests that this Court rehear its denial of Petitioner's Petition, and grant Petitioner's Petition because of its timely relevance to the issues being considered in the *NetChoice* cases and the need to issue an opinion interpreting 47 USC 230(c)(1).

II. Questions About the Proper Interpretation of 47 USC 230 Were Asked by This Court of the Parties in the *NetChoice* Cases. In Petitioner's Supplemental Brief filed on February 13, 2024, Petitioner argued her Petition should be granted and decided along with the *NetChoice* cases because Petitioner believed the *NetChoice* cases could not be argued and decided without serious consideration being given to the proper interpretation of 47 USC 230(c)(1). Petitioner expressed this belief even though this Court did not include any reference to 47 USC 230

in the two questions it certified to be briefed and argued in the *NetChoice* cases, and even though Section 230 was barely mentioned by any of the almost 90 briefs submitted in the *NetChoice* cases. Despite that, Petitioner asserted questions about this important statute would be "raised" during argument in the *NetChoice* cases, and, indeed, during the *NetChoice* arguments, Section 230 was raised repeatedly just as Petitioner predicted.

A. Questions About the Proper Interpretation of 47 USC 230 Raised in Case No. 22-277. In Case No. 22-277, Section 230 was referenced over a dozen times[1] in five colloquies between three Justices (Gorsuch, Thomas, and Barrett), the two attorneys for the parties, Mr. Whitaker and Mr. Clement, and US Solicitor General Prelogar. Word constraints applicable to this Petition for Rehearing allow detailed summaries of only the first three of these colloquies.

1. The first colloquy relating to Section 230 was between Justice Gorsuch and Mr. Whitaker and demonstrated the problem of considering the constitutional issues raised in the *NetChoice* cases before considering the proper statutory interpretation of Section 230:

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[1] FTr. 28:25, 40:11, 65:17, 85:5, 91:9, 118:1, 122:8, & 147:10. In this Petition for Rehearing, "FTr." refers to the transcript of oral argument regarding the Florida statute in Case No. 22-277, and "TTr." refers to the transcript of oral argument regarding the Texas statute in Case No. 22-555.

> JUSTICE GORSUCH: . . . . What about Section 230, which preempts some of this law? How much of it? And how are we to account for that complication in a facial challenge?[2]

Mr. Whitaker tried answering this question by arguing, "I think that the Court should answer the question presented, I guess." By this response, Mr. Whitaker meant that the "question presented" related only to the constitutionality of the Florida statute and not the statutory interpretation of Section 230. To Mr. Whitaker's response, Justice Gorsuch asked, "But how can we do that without looking at 230?" This is exactly the problem Petitioner raised when she asked, "[D]oes the CDA interpreted as we argue in this Petition preempt the states from enacting any statutes in the same area of law?"[3] Justice Gorsuch then followed up this preemption issue later during argument:

> JUSTICE GORSUCH: I just wanted to give you a chance to finish up on the Section 230 point. I think it's Section 6 of your law that says that the law is not enforceable to the extent it conflicts with Section 230.
>
> MR. WHITAKER: Sure, sure.

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[2] FTr. 28-29.

[3] Supplemental Brief, page 4.

> JUSTICE GORSUCH: So why wouldn't we analytically want to address that early on in these proceedings, whether in this Court or a lower court?[4]

Again, this is exactly the problem Petitioner raised: "We argue here that the issues raised in the *NetChoice* cases should be resolved only *after* this Court takes up the task of a proper interpretation of 47 USC 230. This Petition directly requests that this Court interpret 47 USC 230 as suggested by Justice Thomas in *Malwarebytes*. . . . The cart is before the horse."[5]

2. The second colloquy was between Justice Thomas and *NetChoice* counsel Mr. Clement and demonstrated yet again that Section 230 needed to be interpreted before other issues were considered:

> JUSTICE THOMAS: And the argument under Section 230 has been that you're merely a conduit, which . . . was the case back in the '90s and perhaps early 2000s. Now you're saying that you are engaged in editorial discretion and expressive conduct. Doesn't that seem to undermine your Section 230 arguments?[6]

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[4] FTr. 40.

