

No. \_\_\_\_\_

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**In the  
Supreme Court of the United States**

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JASON FYK,

*Petitioner,*

v.

FACEBOOK, INC.,

*Respondent.*

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

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**APPENDIX VOLUME 1  
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**MEMORANDUM\* OPINION, U.S. COURT OF  
APPEALS FOR THE NINTH CIRCUIT,  
NO. 24-465  
(DECEMBER 11, 2024)**

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NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JASON FYK,

*Plaintiff-Appellant,*

v.

FACEBOOK, INC.,

*Defendant-Appellee.*

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No. 24-465

D.C. No. 4:18-cv-05159-HSG

Appeal from the United States District Court  
for the Northern District of California  
Haywood S. Gilliam Jr., District Judge, Presiding

Submitted November 22, 2024\*\*  
Pasadena, California

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).



Before: RAWLINSON, CHRISTEN, and  
JOHNSTONE, Circuit Judges.

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## MEMORANDUM

Jason Fyk appeals the district court’s order denying his second Rule 60(b) motion to vacate and set aside a judgment in favor of Facebook, Inc., and terminating his freestanding “motion re: the (un) constitutionality of 47 U.S.C. § 230(c)(1).” We have jurisdiction under 28 U.S.C. § 1291 and review for abuse of discretion the denial of a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). *Marroquin v. City of Los Angeles*, 112 F.4th 1204, 1211 (9th Cir. 2024) (citing *United States v. Asarco Inc.*, 430 F.3d 972, 978 (9th Cir. 2005)). We affirm.

1. The district court did not abuse its discretion in denying Fyk’s second motion to vacate under Rule 60(b)(5), which authorizes relief from a final judgment that “is based on an earlier judgment that has been reversed or vacated.” Fed. R. Civ. P. 60(b)(5). “Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests, but the Rule provides a means by which a party can ask a court to modify or vacate a judgment or order if ‘a significant change . . . in law’ renders continued enforcement ‘detrimental to the public interest.’” *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)).

Fyk argues that significant post-judgment changes in the law demonstrate that, because Facebook’s challenged content-moderation actions were motivated by anticompetitive animus, Facebook was not entitled to immunity under Section 230(c)(1) of the Communica-

tions Decency Act. He points to two of our published decisions as changing the law concerning the scope of immunity under Section 230(c)(1): *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019), and *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021). But we have already rejected as untimely his argument that *Enigma* changed the controlling law. See *Fyk v. Facebook, Inc.*, No. 21-16997, 2022 WL 10964766, at \*1 (9th Cir. Oct. 19, 2022). And contrary to Fyk’s assertions, *Lemmon* says nothing about whether Section 230(c)(1) shields social-media providers for content-moderation decisions made with anticompetitive animus. See 995 F.3d at 1092 (explaining that the case “has nothing to do with” [the defendant’s] editing, monitoring, or removing of the content that its users generate” (quoting *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016))). The remaining cases Fyk cites are unpublished, dissenting, out-of-circuit, or district-court opinions, which are not binding in this circuit and therefore do not constitute a change in the law. See *Hart v. Massanari*, 266 F.3d 1155, 1170–71 (9th Cir. 2001). Because Fyk has identified no change in the law, the district court did not abuse its discretion in denying his motion under Rule 60(b)(5).

2. Nor did the district court abuse its discretion in denying Fyk’s second motion to vacate under Rule 60(b)(6), which permits a court to vacate a final judgment for “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6). “A movant seeking relief under Rule 60(b)(6) is required ‘to show “extraordinary circumstances” justifying the reopening of a final judgment.”’ *Martinez v. Shinn*, 33 F.4th 1254, 1262 (9th Cir. 2022) (quoting *Gonzalez v. Crosby*, 545 U.S.

524, 535 (2005)). We “have outlined ‘six factors that may be considered . . . to evaluate whether extraordinary circumstances exist.’” *Riley v. Filson*, 933 F.3d 1068, 1071 (9th Cir. 2019) (quoting *Lopez v. Ryan*, 678 F.3d 1131, 1135 (9th Cir. 2012)). But where, as here, “the key issue is whether there was ‘a change in the law,’ . . . we do not need to reach the other five factors if there was no change.” *Id.* (quoting *Jones v. Ryan*, 733 F.3d 825, 839 (9th Cir. 2013)). As explained, the relevant law has not changed, so Fyk is not entitled to relief under Rule 60(b)(6). *See id.* at 1073-74.

3. The district court also properly terminated Fyk’s freestanding motion regarding the constitutionality of Section 230(c)(1). Federal Rules of Civil Procedure 59 and 60(b) generally “cover the field” and “define the practice with respect to any existing rights or remedies to obtain relief from final judgments.” Fed. R. Civ. P. 60(b) advisory committee’s note to 1946 amendment. If relief is not available under either rule, “the only other procedural remedy is by a new or independent action to set aside a judgment. . . .” *Id.*; *see also* Fed. R. Civ. P. 60(b) advisory committee’s note to 2007 amendment. As discussed, Fyk is not entitled to relief under Rule 60(b). He is out of time to seek relief under Rule 59. *See* Fed. R. Civ. P. 59(e). And though he styles his motion as pursuant to Rule 5.1, that rule does not provide for any such motion. *See* Fed. R. Civ. P. 5.1(a). There is thus no basis to consider Fyk’s freestanding motion. *Cf. Allmerica Fin. Life. Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 665 (9th Cir. 1997) (explaining that a district court could not entertain a post-judgment motion to amend a plead-

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ing “until [the movant] demonstrated that he was entitled to relief under Rule 60(b)”).

AFFIRMED.

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**MANDATE, U.S. COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
(JANUARY 23, 2025)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JASON FYK,

*Plaintiff-Appellant,*

v.

FACEBOOK, INC.,

*Defendant-Appellee.*

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No. 24-465

D.C. No. 4:18-cv-05159-HSG  
Northern District of California, Oakland

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**MANDATE**

The judgment of this Court, entered December 11, 2024, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

/s/ Molly C. Dwyer

Clerk of Court

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**ORDER DENYING MOTION TO RECALL,  
U.S. COURT OF APPEALS FOR  
THE NINTH CIRCUIT  
(MARCH 4, 2025)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JASON FYK,

*Plaintiff-Appellant,*

v.

FACEBOOK, INC.,

*Defendant-Appellee.*

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No. 24-465

D.C. No. 4:18-cv-05159-HSG

Northern District of California, Oakland

Before: RAWLINSON, CHRISTEN, and JOHNSTONE,  
Circuit Judges.

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**ORDER**

Appellant Jason Fyk's motion to recall the  
mandate (Dkt. No. 32) is DENIED.

**ORDER, U.S. DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA,  
DENYING MOTION FOR RELIEF  
PURSUANT TO FED. R. CIV. P. 60(B)  
AND TERMINATING MOTION RE:  
CONSTITUTIONALITY OF 47 U.S.C. § 230(C)(1)  
(JANUARY 12, 2024)**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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No. 18-cv-05159-HSG

Re: Dkt. Nos. 61, 66

Before: Haywood S. GILLIAM, JR., U.S. District Judge.

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These motions are the latest in a long string of filings by Plaintiff in this closed case, in which final judgment was entered in June 2019. Dkt. No. 39. The Court DENIES Plaintiff's second Rule 60(b) motion, and consequently TERMINATES Plaintiff's motion regarding the constitutionality of Section 230(C)(1) because there is no active case.

## **I. Procedural History**

In June 2019, Judge White, to whom this case was then assigned, dismissed the case without leave to amend and entered judgment in favor of Defendant and against Plaintiff. Dkt. Nos. 38, 39.<sup>1</sup> The Ninth Circuit affirmed that order in June 2020. Dkt. No. 42. The Ninth Circuit then denied rehearing *en banc*, and the U.S. Supreme Court denied Plaintiff's petition for writ of certiorari in January 2021. Dkt. No. 45. Just over two months later, Plaintiff filed his first motion to vacate the judgment under Rule 60(b). Dkt. No. 46. Judge White denied that motion in November 2021, finding that neither the Ninth Circuit's decision in *Enigma Software Group v. Malwarebytes*, 946 F.3d 1040 (9th Cir. 2019), nor a statement by Justice Thomas in the Supreme Court's denial of certiorari in that matter reversed any case law on which the dismissal order was based, and also finding no "extraordinary circumstances." Dkt. No. 51. The Ninth Circuit affirmed that denial in October 2022, Dkt. No. 54, and the Supreme Court denied certiorari in April 2023. Dkt. No. 59.

Plaintiff now tries again to vacate the judgment, this time asserting that under Rule 60(b)(5), a "law change warrants reversal of the antiquated dismissal order," relying on six cases discussed in the motion. Dkt. No. 61 at 8-23.

## **II. Legal Standard**

Federal Rule of Civil Procedure 60(b), in relevant part, provides that "the court may relieve a party or

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<sup>1</sup> The case was reassigned to the undersigned in August 2023. Dkt. No. 65.



its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.” Fed. R. Civ. P. 60(b). Whether to grant relief under Rule 60(b) is a matter of the Court’s discretion. *Fantasyland Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1001 (9th Cir. 2007).

### III. Analysis

The Court denies Plaintiff’s Rule 60(b)(5) motion on the same basis underlying the November 2021 denial: none of the authorities on which Plaintiff relies changed any controlling precedent on which Judge White relied in dismissing the case and entering judgment. Five of the six cases Plaintiff cites are either out-of-circuit authorities, district court cases, or one Justice’s statement in a denial of certiorari by the Supreme Court. None of these authorities are binding on this Court, and by definition could not have changed the controlling legal framework for interpreting Section 230(c)(1) in *this* Circuit (even assuming that such a change could be a basis for Rule 60(b) relief, which the Court need not decide here).<sup>2</sup> Moreover,

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<sup>2</sup> Similarly, Plaintiff’s December 2023 notice of supplemental authority attaches a district court decision from November 2022,

as Defendant notes, Plaintiff cited the Fourth Circuit’s *Henderson* decision to the Ninth Circuit during his appeal of the first Rule 60(b) denial, and the Ninth Circuit nonetheless affirmed that ruling and declined to reconsider its decision after Plaintiff submitted his notice of supplemental authority. *Fyk v. Facebook, Inc.*, No. 21-16997, Dkt. Nos. 37, 38-1 and 39.

With respect to the only controlling authority cited, *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021), Plaintiff nowhere explains why it is relevant to the issues here, and the Court discerns nothing in it that could possibly warrant vacating this years-old judgment. Critically, the *Lemmon* court found that the cause of action at issue there did “not seek to hold Snap liable for its conduct as a publisher or speaker,” because plaintiffs’ “negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat’s reward system and the Speed Filter).” 995 F.3d at 1092. The court confirmed that, by contrast, the plaintiffs “would not be permitted under § 230(c)(1) to fault Snap for publishing other Snapchat-user content (*e.g.*, snaps of friends speeding dangerously) that may have incentivized the boys to engage in dangerous behavior,” because “attempting to hold Snap liable using such evidence

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around seven months before Plaintiff filed the current Rule 60(b) motion. Dkt. No. 73. Plaintiff’s notice is thus improper under Local Rule 7-3(d)(2), which authorizes filing a notice regarding only “a relevant judicial opinion published after the date the opposition or reply was filed.” And substantively, the decision is not binding and thus, like Plaintiff’s other nonbinding authorities, could not have changed the relevant controlling law underlying the entry of judgment against Plaintiff.

would treat Snap as a publisher of third-party content, contrary to our holding here.” *Id.* at 1093 and n. 4.

In this case, Judge White found that “all three of Plaintiff’s claims arise from the allegations that Facebook removed or moderated his pages,” and held that “[b]ecause the CDA bars all claims that seek to hold an interactive computer service liable as a publisher of third party content, . . . the CDA precludes Plaintiff’s claims.” Dkt. No. 38 at 4. The Ninth Circuit directly affirmed those holdings. Dkt. No. 46-3 at 2-5. So *Lemmon* is inapplicable on its own terms to the circumstances already found (and affirmed) here.

Plaintiff obviously disagrees with this holding, and many others by this Court and the Ninth Circuit. *See, e.g.*, Dkt. No. 63 at 6 (“This Court and the Ninth Circuit relied on policy and purpose to apply 230(c)(1) in an unprecedentedly broad way (*i.e.*, unconstitutionally as applied) . . .). Plaintiff has every right to his opinion. But he does not have the right to perpetually relitigate legal issues that have been definitively decided and affirmed on appeal. It is irrelevant whether Plaintiff thinks the Ninth Circuit got it wrong: that court’s decision is binding on this Court, and is the final word on the matter unless and until the Supreme Court grants certiorari (which it has twice declined to do in this case already).

Finally, nothing in the record undermines Judge White’s earlier conclusion that Plaintiff “has not shown the ‘extraordinary circumstances’ required under 60(b) for granting relief.” Dkt. No. 51 at 2. A losing party simply disagreeing with an adverse judgment is ordinary, not extraordinary, and does not justify vacating the judgment.

#### **IV. Conclusion**

Plaintiff's motion to vacate the judgment, Dkt. No. 61, is DENIED, and this case remains closed with judgment having been entered in 2019 in favor of Defendant and against Plaintiff. Accordingly, there is no basis for taking up Plaintiff's freestanding "motion re: the (un)constitutionality" of Section 230(c)(1), and that motion, Dkt. No. 66, is TERMINATED. The Court reiterates that this case has long been over, and any further filings attempting to relitigate matters already directly affirmed by the Ninth Circuit may result in, among other possible consequences, an order to show cause why Plaintiff's counsel's *pro hac vice* status should not be revoked.

IT IS SO ORDERED.

/s/ Haywood S. Gilliam, Jr.  
United States District Judge

Dated: 1/12/2024

**ORDER REASSIGNING CASE,  
U.S. DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA  
(AUGUST 22, 2023)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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Case No. 18-cv-05159-JSW

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**ORDER REASSIGNING CASE**

IT IS ORDERED that this case has been reassigned using a proportionate, random and blind system pursuant to General Order No. 44 to the Honorable Haywood S. Gilliam, Jr. in the Oakland division for all further proceedings. Counsel are instructed that all future filings shall bear the initials HSG immediately after the case number.

All hearing and trial dates presently scheduled are vacated. However, existing briefing schedules for motions remain unchanged. Motions must be renoticed for hearing before the judge to whom the case has been

App.15a

reassigned, but the renoticing of the hearing does not affect the prior briefing schedule. Other deadlines such as those for ADR compliance and discovery cutoff also remain unchanged.

/s/ Mark B. Busby

Clerk, U.S. District Court

Dated: August 22, 2023

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**ORDER OF RECUSAL,  
U.S. DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA  
(AUGUST 22, 2023)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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Case No. 18-cv-05159-JSW

Before: Jeffrey S. WHITE, U.S. District Judge.

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**ORDER OF RECUSAL**

TO ALL PARTIES AND COUNSEL OF RECORD:

I, the undersigned judge of the court, finding myself disqualified in the above-entitled action, hereby recuse myself from this case and request that the case be reassigned pursuant to the Assignment Plan.

All pending dates of motions are HEREBY VACATED and will be reset, if necessary, by the newly assigned judge.

App.17a

IT IS SO ORDERED.

/s/ Jeffrey S. White  
U.S. District Judge

Dated: August 22, 2023



App.18a

**JUDGMENT, U.S. DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA [DE 39]  
(JUNE 18, 2019)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

---

No. C 18-05159 JSW

Before: Jeffrey S. WHITE, U.S. District Judge.

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Pursuant to the Court's Order granting Defendant Facebook, Inc's motion to dismiss, it is HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Defendant and against Plaintiff.

IT IS SO ORDERED.

/s/ Jeffrey S. White  
U.S. District Judge

Dated: June 18, 2019

**ORDER GRANTING MOTION TO DISMISS,  
U.S. DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA  
(JUNE 18, 2019)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

---

JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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No. C 18-05159 JSW

Before: Jeffrey S. WHITE, U.S. District Judge.

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**ORDER GRANTING MOTION TO DISMISS**

Now before the Court is Defendant Facebook, Inc. (“Facebook”)’s motion to dismiss. Plaintiff, Jason Fyk, filed suit under diversity jurisdiction, for intentional interference with prospective economic advantage, violation of California Business and Professions Code section 17200 *et seq.*, civil extortion, and fraud for Facebook’s devaluation of Plaintiff’s online pages. Plaintiff had used Facebook’s free online platform to create a series of, among other amusing things, pages dedicated to videos and pictures of people urinating.

In enforcing its community standards, Plaintiff alleges that Facebook blocked content posted by Plaintiff and removed content in order to make room for its own sponsored advertisements. Plaintiff contends these actions by Facebook destroyed or severely devalued his pages.

Facebook moves to dismiss on two bases. First, that the claims are barred by Section 230(c)(1) of the Communications Decency Act (“CDA”) which immunizes internet platforms like Facebook for claims relating to moderation of third-party content on the platform such as “reviewing, editing, and deciding whether to publish or to withdraw publication of third-party content.” *Barnes v. Yahoo!*, 570 F.3d 1096, 1102 (9th Cir. 2009). Second, Facebook contends that Plaintiff fails to state a cause of action for each of his individual claims.

### ANALYSIS

Facebook invokes Section 230 of the CDA which “immunizes providers of interactive computer services against liability arising from content created by third parties.” *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 122, 124 (N.D. Cal. 2014) (internal citations omitted). Specifically, Section 230(c)(1) provides that “[n]o provider or user of an interactive service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Section 230(c)(1) “establish[es] broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” *Perfect 10, Inc. v. CCBill LLC*, 481 F.3d 751, 767 (9th Cir. 2007) (internal citations omitted). Immunity extends

to activities of a service provider that involve its moderation of third-party content, such as “reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.” *Barnes*, 570 F.3d at 1102.

The immunity, “like other forms of immunity, is generally accorded effect at the first logical point in the litigation process” because “immunity is an immunity from suit rather than a mere defense to liability.” *Nemet Chevrolet, Ltd. v. Consumer Affairs, Inc.*, 591 F.3d 250, 254 (9th Cir. 2009); *see also Levitt v. Yelp! Inc.*, 2011 WL 5079526, at \*8-9 (N.D. Cal. Oct. 26, 2011) (holding that Section 230(c)(1) immunity protects service providers from lawsuits for their “exercise of a publisher’s traditional editorial functions.”); *see also Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (holding that Section 230 should be “interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.”).

The CDA immunizes Facebook from suit if three conditions are met: (1) Facebook is a “provider or user of an interactive computer service;” (2) the information for which Plaintiff seeks to hold Facebook liable is “information provided by another information content provider;” and (3) Plaintiff’s claim seeks to hold Facebook liable as the “publisher or speaker” of that information. *See Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1092-93 (2015) (citing 47 U.S.C. § 230(c)(1); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014)).

Facebook qualifies as an interactive computer service provider. The CDA defines this element as

“any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.” 47 U.S.C. § 230 (f)(2). Here, the complaint itself alleges that Facebook provides an internet-based platform where millions of users can access third party content, including the content uploaded on Plaintiff’s pages. (See Complaint ¶ 2.) The first element of the CDA immunity provision is therefor met. See *Sikhs for Justice*, 144 F. Supp. 3d at 1093; see also *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 801-02 (N.D. Cal. 2011) (finding that Facebook acts as an interactive computer service).

With regard to the second element of the CDA immunity provision, Plaintiff contends that Facebook is not entitled to immunity because although the statute provides immunity for a website operator for the removal of third-party material, here there is no third party as Plaintiff himself contends that he created the content on his pages. This was precisely the argument rejected by this Court in *Sikhs for Justice* which distinguished the reference to “another information content provider” from the instance in which the interactive computer service itself is the creator or developer of the content. 144 F. Supp. 3d at 1093-94. In other words, “the CDA immunizes an interactive computer service provider that ‘passively displays content that is created entirely by third parties,’ but not an interactive computer service provider by creating or developing the content at issue.” *Id.* at 1094. Put another way, “‘third-party content’ is used to refer to content created entirely by individuals or entities other than the interactive computer service provider.” *Id.* (citing *Roommates*, 521 F.3d at 1162). Here, there is no dispute that Plaintiff was the sole

creator of his own content which he had placed on Facebook's pages. As a result, those pages created entirely by Plaintiff, qualifies as "information provided by another information content provider" within the meaning of Section 230. *See id.*

Lastly, Plaintiff's claims here seek to hold Facebook liable as the "publisher or speaker" of that third party content. The three causes of action alleged in the complaint arise out of Facebook's decision to refuse to publish or to moderate the publication of Plaintiff's content. To determine whether a plaintiff's theory of liability treats the defendant as a publisher, "what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.* (citing *Barnes*, 570 F.3d at 1101). Consequently, if the duty that the plaintiff alleges was violated by defendant "derives from the defendant's status or conduct as a 'published or speaker,' . . . section 230(c)(1) precludes liability." *Id.* (citing *Barnes* 570 F.3d at 1102). Publication "involves the reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Id.* Thus, "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Id.* (citing *Roommates*, 521 F.3d at 1170-71).

Here, all three of Plaintiff's claims arise from the allegations that Facebook removed or moderated his pages. (*See* Complaint ¶¶ 20, 49-73.) Because the CDA bars all claims that seek to hold an interactive computer service liable as a publisher of third party content, the Court finds that the CDA precludes Plaintiff's claims. In addition, the Court concludes

that granting leave to amend would be futile in this instance as Plaintiff's claims are barred as a matter of law. *See, e.g., Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."); *see also Lopez v. Smith*, 293 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (holding that dismissal without leave to amend is justified where "pleading could not possibly be cured by the allegation of other facts.")

### CONCLUSION

For the foregoing reasons, the Court GRANTS Facebook's motion to dismiss without leave to amend. A separate judgment shall issue and the Clerk shall close the file.

IT IS SO ORDERED.

/s/ Jeffrey S. White  
U.S. District Judge

Dated: June 18, 2019

**ORDER DENYING PETITION FOR  
REHEARING EN BANC, U.S. COURT OF  
APPEALS FOR THE NINTH CIRCUIT  
(JANUARY 15, 2025)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JASON FYK,

*Plaintiff-Appellant,*

v.

FACEBOOK, INC.,

*Defendant-Appellee.*

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No. 24-465

D.C. No. 4:18-cv-05159-HSG  
Northern District of California, Oakland

Before: RAWLINSON, CHRISTEN, and  
JOHNSTONE, Circuit Judges.

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**ORDER**

Judges Rawlinson, Christen, and Johnstone voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40.



App.26a

The petition for rehearing en banc (Dkt. No. 28)  
is DENIED.

**FYK MOTION TO RECALL MANDATE,  
U.S. COURT OF APPEALS FOR  
THE NINTH CIRCUIT [32.1]  
(MARCH 3, 2025)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JASON FYK,

*Plaintiff-Appellant,*

v.

FACEBOOK, INC.,

*Defendant-Appellee.*

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Appeal No. 24-465

Appeal of January 12, 2024, Order Denying Motion  
for Relief Pursuant to Fed. R. Civ. P 60(B) and  
Terminating Motion Re: Constitutionality of 47  
U.S.C. Sec. 230(C)(1) [D.E. 74] by Hon. Haywood S.  
Gilliam, Jr. of the U.S. District Court for the  
Northern District of California, 4:18-cv-05159-HSG

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**[TOC & TOA Omitted]**

**I. Summary of Brief**

A key procedural error (nonforfeitable at any stage) occurred at the threshold of this case, and this reversible error is the focus of this brief. Plaintiff-Appellant, Jason Fyk (“Fyk”), has repeatedly addressed the error in his briefs in various ways, yet no court has ever addressed it. Every court involved has ignored the reversible threshold error discussed herein. This fundamental procedural error has tainted the case from the outset, and this motion to recall this Court’s mandate represents Fyk’s last opportunity before being forced to seek relief at SCOTUS (an incredibly expensive and time-consuming process) a third time.

It is critical that this Court address the District Court’s key procedural mistake before Fyk must again petition SCOTUS (mandamus, certiorari, both). In a just system, this Court would recognize that the District Court’s threshold procedural error fundamentally corrupted these proceedings for over six years, recall its mandate, and remand the case for discovery. This would eliminate the need for Fyk to burden SCOTUS yet again. At minimum, under SCOTUS’ mandamus requirements, this Court should be given

one last opportunity to correct the fundamental procedural mistake before resorting to SCOTUS.

The critical error is clear – the District Court improperly treated 47 U.S.C. § 230(c)(1) as an absolute *immunity from suit* (akin to sovereign immunity) rather than as an affirmative defense to liability. Case law (nationwide and in California) clearly establishes that § 230(c)(1) is a defense to liability, not a jurisdictional bar to suit. Even the case law cited by Defendant-Appellee, Facebook, Inc. (“Facebook”) and Judge White in dismissal confirms this.

The distinction is crucial and has skewed the entire case from the start. Facebook’s dismissal briefing improperly treated § 230(c)(1) as a standalone super-immunity from suit, separate from its 12(b)(6) briefing. Judge White followed this same procedurally flawed approach. But § 230(c)(1) is not a blanket immunity from suit, it is a limited affirmative defense to liability requiring a merits-based factual inquiry and discovery before ruling.

At a minimum, Judge White was obligated to convert Facebook’s standalone § 230(c)(1) “sovereign” super-immunity 12(b)(6) argument into a Rule 56 motion, which he did not. Even if he had, summary judgment at the pleading stage would have been improper due to conflicting evidence, including Fyk’s *Verified* Complaint, which constituted sworn evidence.

This case has been procedurally flawed from Day 1. In the interest of justice, the Ninth Circuit must recall its mandate and remand the case for discovery.

## II. Legal Analysis

### A. Recalling Mandate

A plaintiff cannot waive appellate rights concerning a District Court's fundamental 12(b) errors, particularly when the errors involve subject matter jurisdiction, constitutional violations, or the misapplication of law. And while courts are proponents of finality, finality is not absolute – when a fundamental, threshold procedural mistake (*prima facie* reason to recall mandate) occurs that has infected an entire case (as here), recalling a mandate is warranted. The need to recall a mandate is further strengthened where (as here) the fundamental, threshold mistake at issue has broader legal implications and continues to cause harm (e.g., preventing proper adjudication of § 230 cases). And recalling a mandate is particularly appropriate where (as here) the fundamental error/mistake at issue stripped the litigant of legal remedy/due process.

A motion to recall a mandate is appropriate when a fundamental procedural defect undermined the integrity of the appellate process, and there is no set timeframe/deadline within which to file same. This Court has inherent authority to recall a mandate when necessary to prevent a miscarriage of justice. *See, e.g., Bell v. Thompson*, 545 U.S. 794, 804-805 (2005)). Here, this Court's rulings have been premised on a fundamentally flawed District Court 12(b) decision/foundation that violated Supreme Court precedent, Ninth Circuit precedent, and due process. Correcting this mistake is necessary before SCOTUS review.

### **1. Jurisdictional Issues Cannot Be Waived**

A court's lack of subject matter jurisdiction (such as barring a case at the threshold based on supposed immunity from suit) is a fundamental issue that can be raised at any stage, even for the first time on appeal. If a district court erroneously dismisses a case on immunity grounds (here, § 230(c)(1)), a matter akin to 12(b)(1), the appellate court has a duty to review it.

### **2. Errors of Law Are Always Reviewable**

If the district court misinterpreted the law (such as by wrongly treating § 230(c)(1) as a complete bar to suit rather than an affirmative defense to liability) the appellate court must correct it. Appellate courts review 12(b) dismissals *de novo*, without deference to the district court.

### **3. Due Process & Constitutional Violations Cannot Be Waived**

If a dismissal violates due process (such as denying the opportunity to be heard or improperly expanding statutory defenses) appellate courts may review it, even if the plaintiff failed to object properly in the district court. Here, however, Fyk certainly did object but was ignored. A void judgment, issued in clear violation of constitutional protections, may be challenged at any time.

### **4. Structural or Plain Errors Are Not Subject to Waiver**

Some errors are so fundamental they cannot be waived, such as a court failing to apply the correct legal standard (*e.g.*, Judge White's misclassification of § 230(c)(1) as absolute immunity from suit rather

than an affirmative defense to liability) or engaging in judicial overreach by treating Facebook as if it had automatic, sovereign-like immunity. The plain error doctrine allows appellate courts to correct mistakes that undermine judicial fairness, integrity, or public reputation.

**B. Facebook’s Motion to Dismiss and Judge White’s Dismissal Order Wrongly Treat Section 230(c)(1) as a Standalone Super-Immunity Unrelated to Rule 12(b)**

Section III.A of Facebook’s November 1, 2018, Motion to Dismiss [D.E. 20], spanning pages 4-8 of that brief (ahead of whatever 12(b)(6) failure to state a claim arguments Facebook made), contended as follows:

CDA Section 230(c)(1) immunity, ‘like other forms of immunity, is generally accorded effect at the first logical point in the litigation process,’ because ‘immunity is an *immunity from suit* rather than a mere defense to liability.’ *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (*quoting Brown v. Gilmore*, 278 F.3d 362, 366 n.2 (4th Cir. 2002)) (internal quotation marks omitted) (emphasis in original); accord *Levitt v. Yelp! Inc.* (“Levitt I”), 2011 WL 5079526, at \*8–9 (N.D. Cal. Oct. 26, 2011).

[D.E. 20] at 4 (emphasis added by Facebook).

Judge White’s June 18, 2019, Dismissal Order [D.E. 38] stated as follows:

Facebook moves to dismiss on two bases.

First, that the claims are barred by Section 230(c)(1) of the Communications Decency Act ('CDA') which immunizes internet platforms like Facebook for claims relating to moderation of third-party content on the platform such as 'reviewing, editing, and deciding whether to publish or to withdraw publication of third-party content.' *Barnes v. Yahoo!*, 570 F.3d 1096, 1102 (9th Cir. 2009). Second, Facebook contends that Plaintiff fails to state a cause of action for each of his individual claims.

[D.E. 38] at 1-2. Judge White's dismissal order continued by stating (in an essential cut-and-paste of Facebook's briefing), that *Nemet* and *Levitt* stand for the proposition that § 230(c)(1) is an automatic immunity from suit. *See id.* at 3.

Nowhere did Facebook or Judge White frame the supposed § 230(c)(1) super-immunity as sounding in 12(b)(1) or 12(b)(2) or 12(b)(6). And at no time did Judge White convert Facebook's supposed 12(b) motion into a Rule 56 motion.

If § 230(c)(1) were the absolute immunity from suit that Facebook and Judge White claim (rather than the limited affirmative defense to liability that it is), then § 230(c)(2) would be rendered meaningless, mere surplusage (as Fyk has argued since Day 1). Congress could not have intended such a result, as it contradicts fundamental canons of statutory construction and violates due process rights.

But § 230(c)(2) is not merely surplusage; Facebook and Judge White's procedural threshold error in treating § 230(c)(1) as immunity from suit has deprived



Fyk of due process from the outset. Even the very cases they cite (*Nemet* and *Levitt*) affirm that § 230(c)(1) is an affirmative defense to liability, not immunity from suit.

The following cases properly interpret § 230(c)(1) for what it is – an affirmative defense requiring a merits-based factual analysis, discovery, and potential reconsideration at summary judgment, not the sovereign-like immunity Facebook and Judge White assert. Tragically, every court subsequently handling Fyk’s case has blindly followed Judge White’s misapplication of § 230(c)(1), without meaningful independent analysis. This Court has never addressed this reversible threshold error, and it must do so before Fyk is forced to seek relief from SCOTUS once again – an unnecessary burden if this Court simply applies the law correctly.

**C. Courts Across The Nation (Including In California) Are Uniform In Recognizing Section 230(c)(1) For What It Is – It Is An Affirmative Defense To Liability, Not A “Sovereign” Immunity To Suit**

**1. *Energy Automation Systems, Inc. v. Xcentric Ventures, LLC* (In-Depth Analysis Cited by the N.D. Cal. Court in *Levitt*)**

The [CDA] statutory language does not speak in terms of immunity and does not deprive courts from exercising personal jurisdiction, but rather *provides a defense to liability* for any cause of action-such as a claim for defamation-that would treat an

‘interactive computer service’ as a publisher or speaker of information.

Courts have treated this statutory language as granting internet service providers and websites immunity from liability in defamation suits-provided that the service provider or website in question did not participate in the creation of the defamatory statements-*but have not treated the statute as granting immunity from suit. See, e.g., Universal Communications Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-419 (1st Cir.2007) (holding that the CDA provided complete immunity to liability to cover any claim that would treat the defendant as a publisher); *Zeran v. American Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir.1997) (holding that ‘§ 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions’); compare *Anthony v. Yahoo Inc.*, 421 F.Supp.2d 1257, 1262-63 (N.D.Cal.2006) (‘No case of which this court is aware has immunized a defendant from allegations that *it* created content.’); *Blumenthal v. Drudge*, 992 F.Supp. 44, 50 (D.D.C.1998) (‘Section 230 does not preclude joint liability for the joint development of content.’). Indeed, because the statute itself does not use the term ‘immunity’ nor contain any provision regarding the exercise of personal jurisdiction, it could not withstand a construction that would bar the federal courts from exercising personal jurisdiction.

The distinction between statutory immunity

from liability and immunity from suit—that is, immunity from being hailed into federal court at all—is an important one. As the Supreme Court has noted, ‘[i]t is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts’ statutory or constitutional power to adjudicate the case.’ *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 88 (1998). Although Steel Company dealt with the distinction between subject matter jurisdiction and ultimate liability, the Court’s statement applies equally well to the question of personal jurisdiction. Not all defenses to liability (in fact, very few) implicate the court’s power to exercise its jurisdiction over a particular entity or individual. Courts are charged with determining questions of jurisdiction before addressing the merits of the case. *See Northwestern Nat’l Casualty Co. v. Global Moving & Storage Inc.*, 533 F.2d 320, 323 (6th Cir.1976) (holding that the district court was in error when it addressed the merits of the case ‘before it determined that it had the requisite personal jurisdiction’). For this reason it is important that the court not confuse questions of jurisdiction with questions of liability on the merits.

In the Eleventh Amendment immunity setting, the courts have recognized states’ ‘immunity from suit’ and determined questions of immunity apart from the merits of

the underlying case. See *Nelson v. La Crosse County Dist. Atty. (State of Wisconsin)*, 301 F.3d 820, 826 (7th Cir.2002) ('At the very core of sovereign immunity is the inherent right of the sovereign to be immune from private suit.');

see also *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (stating that the 'greater significance [of the Eleventh Amendment] lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III'); *Ku v. State of Tennessee*, 322 F.3d 431, 432 (6th Cir.2003) (noting that 'the Supreme Court is moving in the direction of concluding that, in cases where the district court otherwise has original jurisdiction over the matter, the Eleventh Amendment Immunity defense should be treated in the same way courts have traditionally treated personal jurisdiction rather than as a matter of subject matter jurisdiction'). Additionally, in accordance with specific statutory language in The Foreign Sovereign Immunities Act ('FSIA'), the federal courts have recognized an 'immunity from suit' that is intertwined with questions of both personal and subject matter jurisdiction. See *Maritime International Nominees Establishment v. The Republic of Guinea*, 693 F.2d 1094, 1099-1100 (C.A.D.C.1982).

However, other forms of immunity, such as federal sovereign immunity, have been treated as defenses to liability, and not as a mechanism for defeating a court's jurisdiction. See *Houston Community Hosp. v. Blue Cross and*

*Blue Shield of Texas, Inc.*, 481 F.3d 265, 280 (5th Cir.2007) (agreeing that '[f]ederal sovereign immunity is an immunity from damages only'); *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 326 (holding that 'the *Noerr-Pennington* doctrine does not against liability'). *To summarize, in the absence of direct statutory or Constitutional authority, courts have not permitted defendants to 'immunize' themselves from being hailed into federal court on the basis of traditional defenses to liability, even where those defenses are labeled 'immunities.'*

*Although courts speak in terms of 'immunity' with regard to the protections afforded by the CDA, this does not mean that the CDA has created an 'immunity from suit' or otherwise implicated this court's personal jurisdiction. Rather, the CDA has created a broad defense to liability. Whether or not that defense applies in any particular case is a question that goes to the merits of that case, and not to the question of jurisdiction. See We, Inc., 174 F.3d at 329 ('[W]e have been unable to find any case holding that the burden of litigation on a private defendant justifies an immunity from suit as well as a defense to liability.')*

The importance of this distinction is well-illustrated by the facts at hand. The plaintiff has alleged, in the Amended Complaint and elsewhere, that the defendants created and *developed the alleged defamatory content at issue* and, therefore, that the protections afforded by the CDA do not apply in this

case. The defendants have contradicted the plaintiff's allegations in a declaration and in several affidavits provided by employees of defendant Xcentric. Whether or not the defendants did, in fact, participate in the creation of the alleged content is inextricably tied to the merits of the plaintiff's defamation claim, if not each of its claims, and *requires a factual determination that is not appropriately made at this early stage of the litigation. Ruling on that issue requires inquiry into a factual record that will not exist until the parties have been afforded ample time to complete discovery.*

Generally, when a court faces questions going to the merits of a case in a Rule 12(b)(2) motion, that motion may be converted to a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1351 (when a defendant raises arguments going to the sufficiency of the claim in a 12(b)(2) motion 'the district court may adjudicate the motion and ignore the way it is captioned'); *Larson v. The Port of New York Authority*, 17 F.R.D. 298, 300 (S.D.N.Y.1955) (holding that, '[n]otwithstanding that [the] movant predicates its motion upon F.R.Civ.P. 12(b)(1) and (2), the motion is deemed one to dismiss for failure to state a claim upon which relief can be granted and will be disposed of accordingly').

In the present case, the defendants' arguments on the merits rely on affidavits and other documents; the defendants do not argue that

the Amended Complaint is deficient on its face. Federal Rule of Civil Procedure 12(b) states that, where matters outside the pleadings have been submitted for the court's consideration of a motion to dismiss, the court 'shall' treat the motion as a motion for summary judgment and shall give the parties a 'reasonable opportunity to present all material made pertinent to such a motion by Rule 56.' Fed.R.Civ.P. 12(b). Therefore, in order for the court to consider the defendants' arguments on the merits, the defendants' motion must be analyzed as a Motion for Summary Judgment.

Under Federal Rule of Civil Procedure 56(f), where a party cannot 'present by affidavit facts essential to justify the party's opposition, the court may . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.' Additionally, the Sixth Circuit has held that, '[b]efore ruling on summary judgment motions, a district judge must afford the parties adequate time for discovery, in light of the circumstances of the case.' *Plott v. General Motors Corp.*, 71 F.3d 1190, 1195 (6th Cir.1995) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986) (stressing the importance of allowing ample time for discovery); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (same)).

The plaintiff did not move to lift the stay on discovery pursuant to Rule 56(f), but rather to obtain discovery on arguments the defen-

dants have asserted to defeat jurisdiction. *However, the court has found that the defendants' arguments-concerning 'immunity' under the CDA-go to the merits of the plaintiffs' claims, and not to jurisdiction.* Because the plaintiff's motion to lift stay was predicated on the need to rebut the plaintiff's immunity arguments, the court will grant the plaintiff's motion on the basis of Rule 56(f) and in accordance with the Sixth Circuit's stricture that 'a district judge must afford the parties adequate time for discovery' before ruling on a summary judgment motion. *Plott*, 71 F.3d at 1195.

*Energy Automation Systems, Inc. v. Xcentric Ventures, LLC*, No. 3:06-1079, 2007 WL 1557202, \*12-15 (M.D. Tenn. May 25, 2007) (emphasis added) (internal footnotes omitted).

**2. *Levitt v. Yelp! Inc.* (Misconstrued by Facebook and Judge White During Dismissal – Reversible Error, Never Addressed By This Court)**

Accordingly to Yelp, it is 'squarely immune' under the Communications Decency Act ('CDA'), 47 U.S.C. § 230(c), from claims arising from such activity. Mot. at 15. Although, as explained more fully below, Section 230(c) precludes certain aspects of Plaintiffs' unfair and unlawful practices claims, *it does not provide Yelp blanket 'immunity' from suit or in any way limit this court's jurisdiction over Plaintiffs' claims.* See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096,



1100 (9th Cir. 2009) (*[I]t appears clear that neither this subsection nor any other declares a general immunity from liability from third-party content . . . ‘Subsection (c)(1) does not mention ‘immunity’ or any synonym.’*) (quoting *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008)); *Energy Automation Sys., Inc. v. Xcentric Ventures LLC*, No. 3:06-1079, 2007 WL 1557202, at (M.D. Tenn. May 25, 2007) (*‘Although courts speak in terms of ‘immunity’ . . . this does not mean that the CDA has created an ‘immunity from suit’ . . . Whether or not that defense applies in any particular case is a question that goes to the merits of that case, and not to the question of jurisdiction.’*). Section 230(c) prohibits causes of action in which a plaintiff seeks (1) to treat that entity as the publisher of independently posted content, 47 U.S.C. § 230(c)(1); *see, e.g., Barnes*, 570 F.3d at 1103 or (2) to challenge the good faith blocking or removal of certain categories of objectionable content, 47 U.S.C. § 230(c)(2); *see, e.g., e360-insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605 (N.D. Ill. 2008). *Yelp provides no authority for the broader proposition that Section 230(c) affects this court’s subject matter jurisdiction.*

*Levitt v. Yelp! Inc.*, No. C 10-1321MHP, 2011 WL 131532320, \*6 (N.D. Cal. Mar. 22, 2011) (emphasis added).

**3. *Barnes v. Yahoo!, Inc.* (Misconstrued by Facebook and Judge White During Dismissal – Reversible Error, Never Addressed By This Court)**

Section 230(c) has two parts. Yahoo relies exclusively on the first part, which bars courts from treating certain internet service providers as publishers or speakers. *Looking at the text, it appears clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content, as Yahoo argues it does.* ‘Subsection (c)(1) does not mention ‘immunity’ or any synonym.’ *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir.2008). Our recent *en banc* decision in *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, rested not on broad statements of immunity but rather on a careful exegesis of the statutory language. 521 F.3d 1157, 1171 (9th Cir.2008) (*en banc*) (noting that to ‘*provid[e] immunity every time a website uses data initially obtained from third parties would eviscerate [the statute]*’).

Following this approach, one notices that subsection (c)(1), which after all is captioned ‘Treatment of publisher or speaker,’ precludes liability only by means of a definition. ‘No provider or user of an interactive computer service,’ it says, ‘*shall be treated* as the publisher or speaker of any information provided by another information content provider.’ § 230(c)(1) (emphasis added). Subsection

230(e)(3) makes explicit the relevance of this definition, for it cautions 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.' Bringing these two subsections together, it appears that subsection (c)(1) only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.

*Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-1101 (9th Cir. 2009) (bold emphasis added) (other emphasis in original) (internal footnotes omitted).

**4. *Nemet Chevrolet, Ltd. v. Consumer-affairs.com, Inc.* (Misconstrued by Facebook and Judge White During Dismissal – Reversible Error, Never Addressed By This Court)**

In addressing the *Energy Automation* decision (above), the *Nemet* court held, in pertinent part, as follows:

The court implicitly acknowledged that a court *could* properly address [the 230(c)(1) immunity] issue on a 12(b)(6) motion, and that it was precluded from doing so in that case 1) because it was before the Court on a 12(b)(2) motion; and 2) it could not convert the pleading into a 12(b)(6) motion because of the inclusion of additional extrinsic evidence by the parties.

*Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 564 F. Supp. 2d 544, 551 (E.D. Va. 2008) (emphasis in original). Had Judge White attempted to *sua sponte* convert Facebook’s Motion to Dismiss into something other than what it was (which he did not), he could not have done so because of the presence of extrinsic evidence.

### III. Conclusion

Courts from across the nation (including California courts, and including the decisions Facebook and Judge White so heavily relied on in dismissing Fyk’s case at the threshold and tainting the case across the next six-plus years . . . if the foundation is flawed, that which rests on top is worthless) concur that § 230(c)(1) is an affirmative defense to *liability* that goes to the merits; *i.e.*, is anything but an automatic, blanket immunity to *suit* at the threshold. This is probably why neither Facebook nor Judge White framed the § 230(c)(1) dismissal “analysis” within a dismissal framework (not 12(b)(1), not 12(b)(2), not 12(b)(6), nothing) . . . they framed it as some mythical standalone “sovereign-like” immunity because there simply is no procedural basis for § 230(c)(1) dismissal. The § 230(c)(1) affirmative defense must proceed exactly the way the courts above say it must proceed – allow discovery and revisit same at the summary stage, just as any merit-based dispute (subject to potential affirmative defense) proceeds in the real world, not the due-process-less Twilight Zone Fyk has been stuck in for going on seven years.

Judge White could have arguably converted Facebook’s standalone § 230(c)(1) super-immunity argument into a Rule 56 motion and attempted to

summarily adjudicate on the face of the Verified Complaint, but Judge White did not. And, as *Nemet* recognizes (in citation to *Energy Automation*), Judge White could not have done that anyway because competing evidence was present.

Fyk's Complaint was/is a Verified Complaint. A verified complaint is different from a standard complaint because it is sworn under oath, making the allegations factually verified rather than merely alleged; *i.e.*, Fyk presented his averments as evidence, not allegation. This has significant procedural implications: (a) Courts must treat the verified allegations as evidence at the motion-to-dismiss stage; (b) Under Rule 12(b)(6), courts must assume the truth of factual allegations (evidence, actually) and draw all inferences in the plaintiff's favor; (c) If a factual dispute exists, the court cannot dismiss the case under Rule 12(b)(6) and must allow discovery or convert the motion to summary judgment under Rule 56. And as to evidence at play at the dismissal stage in 2018/2019, it was not just Fyk's Verified Complaint. Facebook's Motion to Dismiss introduced its own make-believe version of facts/evidence, and Fyk's Reply attached exhibits (evidence) in an effort to dispel the lies that Facebook had introduced in its Motion to Dismiss (lies that Judge White embraced wholeheartedly).

Judge White entirely ignored the fact that § 230(c)(1) is a liability affirmative defense (not a blanket immunity from suit) and ignored all the above procedural safeguards, improperly dismissing Fyk's case at the pleading stage despite the existence of factual/evidentiary disputes (*e.g.*, whether Facebook was acting as a neutral platform or engaged in content development) and despite the requirement that verified

allegations must be treated as evidence at the dismissal stage.

This Court's mandate must be recalled amidst the threshold procedural blunders that forever tainted this case and stripped Fyk of due process at every turn, and this case must be remanded to the District Court to proceed with discovery.

#### **CERTIFICATE OF COMPLIANCE**

Undersigned counsel certifies that this brief complies with Ninth Circuit rules concerning petitions for rehearing (as a motion to recall mandate is treated similarly) because the type-volume limitation does not exceed 15 pages. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

App.48a

Dated: March 3, 2025.

Respectfully Submitted,

/s/ Jeffrey L. Greyber

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**FYK SUPPLEMENTAL AUTHORITY:  
A.B. V. SALESFORCE [29.1]  
(JANUARY 14, 2025)**

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U.S. Court of Appeals for the Ninth Circuit

Re: Jason Fyk v. Facebook, Inc., No. 24-465

Appellant's Supplemental Authority in Further  
Support of Appeal

Dear your Honors:

On December 24, 2024, Fyk timely filed his pending Petition for Rehearing *En Banc*. See *P.E.* 28.11 (“Petition”). Per Fed.R.App.P. 28(j) and 9th Cir.R. 28-6, Fyk supplementally submits *A.B., et al. v. Salesforce, Inc.*, 123 F.4th 788 (5th Cir. 2024) in further support of rehearing. As discussed *in* the Petition, reasons for rehearing *en banc* include splits amidst Circuit Courts and/or within this Circuit. As discussed in the Petition, the Third Circuit Court (*Anderson*) and the Fourth Circuit Court (*Henderson*) and this Court (*e.g., Diep*) are at odds with *Fyk* § 230-related rulings. The Fifth Circuit Court joins that list (*A.B.*).

The *A.B.* decision confirms § 230 does not provide blanket immunity; rather, a proper protection analysis hinges on the nature/bases of the “claims-made.”

Plaintiffs’ claims do not seek to hold Salesforce liable for failing to moderate content or any other functions traditionally associated with



a publisher's role. . . . Rather, Plaintiffs seek to hold Salesforce liable for allegedly providing back-office business services to a company it knew (or should have known) was engaged in sex trafficking. These claims would not inherently require Salesforce, if found liable, to exercise any functions associated with publication. Accordingly, Plaintiffs have not engaged in artful pleading, and section 230 does not apply.