[5] Supplemental Brief summarized at p. 8.

[6] FTr. 65.

Mr. Clement then proceeded to give his "understanding" about what he thought was the proper interpretation of Section 230:

> MR. CLEMENT: And Congress, in passing Section 230, looked at some common law cases that basically said, well, if you're just a pure conduit, that means that you're free from liability. But, if you start becoming a publisher, by keeping some bad . . . content out, then you no longer have that common law liability protection.
>
> And as I understand 230, the whole point of it was to encourage websites and other regulated parties to essentially exercise editorial discretion to keep some of that bad stuff out of there . . . ."[7]

Mr. Clement could provide only *his* understanding of Section 230 and not *this Court's* understanding because this Court, as Justice Thomas laments in *Malwarebytes*, has *never interpreted Section 230 in any case*. Mr. Clement's "understanding", which tracks the holdings of lower federal courts[8] that Sec. 230(c)(1) gives Big Tech unconstrained "editorial discretion" to remove or block any content it wants to, is extremely

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[7] FTr. 66.

[8] The Ninth Circuit *Barnes* case, for example.

unlikely to be the understanding of this Court because, as Justice Thomas stated in *Malwarebytes*, the lower federal courts have provided 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." More specifically, Justice Thomas stated in *Malwarebytes*:

> Taken together, both provisions in Sec. 230(c) [230(c)(1) and 230(c)(2)(A)] most naturally read to protect companies when they unknowingly *decline* to exercise editorial functions to edit or remove third-party content, Sec. 230(c)(1), and when they *decide* to exercise those editorial functions in good faith, Sec. 230(c)(2)(A).
>
> But by construing Sec. 230(c)(1) to protect *any* decision to edit or remove content [citing *Barnes*], courts have curtailed the limits Congress placed on decisions to remove content [citing *e-ventures Worldwide, LLC v. Google, Inc.*] (rejecting the interpretation that Sec. 230(c)(1) protects removal decisions because it would "swallo[w] the more specific immunity in (c)(2)"). [Emphasis in the original.]

3. The third colloquy was again between Justice Thomas and Mr. Clement. Justice Thomas wanted to know why Big Tech was not

presented with "a Section 230 problem" "if you win here."[9] Justice Thomas followed up by asking, "So what is it that you are editing out that fits under Section 230?" (*id.*), Mr. Clement understood that Justice Thomas was referring to Sec. 230(c)(2)(A) and stated, "There's a whole bunch of stuff that we think is . . . offensive with the terms of 230 that we're exercising our editorial discretion to take out."[10]

> JUSTICE THOMAS: Well, but 230 does not necessarily touch on offensive material. It touches on obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable. Do you think - -
>
> MR. CLEMENT: It's that last one.
>
> . . . .
>
> MR. CLEMENT: I mean, we could have a fine debate about . . . how much of that - - . . . what's the Latin for that, ["]the company you keep["] and all of that. I mean you could have a fine debate in some other case, but we would certainly take the position that we're protected in those judgments under 230.

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[9] FTr. 85.

[10] FTr. 86.

> JUSTICE THOMAS: Well, I think you'd make that, the ejusdem doctrine, do a lot of work. . . . .[11]

Justice Thomas and Mr. Clement were arguing a point about the proper statutory interpretation of Section 230 in a case which was supposed to be focusing on the constitutional validity of the Florida and Texas statutes.

4. The fourth colloquy involved a long discussion between Justice Gorsuch and SG Prelogar regarding the proper statutory interpretation of Section 230.[12]

5. The fifth colloquy was between Justice Barrett and SG Prelogar. Justice Barrett also expressed concern about the proper interpretation of Section 230 and warned about "land mines,"[13] giving as an example the difference between a user's "posts" and an internet provider's promotion of select posts in "feed."