*A.B.*, 123 F.4th at 798-799 (internal citation omitted). This aligns with *Diep* (9th Cir.), *Anderson* (3d Cir.), and *Henderson* (4th Cir.). At no time have Fyk's claims sought to treat Facebook as Fyk; *i.e.*, hold Facebook liable as "the publisher or speaker" of Fyk's (third-party) content. Instead, Fyk's claims have been purely about Facebook's unfair competition, tortious interference, fraud, and civil extortion in relation to his content; *i.e.*, Fyk has sought to hold Facebook accountable for its own conduct.

Fyk also supplementally submits recent party admissions from Mark Zuckerberg regarding Facebook's propensity for illegality. The "delay" in definitively resolving § 230(c)(1)'s proper application in Fyk's case helped facilitate the rise of the Censorship Industrial Complex (a matter of exceptional national importance, a matter which would not have arisen but-for Fyk's Courts' continued misinterpretation/misapplication of § 230 immunity in his case):

<https://www.youtube.com/watch?v=7k1ehaE0bdii>

Undersigned hereby certifies that the above body of this letter does not exceed 350 words per Fed. R

App.51a

App. 28(j) and 9th Cir. R. 28-6; the body totals 350 words.

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**OPINION, U.S. COURT OF APPEALS FOR THE  
FIFTH CIRCUIT IN *A.B. V. SALESFORCE, INC.*  
(DECEMBER 19, 2024)**

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UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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A.B.; R.J.; J.F.; P.P.; A.E.; JANE DOE,

*Plaintiffs-Appellees,*

v.

SALESFORCE, INCORPORATED,

*Defendant-Appellant.*

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No. 23-20604

Appeals from the United States District Court  
for the Southern District of Texas

USDC Nos. 4:20-CV-1254, 4:20-CV-1256,  
4:20-CV-1516, 4:21-CV-2856

Before: WILLETT and DOUGLAS, Circuit Judges,  
and MORALES, District Judge.\*

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DAVID S. MORALES, District Judge:

This interlocutory appeal centers around section 230 of the Communications Decency Act. Plaintiffs, a group of sex-trafficking victims, were trafficked through

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\* United States District Judge for the Southern District of Texas, sitting by designation.

advertisements posted on Backpage.com, an online advertisement forum. They sued Salesforce, a company that provided cloud-based software tools and related support services to Backpage. Salesforce moved for summary judgment on the grounds that section 230 bars Plaintiffs' claims. Because Plaintiffs' claims do not treat Salesforce as the publisher or speaker of third-party content, Salesforce cannot avail itself of section 230's grant of immunity. Accordingly, we AFFIRM the district court's denial of summary judgment and REMAND for further proceedings consistent with this opinion.

## I

Salesforce is a business-software company that provides cloud-based customer-relationship-management ("CRM") technology. Unlike traditional CRM technology, Salesforce's software allows businesses to dispense with rolodexes,<sup>1</sup> physical files, CDs, or local databases and instead organize their customer data on Salesforce's servers. All types of businesses use this software, and Salesforce is the world's largest CRM-software provider.

Backpage was a Craigslist-style online advertisement forum. But it did not just provide a forum for advertising the sale of your couch before a big move—the website also included advertisements for erotic dancers and escort services. In fact, during a 2017 Senate investigation, Backpage did not deny that its site was used for criminal activity, including

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<sup>1</sup> "Rolodex" is a genericized portmanteau referring to a desktop card index used to record names, addresses, and telephone numbers.

the sale of children for sex. That investigation eventually found that Backpage knowingly facilitated both prostitution and child sex trafficking, and had concealed evidence of criminal activity on its platform. Ultimately, the Department of Justice seized Backpage, and in 2018, Backpage pled guilty to human trafficking.

Sometime in 2012 or 2013, Backpage contacted Salesforce about starting a business relationship. Salesforce employees began communicating with Backpage employees and learned about Backpage's process and priorities. The conversations ranged from granular details about the scope of the potential relationship and the services Salesforce would provide to general communications about Backpage's business. As negotiations progressed, the Salesforce executive team was keen on receiving updates about the deal. Ultimately, Salesforce and Backpage entered a contract in late 2013. The business relationship lasted until December 2018.

While Salesforce was providing its CRM software to Backpage, Plaintiffs A.B. and J.F. were trafficked through advertisements posted on Backpage for the Houston geographic area.<sup>2</sup> In or around 2014, A.B. was sold for unlawful sex acts through force, fraud, and coercion. In or around 2018, J.F. was sold for unlawful sex acts by any means.

Plaintiffs sued Salesforce in the Southern District of Texas. Plaintiffs allege that Salesforce violated the Trafficking Victims Protection Act<sup>3</sup> and chapter 98 of

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<sup>2</sup> These allegations are taken from a representative complaint that is also referenced by Plaintiffs on appeal.

<sup>3</sup> 18 U.S.C. § 1595.

the Texas Civil Practice and Remedies Code.<sup>4</sup> The thrust of the complaint is that by supplying its tools, support, and resources to Backpage, Salesforce knowingly facilitated sex trafficking and directly enabled Backpage to function.

Salesforce first moved to dismiss, arguing, *inter alia*, that section 230 shielded it from liability. The district court denied the motion with respect to the section-230 question and allowed limited discovery on that issue.

When limited discovery concluded, Salesforce moved for summary judgment on the section-230 issue. The district court denied the motion, holding that section 230 does not shield Salesforce because Plaintiffs' claims do not treat Salesforce as a publisher or speaker of third-party content.

After denying Salesforce's motion for summary judgment, the district court *sua sponte* certified its order for interlocutory appeal. In its certification order, the court identified three controlling questions of law on which there may be substantial grounds for difference of opinion:

1. Is Salesforce a provider of an "interactive computer service" such that it qualifies as an entity entitled to the protection of section 230's immunity provisions?

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<sup>4</sup> Five of the six Plaintiffs also alleged conspiracy, negligence, and gross negligence. The district court dismissed those common-law claims, so they are not before the panel.

2. Do Plaintiffs' claims treat Salesforce as a publisher or speaker such that it can invoke the immunity provisions of section 230?
3. If Salesforce is (a) a provider of "interactive computer services," and (b) is treated as a publisher or speaker by Plaintiffs' claims, may Plaintiffs nevertheless proceed with their federal and state law claims under the Fight Online Sex Trafficking Act's exemption to section-230 immunity?

A panel of our court granted leave to file an interlocutory appeal, and we now review the controlling questions of law *de novo*. *Overdam v. Texas A&M Univ.*, 43 F.4th 522, 526 (5th Cir. 2022) (per curiam) (first citing *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996); and then citing *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 198 (5th Cir. 2020)).

## II

Our "jurisdiction is not confined to the precise question[s] certified by the lower court[.]" *Hernandez v. Results Staffing, Inc.*, 907 F.3d 354, 363 (5th Cir. 2018) (quoting *United States v. Stanley*, 483 U.S. 669, 677 (1987)). Because we can resolve this appeal by answering only the second certified question, we do just that. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring in the judgment) ("If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more.").

### III

“Whenever a man publishes, he publishes at his peril.”<sup>5</sup>

That axiom no longer rings true in the internet era. In 1996, Congress enacted section 230(c)(1) of the Communications Decency Act: “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.” 47 U.S.C. § 230(c)(1). With only twenty-six words, Congress fundamentally altered the landscape of liability for publishing content online.

Section 230 provides immunity when the defendant is (1) the provider or user of an interactive computer service and (2) treated as the publisher or speaker of third-party content.<sup>6</sup> *Id.* We address only the second requirement.

Salesforce—standing accused of knowingly benefiting from participation in a sex-trafficking venture in violation of 18 U.S.C. § 1595 and Texas Civil Practice and Remedies Code § 98.002—argues that section 230 cloaks it with immunity because Plaintiffs’ claims “necessarily” treat it as the publisher or speaker of advertisements posted on Backpage. We disagree.

The text of section 230, our precedent, and the precedent of our sister circuits uniformly reject the

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<sup>5</sup> *The King v. Woodfall*, 98 Eng. Rep. 914, 916 (1774).

<sup>6</sup> While courts sometimes break (2) into constitutive parts (*i.e.*, publisher or speaker and third-party content), the parties briefed the issues in line with this phrasing.



argument Salesforce advances. Instead, the proper standard is whether the duty the defendant allegedly violated derives from their status as a publisher or speaker or requires the exercise of functions traditionally associated with publication. Under this standard, Plaintiffs' claims do not treat Salesforce as a publisher or speaker of third-party content. Accordingly, Salesforce cannot avail itself of section-230 immunity.

### A

“As always, we start with the text.” *Campos-Chaves v. Garland*, 144 S. Ct. 1637, 1647 (2024) (citing *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023)). Section 230 plainly provides that no interactive computer service “shall be treated as the publisher or speaker” of third-party content. 47 U.S.C. § 230(c)(1).

A “careful exegesis of the statutory language” reveals that the central inquiry is whether a claim treats the defendant as a publisher or speaker. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (citing *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008) (en banc)). By focusing on the phrase “treated as the publisher or speaker,” we maintain fidelity to the statute Congress enacted—extending section-230 immunity no further than the text requires. *Estate of Bride ex rel. Bride v. Yolo Techs., Inc.*, 112 F.4th 1168, 1175-76 (9th Cir. 2024) (citing *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016)).

Our precedent aligns with this common-sense reading of section 230's text. In *Doe v. MySpace, Inc.*, we adopted a functional, claims-analysis approach to the question of whether a plaintiff's claim treats a

defendant as a publisher or speaker of third-party content. 528 F.3d 413 (5th Cir. 2008). There, the plaintiff sued MySpace on a negligence theory of liability, alleging “fail[ure] to implement basic safety measures to prevent sexual predators from communicating with minors on its [web]site.” *Id.* at 416. We affirmed the district court’s dismissal of the plaintiff’s claims on section-230-immunity grounds. *Id.* at 422. Although the plaintiff argued the claims did not seek to treat MySpace as a “publisher,” but rather to hold MySpace responsible for its own conduct, we affirmed the district court’s conclusion that this was simply “artful pleading.” *Id.* at 419–20. Looking at the specific claims the plaintiff advanced, we found—by reference to sister circuit decisions—that the plaintiff sought to hold MySpace “liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher’s role.” *Id.* at 420 (quoting *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) (internal quotation marks omitted)). This meant that “[t]heir allegations [were] merely another way of claiming that MySpace was liable for publishing the communications and they [spoke] to MySpace’s role as a publisher of online third-party-generated content.” *Id.* Accordingly, section 230 barred the claims. *Id.*

Although much has changed in the sixteen years since we decided *MySpace*, one thing has remained constant: the text of section 230. To the extent that our cases since *MySpace* have understood the section-230 analysis as focusing on the specific claims and allegations advanced by a plaintiff, those cases have remained faithful to the text of the statute Congress

enacted. *See, e.g., Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 284-87 (5th Cir. 2024) (using a claims-analysis approach to distinguish “speaker-liability” from liability under Texas statute regulating the knowing and intentional publication or distribution of sexual material harmful to minors), *cert. granted*, 144 S. Ct. 2714 (2024); *Diez v. Google, Inc.*, 831 F. App’x 723, 724 (5th Cir. 2020) (per curiam) (“[Section] 230 creates federal immunity to any cause of action that would make internet service providers liable for [third-party content].” (emphasis added) (internal citations omitted)).

In contrast to our claims-analysis approach, we have rejected a mechanical, but-for reading of section 230. *See Paxton*, 95 F.4th at 286. A but-for test that asks whether third-party speech lies anywhere in the chain of causation leading to the alleged harm would expand section-230 immunity beyond the statute’s text. *See Yolo*, 112 F.4th at 1176 n.2 (citing *Internet Brands*, 824 F.3d at 853). Such a test would align more with a statute that read “shall be held liable for conduct involving third-party speech.” But that is not the statute Congress enacted. *See* 47 U.S.C. § 230(c)(1).

In *Paxton*, we rejected the plaintiffs’ misguided reading of *MySpace* that was akin to a but-for analysis of section 230’s publisher-or-speaker question. 95 F.4th at 286. There, the plaintiffs argued that *MySpace* stood for the proposition that “Congress provided broad immunity under the [Communications Decency Act] to Web-based service providers for all claims stemming from their publication of information created by third parties.” *Id.* (quoting *MySpace*, 528 F.3d at 418) (emphasis added by plaintiffs). We concluded this interpretation—which would impute a

but-for test into section 230—missed the point. *See id.* Instead, “[t]he emphasis, properly placed, would read ‘Congress provided broad immunity under the [Communications Decency Act] to Web-based service providers for all claims stemming from their publication of information created by third parties. . . .’” *Id.* (quoting *MySpace*, 528 F.3d at 418) (emphasis in original). In other words, the emphasis, properly placed, would emphasize whether claims treat a defendant as a publisher or speaker, not whether third-party speech lies somewhere in the chain of causation.

## B

Although we have not explicitly recognized as much, the *MySpace* analytical framework mirrors that of other federal courts—both sister circuits and district courts within our circuit.<sup>7</sup>

To determine whether a claim treats a defendant as a publisher or speaker, these courts look to the nature of the claim and the duties the plaintiff seeks to impose on the defendant. “To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant’s status or conduct as a ‘publisher or speaker.’” *Barnes*, 570 F.3d at 1102. For example, if the claim seeks to hold the defendant liable for “deciding whether to publish, withdraw, postpone or alter content[.]” the claim treats the defendant as a

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<sup>7</sup> *E.g.*, *Barnes*, 570 F.3d at 1102; *Zeran*, 129 F.3d at 332-33; *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016); *Fed. Trade Comm’n v. Match Grp., Inc.*, No. 3:19-CV-2281, 2022 WL 877107, at \*8-9 (N.D. Tex. Mar. 24, 2022) (Kinkeade, J.); *Doe (S.M.A.) v. Salesforce, Inc.*, No. 3:23-CV-0915, 2024 WL 1337370, at \*8 (N.D. Tex. Mar. 28, 2024) (Boyle, J.).

publisher or speaker and is barred by section 230. *Zeran*, 129 F.3d at 330.

In making this determination, a court can hypothesize what would happen if the allegations were true and the defendant were found liable. *See Force v. Facebook, Inc.*, 934 F.3d 54, 82 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part); *Yolo*, 112 F.4th at 1176. A court may “look . . . to what the duty at issue actually requires: specifically, whether the duty would necessarily require an internet company to monitor[, alter, or remove] third-party content.” *Force*, 934 F.3d at 83 (Katzmann, C.J., concurring in part and dissenting in part) (quoting *HomeAway.com, Inc., v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019)). If it would, then the claim is barred by section 230. *Id.* This thought experiment serves a limited—yet critical—purpose: it helps a court detect when a plaintiff has engaged in the kind of artful pleading *MySpace* prohibits. 528 F.3d at 419-20. If courts did not reach a plaintiff’s specific factual allegations and the implications of those allegations, we would struggle to detect claims that seek to avoid section 230’s grant of immunity by artfully pleading their allegations in terms of negligence or any other duty not traditionally associated with publication. *See id.*

Like we did in *MySpace* and *Paxton*, other federal courts have rejected a mechanical approach to the publisher-or-speaker question. In *MySpace*, we held that a plaintiff cannot artfully plead around section 230 by casting their claims in terms of first-party conduct when they really seek to enforce a duty traditionally associated with publication. 528 F.3d at 420. In other words, it does not matter whether the plaintiff styles the claims in terms of publication. *See*

*id.* It similarly does not matter whether publication is an explicit element of the plaintiff's claim. *Force*, 934 F.3d at 64 n.18. And critically, like we held in *Paxton*, the fact that third-party speech is involved somewhere in the chain of causation that led to a plaintiff's injuries does not mean that a plaintiff's claims necessarily treat a defendant as a publisher or speaker of that third-party speech. *Internet Brands*, 824 F.3d at 853; *Force*, 934 F.3d at 82 (Katzmann, C.J., concurring in part and dissenting in part); *G.G. v. Salesforce.com, Inc.*, 76 F.4th 544, 567 (7th Cir. 2023).

This last point warrants some emphasis: the text of section 230 “does not mandate a ‘but-for test that would provide immunity . . . solely because a cause of action would not otherwise have accrued but for the third-party content.” *Force*, 934 F.3d at 82 (Katzmann, C.J., concurring in part and dissenting in part) (quoting *HomeAway.com, Inc.*, 918 F.3d at 682); accord *Paxton*, 95 F.4th at 286; *G.G.*, 76 F.4th at 567. In other words, section 230 “does not provide a general immunity against all claims derived from third-party content.” *Internet Brands*, 824 F.3d at 853; see also *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 742 (9th Cir. 2024) (“[I]t is not enough that a claim, including its underlying facts, stems from third-party content for § 230 immunity to apply.”). Accordingly, providers of interactive computer services may be held liable for speech or conduct “that is properly attributable to them[,]” even if third-party speech exists somewhere upstream. *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 254 (5th Cir. 2009); see also *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024).

## C

The heart of Salesforce’s argument is that section 230 grants Salesforce broad immunity in all cases arising from the publication of third-party content. According to Salesforce, because the only link between Salesforce and Plaintiffs’ sex-trafficking-related harms is the illicit ads their traffickers posted on Backpage, Plaintiffs necessarily seek to treat Salesforce as the publisher or speaker of those ads.

Although some daylight may peek through between Salesforce’s theory of section 230—let’s call it the only-link theory—and a but-for analysis, we close the blinds on its theory for two reasons.

*First*, like the but-for analysis, the only-link theory would expand the grant of immunity beyond section 230’s text. *Yolo*, 112 F.4th at 1176 n.2 (citing *Internet Brands*, 824 F.3d at 853). Under this theory, any time third-party content is the only link in the chain of causation, section 230 provides immunity—encompassing vastly more than claims that seek to treat a defendant as a publisher or speaker of third-party content. The propriety of such an extension raises interesting questions. The internet—and the world—have changed in numerous ways since 1996. Indeed, “cloud-based” only recently attained any non-meteorological significance. Whether this warrants an expansion (or contraction) in the scope of section-230 immunity is not clear. But one thing is clear: any changes are for Congress, not the courts, to effectuate. We are bound to interpret the text of section 230 as enacted by Congress. And that text supports neither a but-for nor an only-link mode of analysis.

*Second*, the only-link theory cannot stand on its own two feet. According to Salesforce, if the only link between a plaintiff's harm and the defendant is third-party content, then section 230 bars the claims. On that logic, if there were some conduct by a defendant in addition to the third-party content, section 230 would not bar the claims. But what if the defendant's conduct fell squarely within section 230's text? For example, publishing defamatory third-party content. To say that in such situations section 230 would not provide immunity "taxes the credulity of the credulous." *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting). But Salesforce's only-link theory, taken to its logical end, would require that anomaly. Avoiding that anomaly requires a focus on the type of conduct involved. In other words, it requires an analysis of whether the duty the defendant allegedly violated derives from their status as a publisher or speaker or requires the exercise of functions traditionally associated with publication. And that puts us right back where we started: the proper standard, derived from the statute Congress enacted.

Because neither the text of section 230 nor our precedent requires such a meandering analytical framework—that in any event leads right back to the proper framework—we decline Salesforce's invitation to go down the rabbit hole.<sup>8</sup>

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<sup>8</sup> See generally Lewis Carroll, *Alice's Adventures in Wonderland* (1865).



## IV

We have expounded an analytical framework grounded in section 230's text and this court's precedent, which is also consistent with the precedent of our sister circuits. In line with those authorities, we ask "whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *Yolo*, 112 F.4th at 1177 (quoting *Barnes*, 570 F.3d at 1102). Answering this question "requires a close examination of the duty underlying each cause of action[.]" *Id.* at 1176 (quoting *Barnes*, 570 F.3d at 1107). If the duty "derives from the defendant's status or conduct as a 'publisher or speaker[.]'" then section 230 precludes liability. *Id.* at 1177 (quoting *Barnes*, 570 F.3d at 1102). But if the plaintiff's theories would not require the defendant to exercise some kind of publication or editorial function, then section 230 does not preclude liability. *Id.* Applying that standard here, Plaintiffs' claims do not treat Salesforce as the publisher or speaker of third-party content.

Plaintiffs sued Salesforce asserting claims for knowingly benefiting from participation in a sex-trafficking venture under 18 U.S.C. § 1595 and Texas Civil Practice and Remedies Code § 98.002.<sup>9</sup> Specifically, Plaintiffs allege that Salesforce knowingly assisted, supported, and facilitated sex trafficking by selling its tools and operational support to Backpage even though it knew (or should have known) that Backpage was under investigation for facilitating sex trafficking. In essence, Plaintiffs allege that Salesforce breached

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<sup>9</sup> See *supra* note 4.

a statutory duty to not knowingly benefit from participation in a sex-trafficking venture.

To state the obvious: this duty does not derive from Salesforce’s status or conduct as a publisher or speaker and would not require Salesforce to exercise publication or editorial functions to avoid liability. *See Yolo*, 112 F.4th at 1176-77. Rather, the duty simply requires that Salesforce not sell its tools and operational support to a company it knew (or should have known) was engaged in sex trafficking. This is not an action “quintessentially related to a publisher’s role.” *MySpace*, 528 F.3d at 420 (quoting *Green*, 318 F.3d at 471). Accordingly, section 230 does not immunize Salesforce from Plaintiffs’ claims.<sup>10</sup>

The same is true with respect to Salesforce’s interactions with Backpage data.<sup>11</sup> In this context, Salesforce argues that Plaintiffs’ claims would treat Salesforce as a publisher or speaker of data Backpage stored or transmitted using Salesforce’s software. Such claims, Salesforce argues, would require

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<sup>10</sup> We disagree with the district court’s conclusion that *MySpace* does not apply. Although the district court correctly noted that *Myspace*, and much of our section-230 precedent, deals with platforms rather than equipment or service providers, *see, e.g., Doe ex rel. Roe v. Snap, Inc.*, No. 22-20543, 2023 WL 4174061 (5th Cir. June 26, 2023) (per curiam); *Google, Inc. v. Hood*, 822 F.3d 212 (5th Cir. 2016), that is not the lodestar of our section-230 analysis. Rather, as section 230’s text requires, we focus on whether the claims treat the defendant as a publisher or speaker of third-party content. The fact that a defendant is a platform only bears on that analysis to the extent it demonstrates that a defendant is being treated as a publisher or speaker of third-party content.

<sup>11</sup> As distinct from Backpage-user data.

Salesforce to police the use of its products and withdraw or restrict access from customers that misuse them by uploading or transmitting allegedly illegal content. This argument misses the mark in two respects.

*First*, the argument does not comport with the plain text of section 230. As the Seventh Circuit aptly explained,

It does not make sense to treat Salesforce as ‘publishing’ to Backpage itself content that came from Backpage. With respect to any content that was provided by Backpage, Salesforce fails Section 230’s ‘publisher or speaker’ element. To the extent that Salesforce might have ‘published’ its own data to Backpage’s employees, Salesforce fails Section 230’s [other] element, which requires that the published content be ‘provided by [a third party].’

*G.G.*, 76 F.4th at 568 (citing 47 U.S.C. § 230(c)(1)).

*Second*, the claims do not target actions that are “quintessentially related to a publisher’s role.” *MySpace*, 528 F.3d at 420 (quoting *Green*, 318 F.3d at 471). While Salesforce argues it would be required to police the use of its products, that is not quintessentially the function of a publisher. *See id.* (quoting *Green*, 318 F.3d at 471) (monitoring, screening, and deletion of content from its network are actions quintessentially related to a publisher’s role). Of course, a publisher might also need to police the use of its products. But that is not because of the publisher’s unique functions. Rather, it is because a publisher—like Salesforce and every other entity subject to United States federal

law—owes a statutory duty to the public not to knowingly benefit from participation in a sex-trafficking venture. *See* 18 U.S.C. § 1595.

To reach this conclusion, we do not accept any of Plaintiffs’ factual allegations as true. Although the section-230 publisher-or-speaker analysis often occurs at the motion-to-dismiss stage, the presumption that the allegations are true does not drive the analysis. *Compare G.G.*, 76 F.4th at 548-49, *with id.* at 566-67. Rather, the analysis focuses on the claims and theories of liability advanced by a plaintiff. *See, e.g., MySpace*, 538 F.2d at 420. “[W]hat matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” *Barnes*, 570 F.3d at 1102 (emphasis added). To analyze the inherent nature of Plaintiffs’ causes of action, we must necessarily look to their complaint.<sup>12</sup> *See, e.g., Roommates.Com*, 521 F.3d at 1164-65, 1165 n.16 (looking to plaintiffs’ complaint in examining the scope of their substantive claims to determine whether section-230 immunity applies at summary judgment). But we do not accept the allegations associated with their claims as true. As section 230 requires, we only consider whether the allegations inherently seek to treat Salesforce as a publisher or speaker of third-party content, not whether—if true—they would treat Salesforce as a publisher or speaker.

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<sup>12</sup> Counsel for Salesforce seems to recognize as much given their representation before the district court that no discovery was necessary for the court to definitively resolve the section-230 issue.

To be sure, a plaintiff might use section 1595 or section 98.002 to artfully plead around section-230 immunity. For example, a plaintiff might allege that a defendant knowingly benefitted from a sex-trafficking venture by failing to implement adequate content-moderation policies. Although pled in terms of first-party conduct, this claim would ultimately seek liability “for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher’s role.” *MySpace*, 528 F.3d at 420 (quoting *Green*, 318 F.3d at 471). In such a case, section-230 immunity would likely attach.

But that is not the case here. Plaintiffs’ claims do not seek to hold Salesforce liable for failing to moderate content or any other functions traditionally associated with a publisher’s role. *See id.* at 419-20. Rather, Plaintiffs seek to hold Salesforce liable for allegedly providing back-office business services to a company it knew (or should have known) was engaged in sex trafficking. These claims would not inherently require Salesforce, if found liable, to exercise any functions associated with publication.

Accordingly, Plaintiffs have not engaged in artful pleading, and section 230 does not apply.

The summary judgment evidence confirms this account, demonstrating that Plaintiffs do not seek liability for any publication-related functions. The evidence shows that Salesforce did not have any role in:

- screening, monitoring, or filtering content;
- reviewing or analyzing third-party content;
- transmitting or hosting third-party content;

- editing or altering third-party content;
- developing or enforcing content-moderation policies; or
- deciding how third-party content was organized or displayed.

This evidence also elucidates that Plaintiffs do not artfully plead around section 230 by shrouding an attack on functions associated with publication in terms of section 1595 or section 98.002. Indeed, the summary judgment evidence may even preclude claims predicated on such functions.<sup>13</sup> What remains is Plaintiffs' attempt to hold Salesforce liable for allegedly providing back-office business services to a company it knew (or should have known) was engaged in sex trafficking. Again, that is not conduct traditionally associated with publication, so Plaintiffs' claims are not barred by section 230.

On the topic of summary judgment evidence, one last point: the evidence highlights yet another flaw with Salesforce's only-link theory. Even if we could look past the only-link theory's departure from section 230's text—which we cannot—Salesforce does not prevail when that theory is applied to the summary judgment record at hand. The summary judgment evidence paints a picture that belies Salesforce's forceful argument that the only link between Plaintiffs' harm and Salesforce is third-party content. Indeed, the evidence marshalled by Plaintiffs—including emails between Salesforce and Backpage employees discussing sex-trafficking legislation's impact on their ability to

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<sup>13</sup> Plaintiffs agree that Salesforce had “nothing to do” with the trafficking advertisements posted on Backpage.

continue to do business—suggests another link between Salesforce and Plaintiffs’ harms. Namely, Salesforce’s provision of back-office business services to Backpage. We do not express any view regarding the merits of the underlying dispute. Rather, we simply note that under Salesforce’s proposed interpretation of section 230, at a minimum there could exist a genuine dispute of material fact whether the only link between the harm and Salesforce was third-party content. In other words, Salesforce would not have been entitled to summary judgment even under its own novel theory.

\* \* \*

To sum things up: Plaintiffs’ claims do not treat Salesforce as a publisher or speaker of third-party content because they do not (1) derive from Salesforce’s status or conduct as a publisher or speaker or (2) impose on Salesforce any duty traditionally associated with publication. As a result, section 230 imposes no barrier, and Plaintiffs’ claims against Salesforce may proceed. This conclusion follows from section 230’s text and our precedent interpreting same. As an added benefit, this conclusion also aligns with the precedent of our sister circuits.

In deciding the section-230-immunity question, we say nothing about the underlying merits of this dispute. Although section 230 does not immunize Salesforce, that does not necessarily mean that Salesforce is liable.

Immunity and liability are distinct. The question of whether Salesforce is liable to Plaintiffs because it knowingly benefitted from participation in a sex-trafficking venture is not before our court and remains to be answered.

V

Plaintiffs' claims do not treat Salesforce as the publisher or speaker of third-party content, so we AFFIRM the district court's denial of summary judgment and REMAND for further proceedings consistent with this opinion.



**FYK PETITION FOR REHEARING EN BANC,  
U.S. COURT OF APPEALS  
FOR THE NINTH CIRCUIT [28.1]  
(DECEMBER 24, 2024)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JASON FYK,

*Plaintiff-Appellant,*

v.

FACEBOOK, INC.,

*Defendant-Appellee.*

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Appeal No. 24-465

Appeal of January 12, 2024, Order Denying Motion  
for Relief Pursuant to Fed. R. Civ. P 60(B) and  
Terminating Motion Re: Constitutionality of 47  
U.S.C. Sec. 230(C)(1) [D.E. 74] by Hon. Haywood S.  
Gilliam, Jr. of the U.S. District Court for the  
Northern District of California, 4:18-cv-05159-HSG

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**[TOC & TOA Omitted]**

**I. Introduction/Summary of This Petition**

According to a Gallup poll, public confidence in the judiciary has plummeted, with a 35% decrease reflecting growing distrust in the courts – this case exemplifies why. Appellant’s, Jason Fyk’s (“Fyk”), pursuit of basic justice has been obstructed at every turn, exposing systemic bias and judicial failures/evasions within his California Courts. The situation has deteriorated so profoundly that members of Congress have approached Fyk about the prospect of testifying in impeachment proceedings against Judges involved in his case. When judicial misconduct is so blatant that it warrants congressional scrutiny, the system is inherently broken.

From the outset, Fyk faced a deeply flawed and biased process. Judge White dismissed his case without leave to amend, distorted the facts as pleaded, fully endorsed Appellee’s, Facebook, Inc.’s (“Facebook”), demonstrably false arguments (at the pleading stage where “factual” deference to Defendant Facebook was improper), and, perhaps most damningly, held millions in tech stocks – a conflict of interest, which is likely what prompted Judge White to *sua sponte*

recuse himself as “disqualified” more than five years into the case. When Fyk appealed this biased decision, the Ninth Circuit ignored Judge White’s partiality, denied Fyk’s well-reasoned surplusage argument (later affirmed by courts), and entirely overlooked the statute’s “Good Samaritan” general provision. Instead, this Court rubber-stamped Judge White’s flawed reasoning sans meaningful analysis.

Fyk’s petitions for *en banc* review and SCOTUS review were subsequently denied, despite the national significance of his case. His legal arguments were/are indisputable and perhaps too compelling, as granting him a hearing would force his Courts to confront their longstanding errors.

For instance, the Ninth Circuit’s *Barnes* test incorrectly uses “a publisher,” while the Fourth Circuit’s *Henderson* test (now conflicting with the Ninth Circuit) accurately interprets § 230’s text as “the publisher or speaker.” Despite this, the California judiciary persisted in its obvious errors, including the December 11, 2024, Memorandum from this Court. *See* [D.E. 27.1]. When Fyk returned to District Court, Judge White doubled down, rewriting the statute (divesting the statute of its “Good Samaritan” general provision) instead of applying it as written or intended, violating the separation of powers and rendering § 230(c)(1) unconstitutional as applied.

Adding insult to injury, this Court shrugged off Fyk’s *Enigma*/“Good Samaritan” arguments in his second appeal as “untimely,” ignoring SCOTUS’ recent affirmation, which reset the timeliness clock – a critical fact this Court ignored. Fyk filed another motion highlighting this error, but it was dismissed without explanation in a paperless order. Troublingly,

Facebook never raised timeliness as a defense, and Judge White never mentioned it – this Court invoked “untimeliness” *sua sponte* to shield Facebook. Instead of addressing these legal failures, this Court prioritized protecting Facebook over justice, forcing Fyk to fight judicial misconduct rather than Facebook’s misconduct.

While the California judiciary (at least in Fyk’s case) has repeatedly failed/evaded, courts in other jurisdictions are correctly interpreting and applying § 230. For example, the Third Circuit’s decision in *Anderson* demonstrated how platforms can be held accountable for harmful content recommendations (manipulation of others’ content – the same principle central to Fyk’s case) under a proper application of § 230(c)(1). *Anderson* directly conflicts with this Court’s handling of Fyk’s claims, as well as the Fourth Circuit’s *Henderson* decision. Had Fyk’s case been carefully considered and resolved early, it might have set a precedent discouraging platforms like TikTok from misusing § 230 to promote harmful challenges like the “blackout challenge,” potentially saving children’s lives. Instead, the mishandling of § 230(c)(1) in Fyk’s case has allowed Big Tech to evade accountability and emboldened unchecked content provision and development practices. Furthermore, the errors of Fyk’s California Courts have facilitated the rise of the Censorship Industrial Complex, where § 230’s ambiguity is exploited as antitrust leverage over Big Tech to induce censorship of Americans, as evidenced in cases like *Missouri, et al. v. Biden, et al.*, No. 2:22-cv-01213 (W.D. La.), *Webseed, Inc., et al. v. DOS, et al.*, No. 24-cv-576 (W.D. TX), and *Cancer Step Outside the Box, LLC, et al. v. DOS, et al.*, No. 3:24-cv-01465 (M.D. TN).

By the time Fyk filed his third round of challenges (reconsideration motion practice) in District Court, highlighting significant legal developments like *Dan-gaard* (which eviscerated Fyk's initial decision), *Henderson*, and *Anderson*, for examples, Judge White recused himself as previously mentioned. Judge Gilliam, Jr., then took over but simply rubber-stamped Judge White's prior erroneous rulings, dismissing key legal developments as irrelevant or not "controlling." Judge Gilliam, Jr., claimed nothing other than *Lemmon* and *Enigma* were "controlling," while again ignoring *Enigma* as untimely and dismissing *Lemmon* as irrelevant. Judge Gilliam, Jr., even disregarded his own precedent from his own *Rumble* decision. This repeated judicial evasion raises troubling questions about whether the Judges (including the most recent Panel responsible for [D.E. 27.1]) are even reviewing Fyk's case or whether clerks, potentially protecting Big Tech, are intercepting and derailing his arguments – a very real concern given the state of affairs in this country.

Simultaneously with Fyk's 60(b) motion practice, he filed a "non-forfeitable" constitutional challenge under Rule 5.1, based on Judge White's unconstitutional rewrite of the law in [D.E. 51], but Judge Gilliam, Jr., terminated it as "freestanding," blatantly mischaracterizing its procedural foundation. In yet another alarming display of bias, Judge Gilliam, Jr., even threatened Fyk's counsel's *pro hac vice* status if Fyk returned to Court without "controlling law." In other words, Judge Gilliam, Jr., advised Fyk that, unless a higher court corrected his errors, Fyk would be denied representation. This threat to deprive Fyk of legal counsel, unless he could compel a higher court

(like this Court) to fix the California judiciary's glaring mistakes, represents a bias so egregious it should disqualify Judge Gilliam, Jr., from handling any of Fyk's matters in the future.

Undeterred, Fyk appealed again to this Court, refusing to be denied due process. Yet again, this Court denied his appeal, ignoring procedural facts, making material errors, and ignoring his Reply Brief entirely. *See* [D.E. 27.1]. It disregarded conflicts with other circuits (*e.g.*, *Anderson* and *Henderson*), overlooked the relevance of *Lemmon* (despite its explanation in *Wozniak*), failed to address new controlling Ninth Circuit law in *Diep* (raised in Fyk's reply) and *Bonta*, continued to sideline *Enigma*, and ignored inconsistencies in Fyk's District Court (*e.g.*, *Dangaard*, *Bright Data*, *Rumble*). Adding to the absurdity, the Court required Fyk to file a "separate and independent action" for his constitutional challenge while simultaneously labeling it "freestanding" (a definitionally circular contradiction).

This case reveals a troubling reality – Fyk has spent over six years fighting not Facebook, but a biased California judiciary bent on shielding Big Tech. This is no longer *Fyk v. Facebook*, but *Fyk v. California Courts*. The refusal to apply § 230 as written and intended has broken the internet, turned it into a "lawless no-man's-land," cost lives, created U.S. Government antitrust leverage over Big Tech, eroded free speech, and cast doubt on the existence of justice in California.

This case satisfies all the requirements for both panel rehearing and rehearing *en banc*, as outlined in [D.E. 27.2] and detailed below – not just one, but *every* requirement. This is a Petition for Rehearing *En Banc*.

## **II. Summary of This Court's December 11, 2024, Memorandum [D.E. 27.1]**

Like the underlying Judge Gilliam, Jr., rulings up on this appeal, this Court's December 11, 2024, Memorandum [D.E. 27.1] really added nothing meaningful to the analysis.<sup>1</sup> Once again, it represents judicial evasion. This aligns with the requirements for both a petition for panel rehearing and a petition for rehearing *en banc*, as outlined in [D.E. 27.2]. The aim of this Petition for Rehearing *En Banc* is to detail what this Court overlooked within the parameters specified in [D.E. 27.2].

## **III. Legal Analysis**

### **A. Legal Standard**

Sections (1)A and (1)B of [D.E. 27.2] read as follows:

A party should seek panel rehearing only if one or more of the following grounds exist:

- A material point of fact or law was overlooked in the decision;
- A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
- An apparent conflict with another decision of the Court was not addressed in the opinion.

A party should seek en banc rehearing only if one or more of the following grounds exist:

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<sup>1</sup> Pursuant to [D.E. 27.2] a copy of [D.E. 27.1] is attached hereto as Exhibit A for this Court's ease of reference.

- Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- The proceeding involves a question of exceptional importance; or
- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

[D.E. 27.2].

**B. Material Points Of Fact Or Law Were Overlooked, And This Court Overlooked Changes In Law**

This section addresses the first two prongs of panel rehearing, combined to avoid repetition, as this Court (and Fyk's District Courts) have consistently ignored or failed to meaningfully analyze everything Fyk has argued since Day 1 – arguments that have been entirely on point throughout. In short, this Court and its District Courts have *missed everything*, necessitating the inclusion of all six rehearing prongs (panel and/or *en banc*) in this Petition for Rehearing *En Banc*.

**1. Case Law**

This appeal commenced (vis-à-vis the Opening Brief) on March 8, 2024. *See* [D.E. 5]. Briefing concluded (vis-à-vis the Reply Brief) on July 1, 2024. *See* [D.E. 18]. Moreover, by Federal Rule of Appellate Procedure 28(j) letter dated September 3, 2024 [D.E. 22.1], Fyk placed *Anderson v. TikTok, Inc.*, No. 22-



3061, 2024 WL 3948248 (3d Cir. Aug. 27, 2024) before this Court. And, by Rule 28(j) letter dated October 25, 2024 [D.E. 25.1], Fyk placed *Republican National Committee v. Google, LLC*, No. 2:22-cv-01904, 2024 WL 3595538 (E.D. Cal. Jul. 31, 2024) and *Doe v. Snap, Inc.*, 144 S.Ct. 2493 (Jul. 2, 2024) before this Court.<sup>2</sup>

As pointed out in his Reply Brief, between the time Fyk filed his Opening Brief and Reply Brief, this Court’s *Diep v. Apple, Inc.*, No. 22-16514, 2024 WL 1299995 (9th Cir. Mar. 27, 2024) decision issued, the Northern District of California Court’s *X Corp v. Bright Data LTD.*, No. 23-03698-WHA, 2024 WL 2113859 (N.D. Cal. May 9, 2024) decision issued, and the California state court *Wozniak, et al. v. YouTube, LLC, et al.*, 319 Cal. Rptr. 3d 597 (Ct. App. 6th Dist. Apr. 2, 2024) decision issued. And, post-briefing, on September 4, 2024, this Court’s *X Corp. v. Bonta*, 116 F.4th 888 (9th Cir. 2024) decision issued.

This Court’s December 11, 2024, Memorandum [D.E. 27.1] failed to substantively address its *Diep* and *Lemmon* decisions, both of which conflict with the disposition of this case. Notably, *Diep* was a recent Ninth Circuit decision issued after Fyk’s March 2024 Opening Brief and before his July 2024 Reply Brief. Additionally, this Court once again overlooked the profound relevance of its *Enigma* decision, denying Fyk’s use of it as “untimely,” despite his timely invocation following SCOTUS’ affirmation of same.

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<sup>2</sup> Of note, the *RNC* decision is pending appeal in this Court. Fyk reserves any and all prospective rights with respect to this Court’s looming *RNC* decision, as well as any other case law that issues prospectively.

Furthermore, this Court’s September 4, 2024, *Bonta* decision echoes what *Enigma* asserts: “the purpose of Section 230(c) is to provide protection for ‘Good Samaritan’ blocking and screening of offensive material, so that a website may ‘self-regulate offensive third party content without fear of liability.’” *Bonta*, 116 F.4th 888 at 896 (internal citation omitted). Whether through *Enigma* or *Bonta*, this Court continues to disregard § 230’s “Good Samaritan” general provision in Fyk’s case, which is constitutionally untenable. This ongoing failure to apply its own case law has resulted in one erroneous Fyk decision after another.

## **2. Rule 60(b)(5) Versus Rule 60(b)(6)**

This Court’s December 11, 2024, Memorandum mistakenly endorsed Judge Gilliam, Jr.’s conflation of Rules 60(b)(5) and 60(b)(6), rendering Rule 60(b)(6) surplusage to Rule 60(b)(5). Specifically, the Court erroneously held that a “controlling” change in law under Rule 60(b)(5) is required to trigger a Rule 60(b)(6) extraordinary circumstances analysis.

First, Rule 60(b)(6) relief is not somehow triggered by a change in case law. This Court incorrectly made satisfaction of Rule 60(b)(5) a condition precedent to pursuit of Rule 60(b)(6) relief. This is wrong and necessitates rehearing – a change of law is not required under Rule 60(b)(5) to trigger the *Phelps* extraordinary circumstances analysis of 60(b)(6). Rule 60(b)(6) is a “catch-all” provision that applies when extraordinary circumstances justify reopening a final judgment (e.g., like a judge owning millions in technology stocks). SCOTUS and this Court have made this clear in several cases. See, e.g., *Gonzalez v. Crosby*, 545 U.S. 524,

535 (2005) (determining that Rule 60(b)(6) is reserved for cases of extraordinary circumstances, and these circumstances are not limited to changes in the law; they can include judicial misconduct, denial of due process, or significant factual developments); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988) (determining that relief under 60(b)(6) may be warranted for reasons like judicial bias or conflicts of interest, which undermine the integrity of the judicial process); *Riley v. Filson*, 933 F.3d 1068, 1071 (9th Cir. 2019) (determining that extraordinary circumstances may arise from a variety of factors, including procedural irregularities or misconduct, and that Courts must weigh all relevant factors, not just changes in law).

Second, in continuing to deny Rule 60(b)(5) relief, this Court (and Judge Gilliam, Jr.) wrongly believe that Rule 60(b)(5) requires a change in law to be “controlling” in order for 60(b)(5) to be available. This Court erred in such rigidity, and, regardless, as we have discussed elsewhere in this Petition, we have provided this Court with changes in “controlling” case law that do not square with the disposition of Fyk’s case. We will briefly discuss the rigidity of this Court’s (and Judge Gilliam, Jr.’s) change in “controlling” law prerogative.

Rule 60(b)(5) does not require legal change to be “controlling,” but, rather, significant and relevant enough to render continued enforcement of the prior judgment inequitable (*e.g.*, *Dangaard*’s direct contradiction to Fyk’s case). Relief is permitted if a “significant change in law” affects the judgment’s validity. While not binding, persuasive authority or legal developments that materially impact the judg-

ment's context can suffice if they show inequity in enforcement. *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) (SCOTUS emphasized Rule 60(b)(5)'s flexibility, allowing relief for inequities caused by significant legal changes, even if non-binding, when continued enforcement is unfair or contrary to current standards).

Relief may also be granted when enforcing the judgment becomes detrimental to the public interest or creates substantial inequities due to changes in law, even if those changes are not directly controlling. *See, e.g., Horne v. Flores*, 557 U.S. 433 (2009) (SCOTUS emphasized that Rule 60(b)(5) permits relief when prospective application of a judgment is no longer equitable due to changed circumstances, whether from controlling or persuasive legal developments).

### **3. Rule 5.1 Constitutional Challenge**

As to points of law or fact overlooked, this Court engaged in circular reasoning by ratifying Judge Gilliam, Jr.'s disposition of Fyk's Rule 5.1 constitutional challenge. As detailed in prior briefing, Fyk brought his Rule 5.1 challenge as soon as he was eligible to do so. It is illogical (and judicially uneconomical) to suggest that a separate legal action should have been filed when the impetus for the challenge arose from Judge White's unconstitutional divestment of § 230's "Good Samaritan" provision *via* [D.E. 51]. Even if a separate action had been filed, it would have been routed to Judge Gilliam, Jr., and consolidated. Moreover, both Judge Gilliam, Jr., and this Court acknowledged the constitutional challenge as an independent action by labeling it "freestanding." When does "freestanding" not mean "independent"? The reasoning

used to eliminate Fyk's non-forfeitable constitutional challenge (and this Court's rubber-stamping of same) epitomizes absurd circular logic, with serious consequences, including the denial of justice for Fyk.

**C. Conflicts Within This Court Exist, Which Were Not Addressed By This Court**

As discussed in the preceding section of this Petition, this Court's decision-making in this case has overlooked conflicting case law from within this Circuit, its District Courts, and other Circuit Courts.

Within this Court, conflicting case law includes the *Bonta* and *Diep* decisions, as well as *Enigma* and *Lemmon*. In its District Court system, conflicting cases include the Northern District of California's *Dangaard* and *Bright Data* decisions, and the Eastern District of California's *RNC* decision. From other Circuit Courts, conflicting authority includes the Third Circuit's *Anderson* and the Fourth Circuit's *Henderson* decisions.

This Court's December 11, 2024, Memorandum [D.E. 27.1] failed to address any of this conflicting case law. It is particularly egregious that the Court overlooked its own controlling authority (*Diep* and *Bonta*, as well as *Enigma* and *Lemmon*). Equally troubling is this Court's tolerance of conflicting District Court decisions (*Dangaard*, *Bright Data*, and *RNC*) and its outlier status compared to other Circuit Courts (*Anderson* and *Henderson*). These oversights demand correction.

**D. Review By This Entire Court Is Necessary  
To Secure Uniformity**

As outlined in Fyk’s briefing in this appeal (and as noted in prior sections of this Petition), there has been no uniformity between the disposition of his case and other California cases. The lack of uniformity, certainty, and predictability was directly addressed, for example, in Section III.C of Fyk’s Reply Brief. This Court must review this case *en banc* for the first time, as it refused Fyk’s prior *en banc* requests.

There is no uniformity between Fyk’s case and this Court’s decisions in similar cases, its District Courts’ rulings, or other Circuit Courts’ decision-making, as discussed above. This inconsistency is unacceptable. The full Court, sitting *en banc*, must finally deliver uniform justice to Fyk.

**E. This Proceeding Involves Questions Of  
Exceptional Importance**

There is exceptional importance and danger in delay of resolving § 230 properly in relation to Fyk’s case:

The question whether § 230 immunizes platforms for their own conduct warrants th[is] Court’s review. [...] This petition present[s] the Court with an opportunity to do what [the Supreme Court] could not in *Gonzalez* and squarely address § 230’s scope.

Although the [Supreme] Court denies certiorari today, there will be other opportunities in the future [like this one]. But make no mistake about it – there is danger in delay. Social-media platforms

have increasingly used § 230 as a get-out-of-jail free card.

*Doe v. Snap, Inc.*, 144 S.Ct. 2493, 2494 (2024).