B. Questions About the Proper Interpretation of 47 USC 230 Raised in Case No.

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[11] FTr. 86-87. The "Latin" to which Mr. Clement and Justice Thomas refer is "*ejusdem generis*."

[12] FTr. 117-124.

[13] FTr. 147-149.

22-555. There were four colloquies[14] regarding Section 230 prompted by questions from Justices Gorsuch, Alito, and Thomas. Briefly, these colloquies were as follows. The first colloquy between Justice Gorsuch and *NetChoice* attorney Mr. Clement, which goes on for several transcript pages,[15] was particularly significant regarding the need for statutory interpretation of Section 230. Justice Gorsuch complained about the inconsistency in Big Tech's position: "So it's speech for purposes of the First Amendment, your speech, your editorial control, but when we get to Section 230, your submission is that that isn't your speech."[16] Justice Alito makes the same point in a second colloquy later in argument: "Either it's your message or it's not your message, I don't understand how it can be both. . . . [I]t's your message when you want to escape state regulation, but it's not your message when you want to escape liability under state tort law."[17]

Justice Gorsuch also complained:

> JUSTICE GORSUCH: But many of your clients' terms of service, while reserving some editorial discretion - - and I think about most of them . . . as speaking about the things covered by 230,

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[14] TTr. 8:13 & 14:3, 23:7, 43:17, & 51:4.

[15] TTr. 9-16.

[16] TTr. 10.

[17] FTr. 24.

> obscenity, et cetera - - go out of their way to promise an open forum to all members of the public and go out of their way to say we don't endorse what other people say on this site and go out of their way to say all views shall flourish.[18]

Mr. Clement's response to Justice Gorsuch's point is to launch off on a claim that "otherwise objectionable" (as noted above, this is language from Sec. 230(c)(2)(A)) is being used to remove content which is "damaging to youths" and "keeping some bad material off."[19] Of course, Mr. Clement does not mention the real problem which was identified by Justice Kagan in the argument in Case No. 22-277 about removal by Big Tech of, for example, "anti-vaxxers," "insurrectionists," "misinformation as to voting and things like that," and "vaccination policy."[20]

Based on the Clear Need for Statutory Interpretation of Section 230 as Demonstrated by the Oral Argument in the *NetChoice* Cases, This Court Should Rehear its Decision to Deny Certiorari in this Case. The point of citing to all the argument about the proper interpretation of Section 230 in the *NetChoice* cases above is, again, to highlight our contention that the consequences of constitutional

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[18] TTr. 12-13.

[19] TTr. 14.

[20] FTr. 18.

issues raised in the *NetChoice* cases are dependent on how Section 230 is interpreted, and this Court has never interpreted Section 230 in any case in the 27 years since the CDA was enacted. Justices Thomas, Gorsuch, Alito, and Barrett especially raised concerns regarding deciding constitutional issues before providing a proper interpretation of Section 230. Justice Thomas alluded to "230 problems" while Justice Barrett used a "land mine" analogy.

In *Malewarebytes*, Justice Thomas was looking for an "appropriate case" in which to interpret the meaning of Section 230. The case presented by Petitioner presents squarely and without complication the issue of the proper interpretation of Sec. 230(c)(1) to this Court and, as far as we can tell, is the only case presently pending before this Court on petition for certiorari which asks this Court to interpret the meaning of Sec. 230(c)(1).

The facts of Petitioner's case are as simple as the ruling: Petitioner's Facebook account was disabled. Facebook claimed Petitioner "did not follow Facebook's Community Guidelines." In her Second Amended Complaint for breach of contract against Facebook, Petitioner denied that she "failed to follow Facebook's Community Guidelines" and denied that she breached her contract with Facebook. On a 12(b)(6) motion for dismissal based on the pleadings, with no opportunity for discovery, the lower court simply dismissed Petitioner's breach of contract claim against Facebook for deplatforming her Facebook Account "with prejudice." The reason for the dismissal was that Facebook "exercised its editorial discretion" when it

deplatformed Petitioner's Facebook Account. The District Court in this case held that Facebook was "immune" from Petitioner's cause of action for breach of contract pursuant to Sec. 203(c)(1), citing *Barnes* as "binding Ninth Circuit authority [which] held that Sec. 230(c)(1) covers ["covers" here means "immunizes"] . . . a decision to remove content." 572 F.Supp.2d at 796.