The misinterpretation/misapplication of § 230 in Fyk’s case has created a “lawless no-man’s-land,” enabling platforms to wield absolute immunity (*e.g.*, a § 230(c)(1) “get-out-of-jail free card”). The inconsistent rulings discussed in Fyk’s appellate briefing and Section III.C.1 of this Petition, including the failure to address nearly identical circumstances (*Dangaard* and *Fyk*), highlight the urgent need for *en banc* review. Without definitive resolution, platforms will continue exploiting § 230(c)(1) as an unlimited liability shield, suppressing civil liberties and evading accountability, resulting in constitutional harm (*e.g.*, deprivation of due process and free speech), systemic harm, and erosion of fairness and justice. The danger of delay cannot be overstated.

Section 230 is central to the modern Censorship Industrial Complex, and its ambiguity (largely stemming from inconsistent California court rulings) has become a tool for Government leverage over Big Tech, enabling censorship and shielding platforms from accountability. Fyk’s case illustrates this danger – deprivation of rights, systemic censorship, and anti-competitive practices disguised as neutral moderation. By failing to address § 230(c)(1)’s proper application and constitutionality, this Court has perpetuated these harms, leaving Americans like Fyk without recourse while platforms like Facebook evade accountability.

The stakes are exceptionally high. For example, TikTok’s misuse of § 230(c)(1) to promote harmful

content like the “blackout challenge” has cost lives. A proper interpretation in Fyk’s case could have prevented such tragedies by ensuring platforms are not shielded for their own publishing conduct. The *Anderson* decision, for instance, distinguishes between hosting third-party content and affirmative publishing, a distinction central to Fyk’s case, where Facebook’s anticompetitive actions caused direct harm. Yet delays in resolving § 230’s ambiguity have escalated systemic harm, including loss of lives and constitutional rights.

This Court has acknowledged that § 230 case law is unsettled, creating a patchwork of judicial “discretion” that undermines free speech and fair competition. Fyk’s case provides an opportunity for *en banc* review to unify the interpretation/application of § 230 and address these systemic harms. Correcting the misapplication in Fyk’s case will restore fair competition, prevent the misuse of immunity to dominate markets, and ensure adherence to the good-faith standards Congress intended.

Misapplication of § 230 has stripped Fyk and others of due process, free speech, and economic liberties. Section 230(c)(1) was never intended to shield platforms from accountability for deliberate, harmful actions, just as self-defense cannot excuse unrelated unlawful conduct. This Court must determine whether § 230(c)(1) protects affirmative publishing conduct and whether the “Good Samaritan” general provision applies universally to all § 230 defenses, as already determined in *Enigma* and *Bonta*. If these issues remain unresolved, the Court must confront Fyk’s Rule 5.1 challenge – whether § 230(c)(1) is unconstitutional as applied, particularly in light of Judge White’s decision to divest § 230 of its general



provision. *See* [D.E. 51]. Allowing platforms to deprive civil liberties without legal remedy raises profound due process concerns.

The time for judicial clarity in California is now. *En banc* review is essential to set a consistent precedent that protects civil liberties, ensures justice, and restores public trust. Lives, markets, free speech, and due process (all of exceptional importance) depend on decisive action in this case.

**F. This Court’s Decision-Making Conflicts With The Decision-Making of Other Circuit Courts, And There Is An Overriding Need For National Uniformity**

As detailed in earlier sections of this Petition, this Court’s decision-making in Fyk’s case directly conflicts with the Third Circuit’s *Anderson* decision and the Fourth Circuit’s *Henderson* decision. This inconsistency should not persist, and this Court should not rely on SCOTUS to rectify its errors or force Fyk into the extremely costly process of seeking SCOTUS review for a third time. Instead, it is imperative for this Court to acknowledge that its rulings in Fyk’s case conflict with correct decisions from this Circuit, from this Circuit’s District Courts, and from other Circuit Courts, rectify its wrongful handling of Fyk’s case (finally delivering justice more than six years into this lawsuit), and promote national uniformity in the process.

**IV. Conclusion**

This case presents extraordinary circumstances that demand immediate *en banc* review. The misapplication of § 230(c)(1) in Fyk’s case exemplifies the

systemic harms caused by California Courts' inaction, harms that have turned the internet into a "lawless no-man's-land." This Court's refusal to resolve conflicts between its own decisions (*e.g.*, *Enigma*, *Lemmon*, *Diep*, and now *Bonta*), its District Courts (*e.g.*, *Dangaard*, *RNC*, and *Bright Data*), and other circuits (*e.g.*, *Anderson* and *Henderson*) perpetuates a lack of judicial uniformity and platform accountability. California courts, as the primary jurisdiction handling internet-related cases, bear a unique responsibility to address the ambiguity they have fostered for over two decades. The dangers of further delay rest squarely on this Court's shoulders.

Other Circuit Courts, more committed to addressing these profound issues, are recognizing and correcting this Court's misinterpretations of § 230. Cases like *Anderson* and *Henderson* reflect a growing judicial focus on ensuring platforms are not shielded for their own affirmative content manipulation. These changes in case law (arguments Fyk has raised since Day 1) underscore the urgency of resolving his case properly. This Court's continued inaction emboldens platforms to exploit § 230 to suppress civil liberties, evade accountability, and perpetuate harm.

It is no mystery why this Court hesitates. Big Tech has built its business model on biased and clandestine content provision and development, disguised as neutral interactive computer services. Fyk acknowledges that addressing § 230's misinterpretation/misapplication poses an existential threat to these companies, as their immunity from accountability would collapse. The economic interests of these corporations, however, cannot and must not supersede law and/or constitutional rights like free speech and

due process, children's lives, and/or the principles of fairness and justice. The stakes of continued judicial evasion are profound, with real-world consequences including the erosion of public trust, systemic censorship, and loss of life.

Fyk's case provides a pivotal opportunity for this Court to do what it should have done five years ago – lead by example. *En banc* review can finally deliver long-overdue justice to Fyk, clarify § 230's proper scope, and restore coherence among courts and the law. This Court has both the authority and the affirmative duty to protect civil liberties, ensure fair competition, and hold platforms accountable for their actions. Failure to act decisively undermines the Constitution and enables ongoing harm by platforms that prioritize profit over public safety and fundamental rights.

The time for judicial clarity is now. This Court must seize the opportunity to resolve the ambiguities surrounding § 230 (ambiguities that the California judiciary is largely, if not entirely, responsible for), establish a consistent and just precedent, and restore public trust in the judicial system. Lives, free speech, and the integrity of our constitutional framework depend on it.

Plaintiff-Appellant, Jason Fyk, respectfully petitions this Court for rehearing of [D.E. 27.1] *en banc* and/or for this Court's providing Fyk with any other relief that is deemed equitable, just, or proper.

**CERTIFICATE OF COMPLIANCE**

Undersigned counsel certifies that this Petition for Rehearing *En Banc* complies with [D.E. 27.2] because the type-volume limitation does not exceed 4,200 words (this Petition includes 4,200 words), this Petition has been filed within fourteen days of [D.E. 27.1], this Petition is accompanied by a copy of [D.E. 27.1] which is Memorandum that is the subject of this Petition (*see* Ex. A), and this Petition is accompanied by a Form 11 Certificate of Compliance (*see* Ex. B). This Petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Dated: December 24, 2024.

Respectfully Submitted,

/s/ Jeffrey L. Greyber

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**FYK SUPPLEMENTAL AUTHORITY:  
REPUBLICAN NATIONAL COMMITTEE  
v. GOOGLE AND DOE v. SNAP  
(OCTOBER 25, 2024)**

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U.S. Court of Appeals for the Ninth Circuit

Re: Jason Fyk v. Facebook, Inc., No. 24-465

Appellant's Supplemental Authority in Fur-  
ther Support of Appeal

Dear your Honors:

Plaintiff-Appellant ("Fyk") commenced the above-captioned appeal in March 2024. Briefing closed on July 1, 2024, and the Court recently submitted the appeal on the briefs and record. *See* [D.E. 24.1].

Per Fed.R.App.P. 28(j) and 9th Cir.R. 28-6, Fyk supplementally submits *Republican National committee v. Google, LLC*, No. 2:22-cv-01904, 2024 WL 3595538 (E.D. Cal. Jul. 31, 2024) and *Doe v. Snap, Inc.*, 144 S.Ct. 2493 (Jul. 2, 2024). The *RNC* decision confirms § 230(c)(1) protects only passive hosting, *Doe* serves as an ominous harbinger from SCOTUS.

In *Dryoff* . . . , the Ninth Circuit found that the defendant was immune . . . under subsection (c)(1) for [hosting] a third-party's posts about heroin use which ultimately led to the deceased's death because the plaintiff was attempting to hold the defendant liable for the harm caused by that content. 934 F.3d at 1097-98. In this case, by contrast,

there is no allegation that Google published or failed to remove some potentially harmful content that caused an injury leading to the RNC's claims; rather, the challenge is to Google's decision to restrict the availability of, or to not publish, the RNC's emails.

Further, if, as Google claims, subsection (c)(1) applied to the decision to remove content (as opposed to [hosting] it), subsection (c)(2) would be rendered superfluous. . . . [S]ubsections (c)(2)(A) and (B) . . . explicitly provide protection for the act of filtering, or not publishing, content provided by third parties.

*RNC* at \*4 (footnote omitted) (emphasis added).

Fyk's Complaint contains "no allegation[s]" of "harm caused by [] content[;]" rather, Fyk challenges Facebook's decision to anticompetitively restrict and republish his materials. Moreover, Fyk has long-argued " . . . one portion of a statute cannot be read in a way that renders another portion of a statute superfluous/surplusage." *Fyk v. Facebook, Inc.*, 19-16232 [D.E. 12] at 37 (9th Cir. 2019).

"[P]latforms have increasingly used § 230 as a get-out-of-jail free card." *Doe* at 2494. § 230 is "narrow[ly] focus[ed], [yet] lower courts have interpreted § 230 to 'confer sweeping immunity' for a platform's own actions." *Id.* at 2393. "[T]here is danger in [this Court's] delay[ing] [reconciliation/rectification of Fyk's case]." *Id.* (emphasis added).

Undersigned hereby certifies that the above body of this letter does not exceed 350 words per Fed. R.

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App. 28(i) and 9th Cir. R. 28-6; the body totals 350 words.

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**ORDER, U.S. DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA IN  
REPUBLICAN NATIONAL COMMITTEE  
v. GOOGLE  
(JULY 31, 2024)**

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UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

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REPUBLICAN NATIONAL COMMITTEE,

*Plaintiff,*

v.

GOOGLE LLC,

*Defendant.*

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No. 2:22-cv-01904-DJC-JDP

Before: The Honorable Daniel J. CALABRETTA,  
United States District Judge.

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In response to the Court’s prior Order dismissing its complaint, Plaintiff, the Republican National Committee (“RNC”), has filed an amended complaint based on Defendant Google LLC’s alleged practice of diverting the RNC’s emails to Gmail users’ spam folders. Google again argues that it is immune from suit under section 230 of the Communications Decency Act, which prohibits civil liability for restricting access to objectionable communications—including spam—in good faith. Now, though, the RNC has alleged additional facts that, if

proven at trial, would show that Google was not acting in good faith such that section 230's immunity does not apply. Specifically, the RNC alleges that once it filed this lawsuit in October 2022, the email diversions ceased, despite the RNC sending even more emails leading up to and during the November 2022 election. Moreover, the RNC emphasizes that it targeted its emails to users that had engaged with RNC emails more recently and more frequently, and that Google's own data showed that the RNC's spam rate was within the limits suggested by Google.

Turning to the merits, however, the Court concludes that the RNC has not stated a claim under California's Unfair Competition Law ("UCL") or for intentional interference with economic relations. While the RNC may be correct that Google's alleged conduct (if proven) is "unfair" in a colloquial sense, the RNC is unable to point to any legislative policy that is implicated by the alleged conduct. Nor can it point to a sufficient harm to *users* of Gmail—which is the focus of the UCL—that would suggest Google's practices are unfair. And the RNC has not shown Google's alleged conduct has violated any other law, which is a necessary element of intentional interference with economic relations. Accordingly, the Court GRANTS Google's Motion to Dismiss, this time with prejudice.

## **I. Background**

### **A. Factual Background**

In its previous Order dismissing the RNC's first Complaint, the Court discussed the factual allegations of this case which it will not repeat in detail here. (*See* Order (ECF No. 53).) Briefly, the RNC, which oversees

the Republican Party's political operations, alleges that for a period of seven months leading up to the 2022 midterm elections, Google intentionally diverted nearly all of the RNC's fundraising emails to Gmail users' spam folders for a few days toward the end of every month. (First Am. Compl. ("FAC") (ECF No. 58) ¶¶ 1-4, 20.) The email diversions have allegedly cost the RNC numerous potential donations. (*Id.*) The RNC contends that Google was motivated by political animus, and targeted the end of the month because that is historically when the RNC's fundraising is most successful. (*Id.* ¶¶ 2-3, 48.)

In response to the Court's previous Order holding that the RNC had not plausibly alleged that Google acted without good faith sufficient to overcome the jurisdictional bar of section 230 of the Communications Decency Act, 47 U.S.C. § 230, the RNC includes additional factual allegations in the operative FAC. First, following the initiation of this lawsuit on October 21, 2022, the end-of-month spam diversions ceased despite the RNC's email volume and user-reported spam rates remaining essentially unchanged. (*Id.* ¶ 49.) Second, the RNC alleges that despite Google's explanation that the RNC's user-reported spam rates were high, the rates were actually within the industry limit during the relevant period. (*Id.* ¶¶ 42, 72, 82, 9-98, 103.) Third, the RNC provides information about its efforts to comply with industry best practices and reduce user-reported spam rates by targeting the bulk of its email volume to only the most engaged users through a process called audience segmentation, and by engaging with email marketing platforms to monitor email performance. (*Id.* ¶¶ 27-32.)

As in the original complaint, the RNC also includes allegations that Google’s conduct is unfair under the UCL, and that because it violates the UCL and industry standards, Google’s conduct constitutes intentional interference with economic relations. (*Id.* ¶¶ 144-151, 158.)

### **B. Procedural Background**

The RNC filed its initial Complaint on October 21, 2022. (Compl. (ECF No. 1).) The Court granted Google’s Motion to Dismiss the Complaint, finding that section 230 of the Communication Decency Act barred Plaintiff’s claims. (Order (ECF No. 53).) The Court also found that Counts One, Two, and Five through Seven failed as a matter of law, and that Counts Three and Four were not sufficiently alleged. The Court granted leave to amend to establish that Google’s conduct fell within the lack of good faith exception to section 230, and to plead additional facts to support Counts Three and Four, the intentional interference with economic relations and UCL claims. (*Id.* at 15, 30, 37.)

In response to the filing of the FAC, Google filed the present Motion to Dismiss. (Mot. to Dismiss (“MTD”) (ECF No. 60).) The matter is fully briefed with the filing of an Opposition, (Opp’n (ECF No. 64)), Reply (Reply (ECF No. 65)), and Defendant’s Letter Brief (ECF No. 70). The Court held oral argument on March 14, 2024 with Thomas Vaseliou, Thomas McCarthy, and Michael Columbo appearing for Plaintiff and Michael Huston and Sunita Bali appearing for Defendant. The matter was submitted following the hearing.

## II. Legal Standard for Motion to Dismiss

A party may move to dismiss for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). The motion may be granted if the complaint lacks a “cognizable legal theory” or if its factual allegations do not support a cognizable legal theory. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988)). The court assumes all factual allegations are true and construes “them in the light most favorable to the nonmoving party.” *Steinle v. City & County of San Francisco*, 919 F.3d 1154, 1160 (9th Cir. 2019) (quoting *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995)). If the complaint’s allegations do not “plausibly give rise to an entitlement to relief,” the motion must be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

A complaint need contain only a “short and plain statement of the claim showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), not “detailed factual allegations,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But this rule demands more than unadorned accusations; “sufficient factual matter” must make the claim at least plausible. *Iqbal*, 556 U.S. at 678. In the same vein, conclusory or formulaic recitations of elements do not alone suffice. *Id.* (citing *Twombly*, 550 U.S. at 555). This evaluation of plausibility is a context-specific task drawing on “judicial experience and common sense.” *Id.* at 679.

### III. Discussion

#### A. Section 230 Immunity

##### i. Section 230(c)(2)(A)

Section 230 of the Communications Decency Act affords interactive computer service providers immunity from liability for decisions related to blocking and screening of offensive material. 47 U.S.C. § 230(c)(2)(A). “To assert an affirmative defense under section 230(c)(2)(A), a moving party must qualify as an ‘interactive computer service,’ that voluntarily blocked or filtered material it considers ‘to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable,’ and did so in ‘good faith.’” *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011) (quoting 47 U.S.C. § 230(c)(2)(A)). Section 230 must be construed to protect defendants “not merely from ultimate liability, but from having to fight costly and protracted legal battles.” *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (*en banc*). In “close cases” section 230 claims “must be resolved in favor of immunity.” *Id.* at 1174.

Based on the allegations in the prior Complaint, this Court previously found this to be such a “close case” and ultimately decided in favor of immunity for Google. The Court found that Google had established the first two elements of section 230(c)(2)(A): *first*, it is an interactive computer service, and *second*, the RNC’s emails, as mass marketing emails, could reasonably be considered spam, which falls under the “harassing, or otherwise objectionable” umbrella. The sticking point was whether the RNC had alleged

enough facts to make it plausible that Google had not filtered the emails in “good faith.” In its previous Complaint, the RNC did not provide sufficient facts specific to Google’s treatment of the RNC’s emails to elevate the RNC’s allegations above the level of speculation. In the FAC, though, the RNC has met its burden by pleading additional facts to make it at least plausible that Google acted without good faith.

Perhaps the strongest allegation that Google acted without good faith is that the RNC’s emails were not relegated to spam after the RNC filed this lawsuit. As the RNC alleges, the drop in inboxing typically occurred at the end of each month, but, after filing suit in October 21, 2022 and following the midterm election, the RNC experienced no mass diversion at the end of October or any month thereafter. (FAC ¶¶ 4, 49, 51.) The RNC alleges that it did not make any substantive changes to its email practices which would account for the change, and in fact sent more emails in November 2022 than during any other month in which it had experienced the end of month drop. (*Id.* ¶¶ 49, 51.)

The RNC has also provided facts to refute Google’s explanations for the monthly drop in inboxing, making the RNC’s claims that Google was intentionally diverting the emails more plausible. Google’s primary explanation is that users had been marking the RNC’s emails as spam at a high rate, which the algorithm compiled over the month and which led the algorithm to divert emails at a higher rate toward the end of the month. (MTD at 16-17.) In response the RNC provides facts that call that explanation into question. First, the RNC alleges that it engages in “audience segmentation” that allows the RNC to send more targeted

emails to certain users. (FAC ¶¶ 27-32.) Essentially, the RNC sends more emails to users who had engaged with RNC emails more frequently and more recently, and so would ostensibly be much less likely to report those emails as spam. In contrast, the RNC sends fewer and less frequent emails to users who are less likely to engage and may be more likely to view the emails as spam. (*Id.*) Second, the RNC alleges that according to data provided by Google, the RNC's user-reported spam metric was low and within the limits suggested by Google. (*Id.* ¶¶ 82-87.) There was no significant change in the spam rate each month which would account for the monthly drop; and, notably, there was no significant change in user reported spam, either.

Google has also argued that the monthly spam diversion may have been because of the greater volume and frequency of emails sent towards the end of each month. The RNC has acknowledged that it sent more emails at the end of each month, but now alleges that the drop in inboxing would occur even before the RNC increased the volume of emails, meaning that the diversion was not responding to such an increase. (FAC ¶ 75.) In other words, according to the RNC, the mass diversion would occur despite the RNC's email practices remaining relatively the same in the weeks prior to the mass diversions. (*Id.* ¶¶ 70, 75.) To further refute Google's argument, the RNC also alleges that in 2020 it sent four times as many emails with more frequency, sometimes hourly, but did not experience the same type of mass spam diversion. (*Id.* ¶ 50.)

Overall, while there may be technical reasons to account for the abrupt end to the months-long inboxing



pattern, the timing and the lack of a clear reason for the monthly diversions makes the RNC's allegation that Google acted without good faith in diverting the RNC's emails to spam sufficiently plausible at this early stage of the proceedings. Accordingly, Google is not entitled to immunity under section 230(c)(2)(A).

**ii. Applicability of Subsections (c)(1) and (c)(2)(B)**

Google has reprised its argument that it is also immune from liability under section 230 subsections (c)(1) and (c)(2)(B). As the court previously determined, subsection 230(c)(2)(A) is the most applicable for the claims at issue because it applies where a service provider has taken steps to “restrict access to,” among other material, “harassing, or otherwise objectionable” content, which is precisely what the RNC has alleged Google did by filtering its emails to spam. Subsection (c)(1), in contrast, provides that no service provider “shall be treated as the publisher or speaker of any information provided by another information content provider.”

Although Google claims it is carrying out a traditional publishing function by choosing not to publish certain emails to inboxes, subsection (c)(1) turns on whether the asserted claim “inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009), *as amended* (Sept. 28, 2009); *accord Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019). Such is the case for claims that the service provider should be held liable for the injuries that arise from publishing allegedly harmful content produced

by another user or failing to remove harmful content. See, e.g., *Barnes*, 570 F.3d at 1101 (collecting cases where section 230(c)(1) has been applied to claims of defamation, violation of anti-discrimination laws, fraud, negligent misrepresentation, false light, and ordinary negligence). For example, in *Dyroff v. Ultimate Software Group, Inc.*, the Ninth Circuit found that the defendant was immune from suit under subsection (c)(1) for publishing a third-party's posts about heroin use which ultimately led to the deceased's death because the plaintiff was attempting to hold the defendant liable for the harm caused by that content. 934 F.3d at 1097-98.<sup>1</sup> In this case, by contrast, there is no allegation that Google published or failed to remove some potentially harmful content that caused an injury leading to the RNC's claims; rather, the challenge is to Google's decision to restrict the availability of, or to not publish, the RNC's emails.

Further, if, as Google claims, subsection (c)(1) applied to the decision to remove content (as opposed to publishing it), subsection (c)(2) would be rendered superfluous. Rather, it is subsections (c)(2)(A) and (B) that explicitly provide protection for the act of filtering, or not publishing, content provided by third

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<sup>1</sup> In its Motion to Dismiss, Google takes out of context the fact that *Dyroff* involved "features and functions" to organize and display content. (MTD at 25 (quoting *Dyroff*, 934 F.3d at 1098).) The Ninth Circuit discussed those features to rebut the argument that the interactive computer service at issue there was creating content by the use of those features and functions. There is no such argument here. And unlike in *Dyroff*, where the causes of action were based on the *content* of the messages and thus were an attempt to treat the computer service as a publisher, none of the RNC's causes of action in this case seek to treat Google as a publisher.

parties. *Compare Barnes*, 570 F.3d at 1103 (holding that allegations that service provider failed to take down injurious content was barred by section 230(c)(1) because plaintiff effectively sought to hold provider liable for publishing the content) *with Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011) (holding email service provider was immune from suit for filtering spam emails under section 230(c)(2)(A)). Subsections (c)(2)(A) and (B) provide protection for actions that restrict access to or availability of content, or enable a user to do the same, respectively.

Finally, subsection (c)(2)(B) is not at issue in this case because the RNC is specifically alleging that Google took unilateral action that was “not based on users’ spam designations.” (Opp’n at 23.) Google concedes that it filters emails that its algorithm designates as spam, not necessarily just those emails that users themselves designate as spam. (MTD at 4-5.) If Google can show that the decisions to filter were in fact based on a user’s individualized feedback such that Google was effectively just providing the user with the means to filter the RNC’s emails, Google may then be entitled to immunity under subsection (c)(2)(B). But, taking the RNC’s allegations as true, it was Google making the filtering decisions, at least in part, not Google merely providing the technical means for filtering to its users.

Accordingly, section 230 subsections (c)(1) and (c)(2)(B) do not apply in this case. And section 230(c)(2)(A)—which could potentially apply—does not bar this suit given the RNC’s allegations that Google was not operating in good faith.

## **B. Plaintiff's Claims**

The Court previously dismissed many of the RNC's claims with prejudice after finding that, as a matter of law, the claims were not cognizable. The Court granted leave to amend only two causes of action: Count Three, alleging violation of California's Unfair Competition Law, and Count Four, alleging Intentional Interference with Prospective Economic Relations. (Order at 30, 37.) The RNC has included each of the other causes of action in its FAC "to make clear it is not abandoning them and to preserve its right to appeal." (FAC at 42, n.7.) For the same reasons stated in its prior Order dismissing those causes of action, the Court dismisses them here, too. Accordingly, the Court will proceed with addressing only the Third and Fourth Causes of Action.

### **i. UCL**

The California Unfair Competition Law prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Pro. Code § 17200, *et seq.* The UCL is an expansive law which encompasses "anything that can properly be called a business practice and that at the same time is forbidden by law." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). The purpose of the UCL is to prevent unfair competitive conduct which harms both business competitors and the public. *Rubin v. Green*, 4 Cal. 4th 1187, 1200 (1993). A plaintiff may prove a UCL violation by establishing any one of the "unlawful," "unfair," or "fraudulent" prongs. *See Cel-Tech.*, 20 Cal. 4th at 180.

At the outset, Google has asserted that the RNC has not alleged cognizable relief under the UCL. The UCL is an equitable statute with limited remedies and allows only for restitution and injunctive relief. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150 (2003). “Compensation for a lost business opportunity is a measure of damages and not restitution to the alleged victims.” *Id.* (quoting *MAI Sys. Corp. v. UIPS*, 856 F. Supp. 538, 542 (N.D.Cal. 1994)). While the RNC has pled damages, it has not articulated a theory of restitution and thus only has standing to pursue relief if it can seek an injunction. The RNC appears to recognize this point, arguing in its Opposition only that it has standing due to its request for injunctive relief.<sup>2</sup> (Opp’n at 17-18.) Google

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<sup>2</sup> At oral argument, the RNC argued for the first time that the UCL permits declaratory relief as well. The Court’s review of the cited cases and other relevant caselaw proves otherwise. In *Weizman v. Talkspace, Inc.*, the Northern District of California did state that UCL remedies are limited to “restitution and prospective declaratory or injunctive relief.” \_\_\_ F. Supp. 3d \_\_\_, \_\_\_, No. 23-cv-00912-PCP, 2023 WL 8461173, at \*3 (N.D. Cal. Dec. 6, 2023). However, the court relied on two California cases, including a decision of the California Supreme Court, which clearly state that the only available relief is restitution and injunctive relief. *See id.* (first citing *Korea Supply*, 29 Cal. 4th at 1144 and then citing *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 130 (2009)). District Courts are bound by the decisions of the state’s highest court. *Armstrong v. Reynolds*, 22 F.4th 1058, 1073 (9th Cir. 2022). Thus, even if the *Weizman* decision’s characterization of UCL remedies is not an unintentional error, that decision is not controlling. *Colopy v. Uber Technologies Inc.*, on the other hand, merely stands for the position that a UCL claim can serve as the predicate for a claim under the Declaratory Judgement Act, not that declaratory relief can support a UCL claim. *See* No. 19-CV-06462-EMC, 2020 WL 3544982, at \*3 (N.D. Cal. June 30, 2020) (“[T]he Court can see no reason why, if relief is available under the UCL, a plaintiff would not be able to

argues that because the conduct has ceased, the RNC no longer has standing to see injunctive relief such that the UCL claim should be dismissed.

In order to possess standing under Article III of the Constitution, “a plaintiff must show (1) that it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180-81(2000)) The UCL has a similar standing requirement. See Cal. Bus. & Prof. Code § 17204; see also *California Med. Assn. v. Aetna Health of California Inc.*, 14 Cal. 5th 1075, 1087 (2023) (noting that “the phrase ‘injury in fact’ [in the UCL] is borrowed from, and was intended to incorporate aspects of, the federal constitutional law of standing.”).

Under both Article III and the UCL, the RNC has standing to seek injunctive relief under the voluntary cessation doctrine. “It is well settled that ‘a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.’” *Friends of the Earth*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982)).<sup>3</sup> Although

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seek declaratory relief under the DJA.”)

<sup>3</sup> At oral argument, Defendant suggested that the voluntary cessation doctrine did not apply to the UCL, citing to *Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440, 463 (2005). However, the defendant in *Madrid* had not voluntarily ceased the activity, but, rather, the circumstances had changed such that the defendant would have been unable to carry out the same conduct in the

Google appears to have stopped the allegedly illegal conduct for now, “a case should not be considered moot if the defendant voluntarily ceases the allegedly improper behavior in response to a suit, but is free to return to it at any time.” *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994), *overruled on other grounds by Bd. of Trs. of Glazing Health and Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (*en banc*). Here, the allegations suggest that the events at issue are likely to be repeated, such that injunctive relief remains viable. The RNC continues to send the same type of emails to Gmail users at the same volume, and there has been no clear explanation for why the filtering has stopped or a binding assurance from Google that it will not begin again. The fact that a party “takes curative actions only after it has been sued fails to provide sufficient assurances that it will not repeat the violation to justify denying an injunction.” *E.E.O.C. v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987). The Court concludes that the RNC has sufficiently plead entitlement to injunctive relief, and therefore has standing to pursue its UCL claim. The Court now proceeds to the merits of the UCL claim.

### 1. Unlawful Prong

The unlawful prong of the UCL requires that the plaintiff sufficiently plead some separate unlawful offense. *See Rivera v. BAC Home Loans Servicing, L.P.*, 756 F. Supp. 2d 1193, 1200-01 (N.D. Cal. 2010). As discussed above, the Court has previously dismissed

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future. Similar to the inquiry under Article III, *Madrid* clearly states that a plaintiff may seek injunctive relief under the UCL for misconduct which is “likely to recur.” *Id.* at 464.

most of the RNC's claims with prejudice. The only other potentially viable claim, intentional interference with prospective economic relations, is itself dependent on establishing an independently wrongful act which is "wrongful apart from the interference itself." *Korea Supply*, 29 Cal. 4th at 1154.<sup>4</sup> While the RNC is correct that a UCL violation may support an intentional interference with economic relations claim, the UCL needs to have been violated for "reasons other than that [defendant] interfered with a prospective economic advantage." *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1110 (9th Cir. 2007) (quoting *Stevenson Real Est. Servs., Inc. v. CB Richard Ellis Real Est. Servs., Inc.*, 138 Cal. App. 4th 1215, 1224 (2006)). In other words, the RNC may not "bootstrap" its claims on one another by asserting that the intentional interference violates the UCL, and then relying on that UCL violation to support its intentional interference claim. Although the RNC pleads this theory in the FAC (*See* FAC ¶ 144), it seems to have abandoned it, having not raised the argument in opposition. (*See* Opp'n at 12-16 (arguing only that the "unfair" prong is met).) Accordingly, the Court does not find a violation of the UCL under the unlawful prong.

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<sup>4</sup> *See infra* Section III.B.ii. The tort of intentional interference with prospective economic relations requires an intentional act on the part of the defendant designed to disrupt the relationship. *Korea Supply*, 29 Cal. 4th at 1153. The California Supreme Court has clarified that such an act must be "wrongful apart from the interference itself" and that "an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id.* at 1154, 1159.



## 2. Unfair Prong

“The unfair prong of the UCL ‘creates a cause of action for a business practice that is unfair even if not proscribed by some other law.’ *Day v. GEICO Cas. Co.*, 580 F. Supp. 3d 830, 844 (N.D. Cal. 2022) (quoting *Cappello v. Walmart Inc.*, 394 F. Supp. 3d 1015, 1023 (N.D. Cal. 2019)). Whether conduct is unfair can be determined in one of two ways: (1) by establishing that the conduct offends “some legislatively declared policy” (the “tethering” test), or (2) by weighing the utility of the conduct against the harm to the consumer (the “balancing” test).<sup>5</sup> *Id.* at 844-45 (citing *Lozano v. AT*

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<sup>5</sup> While some courts have stated there is a third test for determining unfairness, looking to whether the practice is “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers,” see *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1214 (9th Cir. 2020), these factors appear to be part of the balancing test and do not constitute a distinct basis for finding unfairness. See *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169-70 (9th Cir. 2012) (discussing the balancing test as that articulated by *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861 886-87 (1999) and *Smith v. State Farm Mut Auto. Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001), as modified (Nov. 20, 2001) in which the nature of the practice is part of the balancing test). In a recent opinion, *Nationwide Biweekly Administration, Inc. v. Superior Court of Alameda County*, the California Supreme Court acknowledged that in the absence of guidance from that court, California appellate courts have adopted three different test: the tethering test, the *South Bay/State Farm* balancing test, and the more recent *Camacho/FTC* balancing test, articulated in *Camacho v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006). 9 Cal. 5th 279, 304, n. 10 (2020). California’s high court, however, declined to resolve which was the appropriate test. The Ninth Circuit has recognized the tethering and *South Bay/State Farm* tests, but rejected the *Camacho/FTC* test “in the absence of a clear holding from the California Supreme Court.” *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007).

& *T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007) and *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1169 (9th Cir. 2012)). While the California Supreme Court has rejected the balancing test in favor of the tethering test for competitor suits under the UCL, it has failed to clarify whether the tethering test is the sole test that should apply to consumer suits as well. *Cel-Tech*, 20 Cal. 4th at 186-87; see *Nationwide Biweekly Admin., Inc. v. Superior Ct. of Alameda Cnty.*, 9 Cal. 5th 279, 304 (2020) (acknowledging split in California appellate courts but declining to address whether the tethering test also applies to consumer suits). In the absence of such guidance, the Ninth Circuit has endorsed the use of the balancing test for consumer suits, but has in practice reviewed unfairness under both the balancing and tethering tests. See *Lozano*, 504 F.3d at 735 (stating that the two tests are not mutually exclusive); *Davis*, 691 F.3d at 1170 (finding that plaintiff failed to state a claim under either the balancing or tethering test); see also *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1215 (9th Cir. 2020). The RNC argues that it meets the unfair prong under either of these tests, which the Court will consider in turn.<sup>6</sup>

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Because the California Supreme Court did not make such a clear holding about the viability of the FTC in *Nationwide*, the only two tests applicable in this Circuit are the tethering test and the *South Bay/State Farm* balancing test.

<sup>6</sup> The determination of whether a practice is unfair under the UCL is a legal question decided by the court, not a factual question decided by a jury. *Nationwide Biweekly*, 9 Cal. 5th at 304. Nevertheless, at this stage, the Court still presumes the truth of the allegations in the FAC, as weighing evidence is not appropriate in assessing a motion to dismiss. *Steinle*, 919 F.3d at 1160; *Rubenstein v. Neiman Marcus Grp. LLC*, 687 F. App'x 564,

**a. Tethering test**

The tethering test requires that the alleged conduct be “tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.” *Cel-Tech*, 20 Cal. 4th at 186-87. The UCL is intended to provide a remedy for such conduct where the law may not otherwise provide one. *See, e.g., Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 566 (1998), *abrogated by statute on other grounds* (finding a civil right of action under the UCL for violating a criminal law prohibiting the sale of tobacco to minors); *In re Zoom Video Commc’ns Inc. Priv. Litig.*, 525 F. Supp. 3d 1017, 1047 (N.D. Cal. 2021) (gathering video and audio of minors without parental consent violated the public policy of protecting minors’ personal information online). While the conduct does not need to be a direct violation of the law (which would otherwise collapse the unlawful prong into the unfair prong), “[t]o determine whether something is sufficiently ‘tethered’ to a legislative policy for the purposes of the unfair prong, California courts require a close nexus between the challenged act and the legislative policy.” *Hodsdon v. Mars, Inc.*, 891 F.3d 857, 866 (9th Cir. 2018). “Although the unfair competition law’s scope is sweeping, it is not unlimited.” *Cel-Tech*, 20 Cal. 4th at 182. Under the tethering test, the RNC argues that Google’s conduct is similar enough to causes of action that this Court has already dismissed to make the conduct at least tethered to those laws even if the conduct is not a direct violation of the laws.

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566 (9th Cir. 2017).

*First*, the RNC argues that discrimination based on political affiliation violates the public policy espoused in the Unruh Act despite the Court’s finding that the Unruh Act contains no such policy. As the Court discussed in its previous Order, the California Legislature has so far declined to protect political affiliation under the Unruh Act. While the RNC is correct that the UCL is intended to combat “new schemes” that the legislature has not yet explicitly addressed, “[i]f the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination.” *Cel-Tech*, 20 Cal. 4th at 182. There is nothing novel about political affiliation discrimination. The Court discussed in its prior Order that California courts have in the past suggested that political affiliation discrimination might violate the Unruh Act. *See, e.g., Harris v. Cap. Growth Invs. XIV*, 52 Cal. 3d 1142, 1161 n.10 (1991). But since the *Harris* case, the California Legislature has amended the Unruh Act at least six times to add other protected categories, and yet has not added political affiliation. (Order at 26.) “We generally presume the Legislature is aware of appellate court decisions,” *Therolf v. Superior Court. of Madera County.*, 80 Cal. App. 5th 308, 335 (2022), and so “its inaction on this subject . . . is significant.” *Beverage v. Apple, Inc.*, 101 Cal. App. 5th 736 (2024). The California Legislature’s inaction in this area is far from establishing a “legislatively declared policy” of prohibiting discrimination based on political affiliation.

The RNC attempts to analogize to *Candelore v. Tinder, Inc.*, which held that in addition to violating the Unruh Act, age discrimination in pricing also violated the unfair prong of the UCL. The age discrim-

ination analyzed in *Candelore* differs from political affiliation discrimination in several key respects. First, the *Candelore* court determined that age discrimination in pricing was actually violative of the Unruh Act, and was not just tethered to it. 19 Cal. App. 5th 1138, 1145 (2018). Consistent with the California Supreme Court’s decision in *Marina Point, Ltd. v. Wolfson*, the *Candelore* court held that age discrimination violates the Unruh Act when age is used as an arbitrary proxy for generalized characteristics.<sup>7</sup> *Id.* at 1145, 1151-52; *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 740 (1982). No court has similarly held that political affiliation discrimination directly violates the Unruh Act, and, important here, the Legislature has never indicated a policy against political affiliation discrimination, either.

Notably, California has recognized a public policy against age discrimination in several other contexts. The California Legislature has explicitly codified the *Marina Point* decision by prohibiting age discrimination in housing. *See* Cal. Civ. Code § 51.2(a)-(b). The California Fair Employment and Housing Act also prohib-

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<sup>7</sup> Specifically, in *Marina Point*, the Court held that a landlord could not discriminate against children based on the arbitrary generalization that all children are noisy and disruptive, and in *Candelore*, the court held that Tinder could not base its pricing structure on a generalization about younger users’ income. Other California courts have found that age discrimination is acceptable in certain circumstances and does not violate the Unruh Act. For instance, providing a discount to senior citizens who are likely on a fixed income, or making a fitness club more financially accessible to younger members are socially desirable practices and not “arbitrary discrimination.” *See Starkman v. Mann Theatres Corp.*, 227 Cal. App. 3d 1491, 1499 (1991); *Javorsky v. W. Athletic Clubs, Inc.*, 242 Cal. App. 4th 1386, 1405 (2015).

its age discrimination in employment. *See* Cal. Gov't Code § 12940. These specific statutes evince a legislatively declared policy against age discrimination, at least in select contexts. In contrast, there is no evidence of California public policy against political affiliation discrimination. The closest the Legislature has come is to prohibit violence or threats of violence based on political affiliation under the Ralph Civil Rights Act, which is meaningfully different from prohibiting discrimination on the basis of political affiliation as a general matter. Cal. Civ. Code § 51.7; *see, e.g., Black Lives Matter-Stockton Chapter v. San Joaquin Cnty. Sheriff's Off.*, 398 F. Supp. 3d 660, 679 (E.D. Cal. 2019) (threats of violence based on association with Black Lives Matter would violate the Ralph Civil Rights Act); *Campbell v. Feld Ent., Inc.*, 75 F. Supp. 3d 1193 (N.D. Cal. 2014) (same based on association with animals rights activist group). Accordingly, the many statements of legislative policy against age discrimination from which the *Candelore* court drew are absent in the political affiliation context.

As the Court previously determined, “had the California Legislature intended to give broader protections to individuals on the basis of their political affiliation . . . it would have done so.” (Order at 26). The Court declines to judicially extend the protections of the Unruh Act to political affiliation through the UCL by declaring it “tethered” to the Unruh Act. To do so would be to circumvent what the Court has already observed is a conscious legislative decision to not provide such protection. (*See* Order 24-27.) “[The Court] decline[s] the invitation to do that which the Legislature has left undone.” *Korens v. R. W. Zukin*

*Corp.*, 212 Cal. App. 3d 1054, 1059 (1989), *reh'g denied and opinion modified* (Aug. 28, 1989).

*Second*, the RNC argues that the conduct is tethered to the policy underlying California's common carrier law, specifically that California law "reflects the public policy that messages should be delivered to and received by the designated recipient reasonably and without discrimination," and that Google's conduct is "comparable" to a violation of the California common carrier law, despite the Court's prior finding that the California common carrier law does not apply to email or email carriers. (Opp'n at 14-15). As the Court has discussed in the prior Order, California's common carrier law has historically been applied to services that physically carry persons or goods, like stage-coaches, busses, and ski lifts. (Order at 16.) While the California Supreme Court did interpret the law to include telephone services, *see Goldin v. Pub. Utilities Comm'n*, 23 Cal. 3d 638, 662 (1979), there is no *legislatively declared* policy that electronic means of communication like email should be subject to common carrier standards. *See Cel-Tech*, 20 Cal. 4th at 186-87.

Reading email into the common carrier law would implicate significant policy and Constitutional considerations that the California Legislature has not addressed. As the Court previously discussed, "if email providers are common carriers, they would have an obligation to deliver each of the messages that were entrusted to them" including unwanted and spam emails that could be harmful and disruptive to email users and providers. (Order at 22.) And such a regulation would impose on email providers' First Amendment rights. As the Supreme Court recently recognized:

[d]eciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own. . . . When the government interferes with such editorial choices—say, by ordering the excluded to be included—it alters the content of the compilation.

*Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2402 (2024). Under this standard, a law that would require email providers to treat political content in a certain manner at least implicates the First Amendment.<sup>8</sup> Although a legislature may determine that such a regulation is nonetheless justified, the UCL is not intended to grant courts the authority to make these kinds of complex policy determinations under the guise of judicial decisionmaking. See *Wolfe v. State Farm Fire & Cas. Ins. Co.*, 46 Cal. App. 4th 554, 565 (1996) (warning against judicial intervention in complex areas of policy via the UCL); *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1362 (2012) (collecting cases where California courts have declined to rule on UCL claims implicating complex policy decisions), *as modified on denial of reh'g* (Feb. 24, 2012). The California Legislature is properly in a position to balance these concerns, and without the necessary legislatively declared policy required under the tethering test, this Court may not do so in its stead.

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<sup>8</sup> The Court is in no way offering an opinion on whether such a law would in fact be unconstitutional but is rather observing a significant policy and Constitutional issue that the California Legislature would likely consider if it were to regulate email providers as common carriers.



**b. Balancing test**

The UCL balancing test is less clearly defined than the tethering test. *See Cel-Tech*, 20 Cal. 4th at 185 (criticizing the balancing test for being “amorphous” and “provid[ing] too little guidance to courts”). The balancing test “involves an examination of [the business practice’s] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim. . . .” *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886-87 (1999) (quoting *State Farm Fire & Cas. Co. v. Superior Ct.*, 45 Cal. App. 4th 1093, 1103-04(1996), *abrogated on other grounds by Cel-Tech*, 20 Cal. 4th). In assessing whether and to what extent a business practice is harmful, the court will look to whether it is “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” *Davis*, 691 F.3d at 1169 (quoting *S. Bay*, 72 Cal. App. 4th at 887).

As this description of the balancing test indicates, when assessing the harm, the Court must look only at the harm suffered by the *consumers*, that is, Gmail users, not by the RNC. *See Hodsdon v. Mars, Inc.*, 891 F.3d 857, 867 (9th Cir. 2018). “The UCL’s purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services,” not necessarily to address any conduct that might be viewed as unfair. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 949 (2002), *as modified* (May 22, 2002); *see also Bank of the W. v. Superior Ct.*, 2 Cal. 4th 1254, 1264(1992) (describing the history of the UCL). Because the RNC is not a Gmail user or Google

competitor, the harms it has allegedly suffered are not properly considered under the UCL. *See, e.g., Hodsdon*, 891 F.3d at 867 (declining to look to the practice of utilizing child and slave labor, but rather only examining the conduct which affected the consumer of the chocolate products, namely the failure to disclose these labor practices). The RNC has not cited, and the Court cannot find, any case where an unfair practice claim was based on a harm not suffered by either a consumer or competitor.<sup>9</sup> *See, e.g., California Med. Assn.*, 14 Cal. 5th at 1090 (finding standing to sue under the UCL based on the plaintiff's separate

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<sup>9</sup> A plaintiff may still bring a claim under the UCL even if it has not suffered harm as a consumer or competitor. “[A] private plaintiff has standing to bring a claim under the UCL . . . if he or she has ‘suffered injury in fact and has lost money or property as a result of [the] unfair competition.’” *Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1253 (2009) (quoting Cal. Bus. & Prof. Code § 17204, as amended by Prop. 64, § 3). In a recent opinion, the California Supreme Court determined that a plaintiff may assert a violation of the law on behalf of consumers, so long as the plaintiff has also been harmed in some, but not necessarily the same, way. *California Med. Assn. v. Aetna Health of California Inc.*, 14 Cal. 5th 1075, 1090 (2023) (“UCL standing can be based on an organization’s diversion of resources in response to a threat to its mission.”) However, the allegedly unfair practice must still harm consumers or competitors in order to violate the UCL. *See id.* (despite resting its own standing on a diversion of resources theory, the plaintiffs argued that the insurer’s policy harmed participating physicians and interfered with their medical judgement); *Lagrisola v. N. Am. Fin. Corp.*, 96 Cal. App. 5th 1178, 1192-95 (2023), *review denied* (Feb. 14, 2024) (finding that while the plaintiffs had established a sufficient economic injury, they had not sufficiently alleged an actionable unfair business practice where they could not show that the defendant had any obligation to have a lender license and did not misrepresent its license status to consumers).

economic injury despite the fact that plaintiff was neither a consumer or competitor of the defendant, but noting the alleged harm under the UCL was to participating physicians).

Focusing on the injury to consumer, the RNC asserts that Google's alleged practice of diverting emails to spam harms Gmail users by making it more difficult for them to access their emails and engage with politics. Taking all the RNC's allegations as true and in the light most favorable to it, at its worst Google's alleged conduct, as it applies to consumers, consists of delivering nearly all of the RNC's emails to users' inboxes without issue, save for one or two days over the course of seven months when the messages were delivered to users' spam folders as opposed to their inboxes.<sup>10</sup>

While there is no case that clearly defines what constitutes conduct that is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers," a review of the caselaw reveals several themes. A common unfair practice is a scheme that seek to exploit consumers. For example, having a product fail is not substantially injurious, but "charging customers exorbitant sums of money" to remediate the harm of the inevitable failure is. *In re Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776, 798 (N.D. Cal. 2017).

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<sup>10</sup> The RNC has also claimed that Google misrepresents the nature of its services to users. (FAC ¶ 151.) However, this is fundamentally an allegation of fraud and the RNC has failed to plead facts sufficient to meet the Rule 9 fraud pleading standard, nor has it alleged that the users relied on these misrepresentations in choosing to set up a Gmail account, as the Court noted in its prior Order. (Order at 36-37.) See *O'Connor v. UberTechs., Inc.*, 58 F. Supp. 3d 989, 1003 (N.D. Cal. 2014).

Similarly, hiding no-parking signs, then arranging for a towing company to remove the cars while receiving a kickback from the towing company is an unfair practice. *People v. James*, 122 Cal. App. 3d 25, 36 (1981). In contrast, a practice that minimally harms some consumers but does not provide a clear benefit to the defendant is not an unfair practice. In *Puentes v. Wells Fargo Home Mortgage, Inc.* the court found that the practice of using a standard month for mortgage payments, which resulted in the plaintiffs being charged for two additional days of interest because they paid off their loan February—but provided defendant with no net monetary benefit overall—was not immoral, unethical, oppressive or unscrupulous, or substantially injurious. 160 Cal. App. 4th 638, 649 (2008). And, most applicable here, declining to advertise another business’s services but not excluding those services from the market is not an unfair practice. In *Drum v. San Fernando Valley Bar Assn.*, the court found that the bar association’s refusal to sell its membership mailing list to a mediator not in good standing with the bar was not immoral, unethical or unscrupulous because the association did not otherwise prevent the consumers from being able to find or engage the mediator’s services. 182 Cal. App. 4th 247, 257 (2010); *cf. Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1133 (9th Cir. 2014) (withholding positive business reviews was not extortion under the UCL because Yelp had no obligation to provide positive reviews).