So the absurd result in this case is that, even though on Facebook's 12(b)(6) motion Petitioner must be considered *not* to have breached her contract with Facebook and *not* to have "failed to follow Facebook's Community Standards, Sec. 230(c)(1) immunized Facebook for the act of deplatforming Petitioner's Facebook Account. Basically, Petitioner was deplatformed and had no recourse regardless of what she did and regardless of what the contract provided because the District Court ruled they were totally irrelevant. This result would be impossible under Justice Thomas' interpretation of Sec. 230(c)(1) set out in *Malwarebytes*.

This is not justice.

Is this Court really going to deny certiorari in this case and allow this injustice to continue? We understand that Petitioner's case appears to be very small, but Petitioner stands in the shoes of *billions* of Big Tech users who are being treated and abused just like her because lower federal courts have interpreted Sec. 230(c)(1) to grant immunity to Big Tech for its abusive behavior. Only this Court can stop the abuse, and if this Court does not stop it with this case, when is it going to stop it? Why is this case not the

"appropriate case" to give Section 230 the most "naturally" read interpretation called for by Justice Thomas in *Malwarebytes*?

For Justices who are simply concerned that Sec. 230(c)(1) is being misinterpreted, certiorari should be granted in this case to provide lower courts with a correct interpretation of Sec. 230(c)(1). For Justices who are expressing concern about broad levels of generality in considering constitutional issues where there is no specific statutory interpretation of the meaning of Sec. 230(c)(1), certiorari should be granted. For Justices who are concerned that Sec. 230(c)(1) is being incorrectly interpreted to give Big Tech "carte blanche" immunity and get away, for example, with racially discriminating against users by removing content (as Justice Thomas complains in *Malwarebytes* citing *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed.Appx. 526 (9th Cir. 2017)), certiorari should be granted. The arguments recently before this Court in the *NetChoice* cases highlighted the need to resolve all these Sec. 230(c)(1) issues.

As the *NetChoice* arguments clearly demonstrate, there are problems with Sec. 230(c)(1), but if anyone thinks this Court can wait for Congress to step in and solve the problems, we believe this will never happen. As the situation exists right now with lower courts' misinterpretation of Sec. 230(c)(1), Big Tech "has its cake, and eats it too." Big Tech can remove whatever content it wants, and it gets maximum immunity for doing so. As Justice Thomas argued in *Malwarebytes*, Sec. 230(c)(1) was never intended to provide immunity for removing content.

Because Big Tech now has immunity for removing content, the "new public forum" of the Internet is skewed toward a super-concentration of power that can limit public debate in any direction it chooses, a result never intended by Congress and a result which is tending to rip this country apart. This entire country was built upon the concept of the avoidance of the concentration of power. The problem with relying on Congress to amend the CDA now is that Congress is most likely to respond to pressure from the most powerful interest groups. What chance in lobbying Congress do individual users like Petitioner, who are deplatformed without recourse as Sec. 230(c)(1) is presently misinterpreted, have against trillion dollar corporations which want to maintain the lower court interpretation status quo of Sec. 230(c)(1)? Because this Court has failed to act and provide interpretive guidance regarding Sec. 230(c)(1), States like Florida and Texas have had to force the issue resulting in the *NetChoice* cases. This Court has an opportunity to grant certiorari in this case and provide interpretive guidance for Sec. 230(c)(1) which is sorely missing.

We ask this Court to rehear its Order denying certiorari in this case, grant certiorari, and use this case to issue a needed and timely opinion about whether Sec. 230(c)(1) grants immunity to Big Tech for the removal of content.

CONCLUSION

For the foregoing reasons, this Petition should be granted.

Respectfully submitted,

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CERTIFICATE OF PETITIONER

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.