Here, the alleged conduct does not rise to the level of being “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” While political discrimination may fall under the umbrella of these terms, the Court must, again, focus on the business

practice and the harms to the consumer. *See Hodsdon*, 891 F.3d at 867. Having a small number of wanted emails diverted to spam on occasion is not “substantially injurious” to Gmail users. Google is not alleged to have diverted the emails to force users to pay large sums of money to get their emails back; the users could access those emails at any time. Nor did Google realize any monetary benefit from diverting the RNC’s emails. While the practice did allegedly cause substantial monetary injury to the RNC, the Gmail users were not harmed in a similar way.

The allegations of political discrimination, if true, are certainly concerning and may have wide and severe implications for the future of political discourse. It may even be that Google’s conduct is “unfair” in a colloquial, as opposed to a legal, sense. But it is not the role of this Court to decide these significant policy issues that must be addressed by a legislative body in the first instance. As broad as it is, California’s Unfair Competition Law does not cover the conduct alleged by the RNC. Accordingly, the Court GRANTS the Motion to Dismiss as to the Third Cause of Action.

## **ii. Intentional Interference with Prospective Economic Relations**

To plead the tort of intentional interference with prospective economic relations, a plaintiff must plead: “(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and

(5) economic harm to the plaintiff proximately caused by the acts of the defendant.” *Korea Supply*, 29 Cal. 4th at 1153. The California Supreme Court has clarified that to meet the third element, “a plaintiff must plead and prove that the defendant’s acts are wrongful apart from the interference itself.” *Id.* at 1154; see *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995).

### **1. Independently Wrongful Act**

The Court previously dismissed the RNC’s claim of intentional interference with prospective economic relations on the basis that the RNC had not plead some independent unlawful conduct to support this claim. “[A] plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff’s expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself.” *Della Penna*, 11 Cal. 4th at 393. “[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.” *Korea Supply*, 29 Cal. 4th at 1159.

The RNC argues that Google’s conduct is independently wrongful because it violates the UCL and “the common law’s established common-carrier doctrine.” (Opp’n at 20.) As determined above, the RNC has not established a violation of the UCL and so it cannot form the basis of the intentional interference claim. The common carrier argument similarly fails. The supposed common-law common carrier doctrine is

derived from a—now vacated—out of circuit opinion assessing a different state’s statutory common carrier law. In the opinion, the Fifth Circuit explicitly states that the historical common carrier doctrine “vests *States* with the power to impose nondiscrimination obligations on communication and transportation providers,” and then surveys how some States have enacted various common carrier laws defining and regulating common carriers in different ways. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 470-72 (5th Cir. 2022) (emphasis added), *cert. granted in part sub nom. NetChoice, LLC v. Paxton*, 147 S. Ct. 447 (2023), and *vacated and remanded sub nom. Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024). The Court has already discussed at length in its prior Order why under California law—the law applicable here—Google is not a common carrier and thus not subject to any duties of a common carrier. (Order at 16-22.)

Additionally, the RNC briefly alleges that Google’s conduct is independently wrongful because Google violated “established industry, trade or professional rules or standards, such as Google’s own terms of service and implied warranties.” (FAC ¶ 158.) While industry standards and professional rules may satisfy the requirement that a plaintiff prove an independently wrongful act, the conduct must be proscribed by some “determinable legal standard” that “provides for, or gives rise to, a sanction or means of enforcement for a violation.” *Stevenson Real Est. Servs., Inc. v. CB Richard Ellis Real Est. Servs., Inc.*, 138 Cal. App. 4th 1215, 1223 (2006). That a defendant’s conduct may be “unethical” or may have violated industry standards is insufficient without a determinable means by which to enforce the industry standard or rule. *Gemini*

*Aluminum Corp. v. California Custom Shapes, Inc.*, 95 Cal. App. 4th 1249, 1259 (2002). For example, in *Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc.*, the court held that despite the American Industrial Real Estate Association's Rules of Professional Conduct establishing a well-defined standard for what was "permitted, required and prohibited" within the industry, a violation of the rules could not be considered independently wrongful under *Korea Supply* because there was no way for an aggrieved member to enforce the rules through, for example, a sanction, right of arbitration, or other internal remedy. *Stevenson Real Estate*, 138 Cal. App. 4th at 1222-24. Here, the RNC fails to explain either in the FAC or its Opposition what the industry, trade, or professional rules or standards are, how or where those standards and rules are clearly established, or how they are enforceable. Accordingly, this allegation is not enough to establish an independently wrongful act.

The RNC has therefore failed to plead any independently wrongful conduct to support its claim.

## **2. Probability of an Economic Benefit**

The RNC's claim also fails for the independent reason that the RNC has not adequately pled the probability of an economic benefit. *See Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.*, 2 Cal. 5th 505, 511 (2017). As stated above, a plaintiff must allege an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff.



While Google is correct that an intentional interference claim requires the plaintiff “to identify a particular relationship or opportunity with which the defendant’s conduct is alleged to have interfered,” this requirement does not require a plaintiff to *name* an individual. *Damabeh v. 7-Eleven, Inc.*, No. 5:12-CV-1739-LHK, 2013 WL 1915867, at \*10 (N.D. Cal. May 8, 2013); see *Soil Retention Prod., Inc. v. Brentwood Indus., Inc.*, 521 F. Supp. 3d 929, 961 (S.D. Cal. 2021). Rather, the purpose of the requirement is to distinguish between established and speculative relationships. *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 524 (1996). The requirement “does not mean the party must [be] identified by name; it [i]s enough that the defendant was aware its actions would frustrate the legitimate expectations of a *specific*, albeit unnamed, [party].” *Id.* (citing *Ramona Manor Convalescent Hosp. v. Care Enterprises*, 177 Cal. App. 3d 1120 (1986), *as modified on denial of reh’g* (Mar. 5, 1986)); see also *Weintraub Fin. Servs., Inc. v. Boeing Co.*, No. CV-20-3484-MWF-GJSx, 2020 WL 6162801, at \*8 (C.D. Cal. Aug. 7, 2020) (holding that the plaintiffs had “alleged a ‘particular relationship or opportunity with which the defendant’s conduct . . . interfered’ rather than vague allegations regarding a relationship with an ‘as yet unidentified’ customer” despite not naming the buyer). With these principles in mind, the RNC has sufficiently alleged a pre-existing relationship with a class of Gmail users who had donated to the RNC in the past.

Despite pleading the requisite relationships, the RNC has failed to plead the reasonable probability of an economic benefit stemming from these relationships. Overall, courts have narrowly construed this element,

requiring specific facts to show that a benefit was almost certain. See *Roy Allan Slurry Seal, Inc.*, 2 Cal. 5th at 518; *Pac. Gas & Elec. Co. v. Bear Stearns & Co.* 50 Cal. 3d 1118, 1136-1137 (1990) (noting that courts “have been cautious in defining the interference torts, to avoid promoting speculative claims.”). The fact that a plaintiff has a preexisting business relationship with a party is not sufficient; the plaintiff must provide details about the impending contract or other economic benefit. See *Soil Retention*, 521 F. Supp. 3d at 961 (requiring a plaintiff to allege “not just ‘an economic relationship between the plaintiff and some third party’ but also the [ ]probability of future economic benefit to the plaintiff.” (quoting *Korea Supply*, 29 Cal. 4th at 1153)). For example, the failure to specify “what the terms were, when the contracts were being negotiated (*e.g.*, whether those contracts fell through before, during, or after Defendant’s alleged . . . acts), and how much money, if any, Plaintiff lost as a result” dooms a claim. *Id.* at 962.

Here, the RNC has alleged only that the users requested RNC emails, engaged with the emails, and have donated in the past without any other facts to establish that these users would donate in the future. (See FAC ¶¶ 2, 27-32, 53, 56; Opp’n at 18). The RNC has failed to point to any case where a past economic relationship standing alone was enough to show the reasonable probability of a future benefit, and the Court has been unable to find one in its own review. See, *e.g.*, *Putian Authentic Enter. Mgmt. Co., Ltd v. Meta Platforms, Inc.*, No. 5:22-CV-01901-EJD, 2022 WL 1171034, at \*5 (N.D. Cal. Apr. 19, 2022) (finding that description of “past customers, not future customers” did not suffice to establish interference with

a future business benefit). Similarly, the fact that users request and “engage” with emails does not support the conclusion that a user would have also donated. Without more facts about the nature or frequency of the past donations to bolster the probability of a recurrence, the RNC has established “at most a hope for . . . future benefit.” *Blank v. Kirwan* 39 Cal. 3d 311, 331 (1985).

Thus, the RNC has failed to allege the elements necessary for its intentional interference with prospective economic relations claim. Accordingly, the Court GRANTS the Motion to Dismiss as to the Fourth Cause of Action.

### **iii. Leave to Amend**

Despite being given leave to amend to establish “a plausible theory of unfairness or unlawfulness” for its UCL claim, and to allege an independently wrongful act to support its intentional interference claim, the RNC has failed to do either. The RNC has not provided any indication that there are additional facts it could allege to establish these elements of its claims. Therefore, the Court finds that amendment would be futile. See *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009), *as amended* (Feb. 10, 2009) (denial of leave to amend appropriate where amendment would be futile because the plaintiff had no additional facts to plead).

## **IV. Conclusion**

For the above reasons, IT IS HEREBY ORDERED that Google’s Motion to Dismiss (ECF No. 60) is GRANTED. The RNC’s claims are hereby DISMISSED WITH PREJUDICE.

App.133a

The Clerk of Court is directed to close this case.

/s/ The Honorable Daniel J. Calabretta  
United States District Judge

Dated: July 31, 2024

**STATEMENT OF JJ. THOMAS AND GORSUCH,  
DISSENTING FROM DENIAL OF CERTIORARI  
IN *DOE v. SNAP INC*  
(JULY 2, 2024)**

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SUPREME COURT OF THE UNITED STATES

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JOHN DOE, THROUGH NEXT  
FRIEND JANE ROE

v.

SNAP, INC., DBA SNAPCHAT, L.L.C.,  
DBA SNAP, L.L.C.

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No. 23–961

On Petition for Writ of Certiorari to the  
United States Court Of Appeals for the Fifth Circuit  
Before: THOMAS and GORSUCH, Justices.

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The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE  
GORSUCH joins, dissenting from the denial of certio-  
rari.

When petitioner John Doe was 15 years old, his  
science teacher groomed him for a sexual relationship.  
The abuse was exposed after Doe overdosed on  
prescription drugs provided by the teacher. The teacher  
initially seduced Doe by sending him explicit content  
on Snapchat, a social-media platform built around the  
feature of ephemeral, self-deleting messages.

Snapchat is popular among teenagers. And, because messages sent on the platform are self-deleting, it is popular among sexual predators as well. Doe sued Snapchat for, among other things, negligent design under Texas law. He alleged that the platform’s design encourages minors to lie about their age to access the platform, and enables adults to prey upon them through the self-deleting message feature. *See* Pet. for Cert. 14-15. The courts below concluded that § 230 of the Communications Decency Act of 1996 bars Doe’s claims. 47 U.S.C. § 230. The Court of Appeals denied rehearing en banc over the dissent of Judge Elrod, joined by six other judges. 88 F.4th 1069 (2023).

The Court declines to grant Doe’s petition for certiorari. In doing so, the Court chooses not to address whether social-media platforms—some of the largest and most powerful companies in the world—can be held responsible for their own misconduct. Section 230 of the Communications Decency Act states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” § 230(c)(1). In other words, a social-media platform is not legally responsible as a publisher or speaker for its users’ content.

Notwithstanding the statute’s narrow focus, lower courts have interpreted § 230 to “confer sweeping immunity” for a platform’s own actions. *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 592 U.S. \_\_\_, \_\_\_ (2020) (statement of THOMAS, J., respecting denial of certiorari) (slip op., at 1). Courts have “extended § 230 to protect companies from a broad array of traditional product-defect claims.” *Id.*, at \_\_\_, \_\_\_ (slip op., at 8–9) (collecting examples). Even when

platforms have allegedly engaged in egregious, intentional acts—such as “deliberately structur[ing]” a website “to facilitate illegal human trafficking”—platforms have successfully wielded § 230 as a shield against suit. *Id.*, at \_\_\_\_ (slip op., at 8); see *Doe v. Facebook*, 595 U.S. \_\_\_, \_\_\_\_ (2022) (statement of THOMAS, J., respecting denial of certiorari) (slip op., at 2).

The question whether § 230 immunizes platforms for their own conduct warrants the Court’s review. In fact, just last Term, the Court granted certiorari to consider whether and how § 230 applied to claims that Google had violated the Antiterrorism Act by recommending ISIS videos to YouTube users. See *Gonzalez v. Google LLC*, 598 U.S. 617, 621 (2023). We were unable to reach § 230’s scope, however, because the plaintiffs’ claims would have failed on the merits regardless. See *id.*, at 622 (citing *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023)). This petition presented the Court with an opportunity to do what it could not in *Gonzalez* and squarely address § 230’s scope.

Although the Court denies certiorari today, there will be other opportunities in the future. But, make no mistake about it—there is danger in delay. Social-media platforms have increasingly used § 230 as a get-out-of-jail free card. Many platforms claim that users’ content is their own First Amendment speech. Because platforms organize users’ content into newsfeeds or other compilations, the argument goes, platforms engage in constitutionally protected speech. See *Moody v. NetChoice*, 603 U.S. \_\_\_, \_\_\_\_ (2024). When it comes time for platforms to be held accountable for their websites, however, they argue the opposite.

Platforms claim that since they are *not* speakers under § 230, they cannot be subject to any suit implicating users' content, even if the suit revolves around the platform's alleged misconduct. *See Doe*, 595 U.S., at \_\_\_, \_\_\_ (statement of THOMAS, J.) (slip op., at 1–2). In the platforms' world, they are fully responsible for their websites when it results in constitutional protections, but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry. The Court should consider if this state of affairs is what § 230 demands. I respectfully dissent from the denial of certiorari.



App.138a

**FYK SUPPLEMENTAL AUTHORITY:  
ANDERSON V. TIKTOK  
(SEPTEMBER 3, 2024)**

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***NOTICE OF FILING SUPPLEMENTAL  
8/27/24 AUTHORITY***

September 3, 2024

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*Via ECF*

U.S. Court of Appeals for the Ninth Circuit

Re: *Jason Fyk v. Facebook, Inc.*, No. 24-465  
Appellant's Supplemental Authority in  
Further Support of Appeal

Dear your Honors:

Plaintiff-Appellant ("Fyk") commenced the above-captioned appeal in early-March 2024. Briefing closed on July 1, 2024, with Fyk's filing of his Reply Brief [D.E. 18]. Oral argument is presently scheduled in early-November 2024. Per Fed. R. App. P. 28(j) and 9th Cir. R. 28-6 (and AC notes), Fyk submits/encloses this August 27, 2024, decision as supplemental author-

ity in further support of his appellate briefs: *Anderson v. TikTok, Inc.*, No. 22-3061, 2024 WL 3948248 (3d Cir. Aug. 27, 2024).

The *Anderson* decision confirms what Fyk has been saying all along. For example, the *Anderson* court properly held as follows: (a) interactive computer services “are immunized only if they are sued for someone else’s expressive authority or content (*i.e.*, third-party speech), but they are not immunized if they are sued for their own expressive activity or content (*i.e.*, first-party speech).” *Id.* at \*3. (b) 230(c)(1) “allows suits to proceed if the allegedly wrongful conduct is not based on the mere hosting of third-party content, but on the acts or omissions of the provider of the interactive computer service.” *Id.* at \*9.

Here, as discussed in Fyk’s appellate briefing (*see, e.g.*, July 1, 2024, Reply Brief, [D.E. 18] at 8-10 discussing *Diep v. Apple, Inc.*, No. 22-16514, 2024 WL 16514 (9th Cir. Mar. 27, 2024), at 10-13 discussing *X Corp. v. Bright Data LTD.*, No. 23-03698-WHA, 2024 WL 2113859 (N.D. Cal. May 9, 2024), and at 13-17 discussing *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021) vis-a-vis *Wozniack, et al. v. YouTube, LLC, et al.*, 319 Cal. Rptr. 3d 597 (Ct. App. 6th Dist. App. Apr. 2, 2024)), the duties underlying Fyk’s causes of action purely concern Facebook’s acts or omissions; *i.e.*, Facebook’s wrongdoing. Hence, the above Third Circuit case squares with Ninth Circuit authority and is accordingly additional support for Fyk on this appeal.

Undersigned hereby certifies that the above body of this letter does not exceed 350 words per Fed. R. App. 28(j) and 9th Cir. R. 28-6; the body totals 305 words.

App.140a

Submitted By:

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Enclosure

CC: Facebook, Inc., Counsel of Record *via* e-filing of  
equal date

**OPINION, U.S. COURT OF APPEALS FOR THE  
THIRD CIRCUIT IN *ANDERSON v. TIKTOK*  
(AUGUST 27, 2024)**

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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TAWAINNA ANDERSON, INDIVIDUALLY AND  
AS ADMINISTRATRIX OF THE ESTATE OF  
N.A., A DECEASED MINOR,

*Appellant,*

v.

TIKTOK, INC.; BYTEDANCE, INC.

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No. 22-3061

On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. Civil No. 2-22-cv-01849)

U.S. District Judge: Honorable Paul S. Diamond

Argued January 17, 2024

(Filed: August 27, 2024)

Before: SHWARTZ, MATEY, and PHIPPS,  
Circuit Judges.

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**OPINION OF THE COURT**

SHWARTZ, *Circuit Judge.*

TikTok, Inc., via its algorithm, recommended and promoted videos posted by third parties to ten-year-old Nylah Anderson on her uniquely curated “For You Page.” One video depicted the “Blackout Challenge,” which encourages viewers to record themselves engaging in acts of self-asphyxiation. After watching the video, Nylah attempted the conduct depicted in the challenge and unintentionally hanged herself. Nylah’s mother, Tawainna Anderson, sued TikTok and its corporate relative ByteDance, Inc., (collectively, “TikTok”) for violations of state law. The District Court dismissed her complaint, holding that the Communications Decency Act (“CDA”), 47 U.S.C. § 230, immunizes TikTok. For the following reasons, we will reverse in part, vacate in part, and remand.

## I

### A<sup>1</sup>

TikTok is a video-sharing social media platform that allows users to create, post, and view content. TikTok users can search the platform for content or, without searching, view content that TikTok’s algorithm recommends by posting the content to a user’s “For You Page” (“FYP”).<sup>2</sup> TikTok’s algorithm is not based

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<sup>1</sup> We draw the facts from the complaint, accept them as true, *Santiago v. Warminster Twp.*, 629 F.3d 121, 128 (3d Cir. 2010), and “view[] them in the light most favorable to [the] plaintiff,” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (citation omitted). “[W]e disregard legal conclusions and ‘recitals of the elements of a cause of action, supported by mere conclusory statements.’” *Santiago*, 629 F.3d at 128 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

<sup>2</sup> An algorithm is a set of digital instructions that perform a task. *See Force v. Facebook, Inc.*, 934 F.3d 53, 58 (2d Cir. 2019)

solely on a user's online inputs. Rather, the algorithm curates and recommends a tailored compilation of videos for a user's FYP based on a variety of factors, including the user's age and other demographics, online interactions, and other metadata.

Some videos that may appear on users' FYPs are known as "challenges," which urge users to post videos of themselves replicating the conduct depicted in the videos. The "Blackout Challenge . . . encourages users to choke themselves with belts, purse strings, or anything similar until passing out." App. 31 (Compl. ¶ 64). TikTok's FYP algorithm recommended a Blackout Challenge video to Nylah, and after watching it, Nylah attempted to replicate what she saw and died of asphyxiation.

## B

Anderson, as the administratrix of Nylah's estate, sued TikTok in the United States District Court for the Eastern District of Pennsylvania, asserting claims for, among other things, strict products liability and negligence.<sup>3</sup> She alleges that TikTok: (1) was aware of

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(citation omitted).

<sup>3</sup> Anderson also brings claims for wrongful death and under Pennsylvania's Survival Act, 42 Pa. Cons. Stat. § 8302. Because those claims are derivative of her tort claims, her ability to pursue them depends on whether her tort claims survive the motion to dismiss. *See Tulewicz v. Se. Pa. Transp. Auth.*, 606 A.2d 427, 431 (Pa. 1992) (survival action); *Valentino v. Phila. Triathlon, LLC*, 150 A.3d 483, 493 (Pa. Super. Ct. 2016) (wrongful death).

Anderson abandoned her claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. and Cons. Stat. § 201-1 *et seq.*, and the California Consumer Legal

the Blackout Challenge; (2) allowed users to post videos of themselves participating in the Blackout Challenge; and (3) recommended and promoted Blackout Challenge videos to minors' FYPs through its algorithm, including at least one such video to Nylah's FYP, which resulted in her death. The District Court dismissed the complaint, holding that TikTok was immune under § 230 of the CDA, 47 U.S.C. § 230. *Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276, 282 (E.D. Pa. 2022).

Anderson appeals.<sup>4</sup>

## II<sup>5</sup>

Congress enacted § 230 of the CDA to immunize interactive computer services ("ICSs")<sup>6</sup> from liability based on content posted by third parties in certain circumstances. *See F.T.C. v. Accusearch Inc.*, 570 F.3d

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Remedies Act, Cal. Civ. Code § 1750 *et seq.* *See Anderson v. TikTok, Inc.*, 637 F. Supp. 3d 276, 279 (E.D. Pa. 2022).

<sup>4</sup> Anderson does not challenge the District Court's order denying her motion for leave to file an amended complaint.

<sup>5</sup> The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(a). We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over a district court's order granting a motion to dismiss. *Santiago*, 629 F.3d at 128 (citation omitted). "To survive a motion to dismiss, a complaint must . . . plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted).

<sup>6</sup> TikTok is an "interactive computer service," which is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet[.]" 47 U.S.C. § 230(0)(2).

1187, 1195 (10th Cir. 2009).<sup>7</sup> Section 230 immunizes ICSs only to the extent that they are sued for “information provided by another information content provider.”<sup>8</sup> 47 U.S.C. § 230(c)(1).<sup>9</sup> In other words, ICSs are immunized only if they are sued for someone else’s expressive activity or content (*i.e.*, third-party speech), but they are not immunized if they are sued for their own expressive activity or content (*i.e.*, first-party speech).

Anderson asserts that TikTok’s algorithm “amalgamat[es] [] third-party videos,” which results in “an expressive product” that “communicates to users . . . that the curated stream of videos will be interesting to them[.]” ECF No. 50 at 5. The Supreme Court’s recent discussion about algorithms, albeit in the First Amendment context, supports this view.<sup>10</sup>

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<sup>7</sup> Specifically, “Congress enacted the CDA in response to a state-court decision which held that the provider of an online messaging board could be liable for defamatory statements posted by third-party users of the board.” *Accusearch Inc.*, 570 F.3d at 1195 (citations omitted).

<sup>8</sup> “The term ‘information content provider’ means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other [ICS].” 47 U.S.C. § 230(0)(3).

<sup>9</sup> The immunity stems from the statutory language providing, with limited exceptions that do not apply here, 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 § 230(c)(1). 47 U.S.C. § 230(e).

<sup>10</sup> In *Moody v. NetChoice, LLC*, the Supreme Court considered social media platforms’ algorithms that construct feeds to relay content to users. 144 S. Ct. 2383, 2393 (2024). The Court described the platforms at issue in *NetChoice* as ones that “cull



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and organize uploaded posts in a variety of ways. A user does not see everything. . . . The platforms will have removed some content entirely; ranked or otherwise prioritized what remains; and sometimes added warnings or labels.” *Id.* at 2395. The Court explained that, by engaging in such activity, the platforms “shape other parties’ expression into their own curated speech products.” *Id.* at 2393. Although “[t]he selection and ranking is most often based on a user’s expressed interests and past activities,” the Court noted that “it may also be based on more general features of the communication or its creator[,]” particularly given that some platforms have guidelines that “detail the messages and videos that the platform[] disfavor[s.]” *Id.* at 2403.

In holding that “expressive activity includes presenting a curated compilation of speech originally created by others[,]” *id.* at 2400, the Court declined to address “algorithms [that] respond solely to how users act online[,]” *id.* at 2404 n.5. Accordingly, the presence or absence of a platform’s standards or preferences that govern an algorithm’s choices may dictate whether the algorithm is expressive speech, *id.* at 2410 (Barrett, J., concurring), as might whether the platform is a “passive receptacle[] of third-party speech . . . that emit[s] what [it is] fed” or whether it only responds to specific user inquiries, *id.* at 2431 (Alito, J., concurring in the judgment). *See also id.* at 2409-10 (Barrett, J., concurring) (distinguishing types of algorithms); *id.* at 2430-32 (Alito, J., concurring in the judgment) (same).

Because TikTok concedes that Anderson’s complaint “describe[s] an algorithm indistinguishable from those addressed in *NetChoice*[,]” ECF No. 51 at 2, which the Supreme Court described as one that results in expressive speech, *NetChoice*, 144 S. Ct. at 2405 (holding that “social-media platforms are in the business, when curating their feeds, of combining multifarious voices to create a distinctive expressive offering” (internal quotation marks and citation omitted)), we need not weigh in on whether other algorithms result in expressive speech. Moreover, because TikTok’s “algorithm, as described in the complaint, does not” “respond solely to how users act online,” ECF No. 51 at 2 (quoting *NetChoice*, 144 S. Ct. at 2404 n.5), TikTok makes choices about the content recommended and promoted to specific users, and by doing so, is engaged in its own first-party speech.

In *Moody v. NetChoice, LLC*, the Court considered whether state laws that “restrict the ability of social-media platforms to control whether and how third-party posts are presented to other users” run afoul of the First Amendment. 144 S. Ct. 2383, 2393 (2024). The Court held that a platform’s algorithm that reflects “editorial judgments” about “compiling the third-party speech it wants in the way it wants” is the platform’s own “expressive product” and is therefore protected by the First Amendment. *Id.* at 2394.

Given the Supreme Court’s observations that platforms engage in protected first-party speech under the First Amendment when they curate compilations of others’ content via their expressive algorithms, *id.* at 2409, it follows that doing so amounts to first-party speech under § 230, too. *See Doe ex rel. Roe v. Snap, Inc.*, 144 S. Ct. 2493, 2494 (2024) (Thomas, J., dissenting from denial of certiorari) (observing that “[i]n the platforms’ world, they are fully responsible for their websites when it results in constitutional protections, but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry.”).

Here, as alleged, TikTok’s FYP algorithm “[d]ecid[es] on the third-party speech that will be included in or excluded from a compilation—and then organiz[es] and present[s] the included items” on users’ FYPs. *NetChoice*, 144 S. Ct. at 2402. Accordingly, TikTok’s algorithm, which recommended the Blackout Challenge to Nylah on her FYP, was TikTok’s own “expressive activity,” *id.*, and thus its first-party speech. Such first-party speech is the basis for Anderson’s claims. *See* App. 39 (Compl. ¶ 107(k),

(o)) (alleging, among other things, that TikTok’s FYP algorithm was defectively designed because it “recommended” and “promoted” the Blackout Challenge).<sup>11</sup> Section 230 immunizes only information “provided by another[.]” 47 U.S.C. § 230(c)(1), and here, because the information that forms the basis of Anderson’s lawsuit—*i.e.*, TikTok’s recommendations via its FYP algorithm—is TikTok’s own expressive activity, § 230 does not bar Anderson’s claims.<sup>12,13</sup>

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<sup>11</sup> We recognize that TikTok’s first-party speech captures certain third-party speech. However, “exercis[ing] editorial discretion in the selection and presentation’ of content” qualifies as “speech activity’ . . . [whether] the content comes from third parties [or] it does not.” *NetChoice*, 144 S. Ct. at 2402 (first alteration in original) (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998)).

<sup>12</sup> We reach this conclusion specifically because TikTok’s promotion of a Blackout Challenge video on Nylah’s FYP was not contingent upon any specific user input. Had Nylah viewed a Blackout Challenge video through TikTok’s search function, rather than through her FYP, then TikTok may be viewed more like a repository of third-party content than an affirmative promoter of such content. Given the type of algorithm alleged here, we need not address whether § 230 immunizes any information that may be communicated by the results of a user’s search of a platform’s content.

We need not address in this case the publisher/distributor distinction our colleague describes, nor do we need to decide whether the word “publisher” as used in § 230 is limited to the act of allowing third-party content to be posted on a website an ICS hosts, as compared to third-party content an ICS promotes or distributes through some additional action, because, in this case, the only distribution at issue is that which occurred via TikTok’s algorithm, which as explained herein, is not immunized by § 230 because the algorithm is TikTok’s own expressive activity.

<sup>13</sup> We recognize that this holding may be in tension with *Green*

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*v. America Online (AOL)*, where we held that § 230 immunized an ICS from any liability for the platform’s failure to prevent certain users from “transmit[ing] harmful online messages” to other users. 318 F.3d 465, 468 (3d Cir. 2003). We reached this conclusion on the grounds that § 230 “bar[red] ‘lawsuits seeking to hold a service provider liable for . . . deciding whether to publish, withdraw, postpone, or alter content.’” *Id.* at 471 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). *Green*, however, did not involve an ICS’s content recommendations via an algorithm and pre-dated *NetChoice*. Similarly, our holding may depart from the *pre-NetChoice* views of other circuits. *See, e.g., Dyroff v. Ultimate Software Grp.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (“[R]ecommendations and notifications . . . are not content in and of themselves.”); *Force v. Facebook, Inc.*, 934 F.3d 53, 70 (2d Cir. 2019) (“Merely arranging and displaying others’ content to users . . . through [] algorithms—even if the content is not actively sought by those users—is not enough to hold [a defendant platform] responsible as the developer or creator of that content.” (internal quotation marks and citation omitted)); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016) (concluding that § 230 immunity applied because the structure and operation of the website, notwithstanding that it effectively aided sex traffickers, reflected editorial choices related to traditional publisher functions); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (adopting *Zeran* by noting that “traditional editorial functions” are immunized by § 230); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (immunizing a platform’s “decision whether to print or retract a given piece of content”); *Johnson v. Arden*, 614 F.3d 785, 791-92 (8th Cir. 2010) (adopting *Zeran*); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (rejecting an argument that § 230 immunity was defeated where the allegations went to the platform’s traditional editorial functions).

### III

For the foregoing reasons, we will reverse in part, vacate in part, and remand.<sup>14</sup>

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<sup>14</sup> To the extent that Anderson still pursues any claims not premised upon TikTok's algorithm, we leave to the District Court to determine, among other things, whether, consistent with this Opinion, those claims are barred by § 230. *See* Appellant's Br. at 21 (acknowledging that TikTok's "initial action in publishing the Blackout Challenge generally on the TikTok app may very well fall within the protections of the CDA"); Reply Br. at 9 n.1 (acknowledging that certain allegations in Anderson's complaint may be barred by the CDA).

**MATEY, *Circuit Judge*, concurring in the judgment in part and dissenting in part.**

TikTok reads § 230 of the Communications Decency Act, 47 U.S.C. § 230, to permit casual indifference to the death of a ten-year-old girl. It is a position that has become popular among a host of purveyors of pornography, self-mutilation, and exploitation, one that smuggles constitutional conceptions<sup>1</sup> of a “free trade in ideas” into a digital “cauldron of illicit loves” that leap and boil with no oversight, no accountability, no remedy.<sup>2</sup> And a view that has found support in a surprising number of judicial opinions dating from the early days of dial-up to the modern era of algorithms, advertising, and apps.

But it is not found in the words Congress wrote in § 230, in the context Congress acted, in the history of common carriage regulations, or in the centuries of tradition informing the limited immunity from liability enjoyed by publishers and distributors of “content.” As best understood, the ordinary meaning of § 230 provides TikTok immunity from suit for hosting videos created and uploaded by third parties. But it does not

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<sup>1</sup> Assumptions that find no support in the First Amendment, which “was not designed or originally understood to provide a font of judicially crafted doctrines protecting expressive freedom.” Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 320 (2017). And “[t]he problem with Section 230 is that in a bout of free speech zeal, courts have interpreted the law to be far more extensive than it is written or should be.” Daniel Solove, *Restoring the CDA Section 230 to What It Actually Says*, TeachPrivacy (Feb. 4, 2021), <https://teachprivacy.com/restoring-the-cda-section-230-to-what-it-actually-says/>.

<sup>2</sup> Saint Augustine of Hippo, *The Confessions of Saint Augustine* 42 (Hackett Publishing Co. 2006).

shield more, and Anderson’s estate may seek relief for TikTok’s knowing distribution and targeted recommendation of videos it knew could be harmful. Accordingly, I concur in the judgment in part and dissent in part.

## I.

### A.

Ten-year-old Nylah Anderson died after attempting to recreate the “Blackout Challenge” she watched on TikTok. The Blackout Challenge—performed in videos widely circulated on TikTok—involved individuals “chok[ing] themselves with belts, purse strings, or anything similar until passing out.” App. 31.<sup>3</sup> The videos “encourage[d]” viewers to record themselves doing the same and post their videos for other TikTok users to watch. App. 31. Nylah, still in the first year of her adolescence, likely had no idea what she was doing or that following along with the images on her screen would kill her. But TikTok knew that Nylah would watch because the company’s customized algorithm placed the videos on her “For You Page”<sup>4</sup> after it “determined that the Blackout Challenge was ‘tailored’ and ‘likely to be of interest’ to Nylah.” App. 31.

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<sup>3</sup> We must take the well-pleaded factual allegations drawn from the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

<sup>4</sup> The For You Page displays a unique series of videos to each user based on TikTok’s algorithm, which “selects which videos are shown to each user based on the user’s demographics, including age, [and] user interactions such as the videos viewed and shared.” App. 28 (emphasis omitted).

No one claims the videos Nylah viewed were created by TikTok; all agree they were produced and posted by other TikTok subscribers. But by the time Nylah viewed these videos, TikTok knew that: 1) “the deadly Blackout Challenge was spreading through its app,” 2) “its algorithm was specifically feeding the Blackout Challenge to children,” and 3) several children had died while attempting the Blackout Challenge after viewing videos of the Challenge on their For You Pages. App. 31-32. Yet TikTok “took no and/or completely inadequate action to extinguish and prevent the spread of the Blackout Challenge and specifically to prevent the Blackout Challenge from being shown to children on their [For You Pages].” App. 32-33. Instead, TikTok continued to recommend these videos to children like Nylah.

**B.**

Following her daughter’s death, Tawainna Anderson sued TikTok and its parent company, ByteDance, Inc. Anderson seeks to hold TikTok liable for 1) hosting the Blackout Challenge videos on its platform, 2) continuing to distribute the videos after it learned about the videos and the deaths that followed, and 3) recommending the videos to Nylah after TikTok knew the videos were likely to cause harm. TikTok moved to dismiss, arguing that Anderson sought to hold TikTok liable for acts completely immunized by § 230(c)(1). The District Court agreed.

**II.**

TikTok maintains that Anderson’s claims are foreclosed by a nearly-limitless interpretation of § 230 adopted by several courts. But the best reading of the



statute suggests a far narrower understanding of § 230 immunity.

**A.**

Like any man-made law, § 230 did not appear in a vacuum, and “some context is key to understanding Congress’s aim” and the precise language it selected. *OI Eur. Grp. B. V. v. Bolivarian Republic of Venezuela*, 73 F.4th 157, 166 (3d Cir. 2023), *cert. denied*, 144 S. Ct. 549 (2024); *see also* 1 William Blackstone, *Commentaries* \*61, \*87. Congress enacted § 230 following more than a century of state and federal law regulating the transmission of third-party information and against the backdrop of two widely discussed judicial decisions addressing the liability of online service providers. Those decisions tracked traditional liability regimes that shielded parties who merely sent along allegedly harmful information, while imposing duties on those who did so with specific knowledge of the harmful nature of the content.

1. Begin with the birth of long-distance communication. Like the chat rooms and bulletin boards provided by 1990s online service providers, telegraph companies long served as the conduit for communication for much of the late nineteenth and early twentieth centuries. Given the immense market power of the telegraph,<sup>5</sup> the law regularly imposed access and nondiscrimination duties familiar to physical networks like railroads.<sup>6</sup> That raised questions about liability,

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<sup>5</sup> *See* Matt Stoller, *Goliath* 5-7 (2019).

<sup>6</sup> *See* Peter Huber, *Law and Disorder in Cyberspace* 26 (1997) (“Federal authorities had already been regulating railroads for decades. Congress figured that regulating phones would be much

since state laws often held companies responsible for negligent deliveries. See Adam Candeub, *The Common Carrier Privacy Model*, 51 U.C. Davis L. Rev. 805, 810-15 (2018). Liability could also attach based on the content of third-party information. See Adam Candeub, *Reading Section 230 as Written*, 1 J. of Free Speech L. 139, 145-47 & 146 n.26 (2021). While telegraph operators were ordinarily not responsible for the materials they transmitted, see *O'Brien v. W. U Tel. Co.*, 113 F.2d 539, 541-43 (1st Cir. 1940), liability could attach if the company knew the content was harmful, see *Von Meysenbug v. W. U Tel. Co.*, 54 F. Supp. 100, 101 (S.D. Fla. 1944); see also *Biden v. Knight First Amend. Inst. At Columbia Univ.*, 141 S. Ct. 1220, 1223 & n.3 (2021) (Thomas, J., concurring).<sup>7</sup> But that was the rare exception.

This was the common-sense system throughout the twentieth century.<sup>8</sup> Transmitters usually had

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the same.”); see also James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 261-68 (2002); *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223 & n.2 (2021) (Thomas, J., concurring); *Cellco P'ship v. FCC*, 700 F.3d 534, 545-46 (D.C. Cir. 2012). Common carriage arrangements pursued a regulatory bargain, with carriers receiving benefits (like immunities from suit and market control) in exchange for increased delivery obligations. See Adam Candeub, *Bargaining For Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale J.L. & Tech. 391, 398-413 (2020).

<sup>7</sup> Liability for telephone companies came to function much the same way. See Candeub, *Reading Section 230 as Written*, *supra*, at 146 n.26.

<sup>8</sup> It also conformed with the regulation of other common carriers. A railroad, for example, was generally not liable for a passenger's unlawful acts facilitated by the train unless the operator knew

little control over what rode their networks<sup>9</sup> and rarely knew the circumstances that might make a statement harmful.<sup>10</sup> Imposing liability for conduct that lacked culpability would unfairly punish beneficial industries and pin emerging networks under the weight of endless lawsuits. But the scale tipped in a different way when a transmitter of third-party information knew the content was harmful, a distinction that carried into the changes in communications technology during the back half of the twentieth century.

2. The internet began infiltrating daily life in the early 1990s through large commercial service providers like CompuServe, Prodigy, and AOL.<sup>11</sup> These emerging services “were born serving content of their own,”<sup>12</sup> but, facing competition, they expanded to allow

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its service was being used for an unlawful purpose. *See* Bruce Wyman, *Illegality as an Excuse for Refusal of Public Service*, 23 Harv. L. Rev. 577, 584 (1910). So too with telegraphs and telephones that had only a duty to “refuse to transmit messages which would implicate [the company] in illegality,” such as communications these companies knew were libelous, obscene, fraudulent, or otherwise used to further some harmful act proscribed by law. *See id.* at 584-85, 587.

<sup>9</sup> *See* Ryan Gerdes, *Scaling Back 230 Immunity: Why the Communications Decency Act Should Take a Page from the Digital Millennium Copyright Act’s Service Provider Immunity Playbook*, 60 Drake L. Rev. 653, 656 (2012).

<sup>10</sup> Take the telegraph operator transmitting the statement “John is a crook.” If the operator does not know that John is scrupulously law-abiding, the context necessary to make the statement false and libelous is absent.

<sup>11</sup> Lawrence Lessig, *The Future of Ideas* 147 (2001).

<sup>12</sup> *Id.* at 148.

“users to post comments on bulletin boards, open to other members, and to communicate in chat rooms.”<sup>13</sup> Those added functions resurrected the old legal question familiar to common carriers: Should online service providers be liable for the actions of third parties on their networks? Understanding how courts answered this question is essential to understanding the legal context in which § 230 was enacted. Because a 1991 district court decision set the boundaries of liability law for the next three decades.

Believed to be the first case in the United States “to decide whether an online service . . . could be held liable for third-party content,”<sup>14</sup> *Cubby, Inc. v. CompuServe, Inc.* involved a defamation claim arising out of an allegedly libelous statement appearing on one of CompuServe’s “special interest ‘forums.’” 776 F. Supp. 135, 137 (S.D.N.Y. 1991). These fora, “comprised of electronic bulletin boards, interactive online conferences, and topical databases,” allowed subscribers to post their own messages and interact with other users. *Id.* Pivoting from the closed curation of the old networks, CompuServe did not review subscriber postings. *Id.* Inevitably, disagreements arose among the users, and a lawsuit followed seeking to hold CompuServe liable for a posting on its system.

The district court sketched two paths for determining CompuServe’s liability. Perhaps the company could be considered a “publisher,” someone strictly liable for repeating defamatory statements no matter the

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<sup>13</sup> Jeff Kosseff, *The Twenty-Six Words That Created The Internet* 37 (2019).

<sup>14</sup> *Id.* at 42.

company's knowledge of what was said and why it might be actionable. *Id.* at 139. Or the company might be a "distributor," like "news vendors, book stores, and libraries," and liable only if the company knew or had reason to know the statement was defamatory. *Id.* The district court decided CompuServe's forum was "in essence an electronic, for-profit library," with the company having "little or no editorial control over [the forum's] contents." *Id.* at 140. And because it was merely a distributor, liability could only attach if CompuServe knew the post was defamatory (which it did not). *Id.* at 140-41.

*CompuServe* both won praise and stoked worry because the opinion turned on the amount and kind of editorial control exercised by the internet forum, a test that could vary in application from service to service. *See, e.g.,* Jonathan M. Moses & Michael W. Miller, *CompuServe Is not Liable for Contents*, Wall St. J. (Oct. 31, 1991). Prodigy, for example, sold subscribers on the rigor of its screening and the promise that families could enjoy online entertainment without offensive messages. That suggested Prodigy could be subject to strict liability because it was "the only major commercial [bulletin board] operator that monitor[ed] all public messages by screening them before they [were] posted." David J. Conner, Note, *Cubby v. CompuServe*, *Defamation Law on the Electronic Frontier*, 2 Geo. Mason Indep. L. Rev. 227, 240 (1993).

These predictions proved prescient. Three years later, in *Stratton Oakmont, Inc. v. Prodigy Services Company*, Prodigy was sued for hosting allegedly defamatory statements posted on one of its electronic bulletin boards. 1995 WL 323710, at \*1 (N.Y. Sup. Ct. May 24, 1995). Following the reasoning of *CompuServe*,

the *Stratton Oakmont* court found Prodigy “exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.” *Id.* at \*3. That meant Prodigy was liable for any defamatory statements on its service. *Id.* at \*3-5. Though it was a non-precedential opinion issued by a state trial court judge, *Stratton Oakmont* received significant attention, much of it negative.<sup>15</sup> If *Stratton Oakmont’s* reasoning stood, online service providers acting to exclude offensive and obscene content would now risk liability for the rest of the material they hosted. See Adam Candeub, *Bargaining For Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale J.L. & Tech. 391, 421 (2020).

## B.

1. Congress responded vigorously, and a mere nine months after *Stratton Oakmont*, the President signed the Communications Decency Act of 1996 (CDA) into law as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. A last-minute addition to the Telecommunications Act, the CDA was initially designed to regulate internet pornography and protect children from obscene and harmful material. See Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency*

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<sup>15</sup> See Kosseff, *supra*, at 55-71; R. Hayes Johnson Jr., *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Services Co.*, 49 Ark. L. Rev. 589, 594 & n.10 (1996); Douglas B. Luftman, Note, *Defamation Liability for On-Line Services: The Sky Is Not Falling*, 65 Geo. Wash. L. Rev. 1071, 1072 (1997) (describing the “apocalyptic reactions in the legal and technical communities”).

*Act: Regulating Barbarians on the Information Superhighway*, 49 Fed. Comm. L.J. 51, 52-58 (1996). But a month after *Stratton Oakmont*, lawmakers introduced the CDA amendment that ultimately became § 230. See Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995). Unlike other aspects of the CDA, § 230's "proposal and passage flew under the radar" and "received virtually no opposition or media coverage." Jeff Kosseff, *The Twenty-Six Words That Created The Internet* 3 (2019).

As enacted, § 230 created two complementary protections. Section 230(c)(1) directs that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." And § 230(c)(2)(A) states that "[n]o provider or user of an interactive computer service shall be held liable on account of . . . 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." The statute expressly preempts any "cause of action" or "liability" "under any State or local law that is inconsistent with" those provisions. § 230(e)(3).

It is conventional wisdom that § 230 was passed to, at least in part, overrule *Stratton Oakmont*,<sup>16</sup> a

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<sup>16</sup> See Kosseff, *supra*, at 48-82; Candeub, *Bargaining For Free Speech*, *supra*, at 419-21; *Force v. Facebook, Inc.*, 934 F.3d 53, 79-80 (2d Cir. 2019) (Katzmann, J., concurring in part & dissenting in part). Contemporary commentators, *see, e.g.*, Cannon, *supra*, at 61-63, 68, early courts, *see, e.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), and even modern proponents of broad § 230 immunity, *see, e.g.*, Tr. Oral Argument at 126,

goal that fit within the purpose of the CDA’s statutory scheme. Most of the CDA’s provisions sought to protect minors from offensive online material. *See Force v. Facebook, Inc.*, 934 F.3d 53, 78-80 (2d Cir. 2019) (Katzmann, J., concurring in part & dissenting in part). But *Stratton Oakmont*’s reasoning undercut incentives for computer services to limit access to offensive material. After all, it was precisely Prodigy’s attempt to moderate its platform to provide a family-friendly environment that led to vast tort liability. *See Stratton Oakmont*, 1995 WL 323710, at \*1-5. By overruling *Stratton Oakmont*, Congress encouraged private action to complement the CDA’s regulations and bolster efforts to reduce the spread of indecent material on the internet. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

2. But from the very start, courts held § 230 did much more than overrule *Stratton Oakmont*’s publisher-liability theory. And they almost all followed *Zeran v. America Online, Inc.*, which read § 230(c)(1) to immunize an interactive computer service provider’s “exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.” 129 F.3d at 330. This broad immunity was broadened even further when *Zeran* held that § 230(c)(1) barred both publisher *and* distributor liability. *Id.* at 331-34. Though *Zeran* has been criticized as inconsistent with the text, context, and purpose of § 230 (and was decided in an era where those traditional tools of construction were rarely consulted), the opinion was cut-and-paste copied by courts across the country in the first few years after the statute arrived.

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*Gonzalez v. Google LLC*, 598 U.S. 617 (2023) (No. 21-1333) (Counsel for Google: “[O]ne lawsuit freaked out the Congress. . . .”), all agree.



*See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15-18 (2020) (Thomas, J., statement respecting denial of certiorari); *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 746-47 (9th Cir. 2024) (Nelson, J., concurring); Candeub, *Bargaining For Free Speech*, *supra*, at 423-28.

Today, § 230 rides in to rescue corporations from virtually any claim loosely related to content posted by a third party, no matter the cause of action and whatever the provider’s actions. *See, e.g., Gonzalez v. Google LLC*, 2 F.4th 871, 89298 (9th Cir. 2021), *vacated*, 598 U.S. 617 (2023); *Force*, 934 F.3d at 65-71. The result is a § 230 that immunizes platforms from the consequences of their own conduct and permits platforms to ignore the ordinary obligation that most businesses have to take reasonable steps to prevent their services from causing devastating harm.

### C.

But this conception of § 230 immunity departs from the best ordinary meaning of the text and ignores the context of congressional action. Section 230 was passed to address an old problem arising in a then-unique context, not to “create a lawless no-man’s-land” of legal liability. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).

As with all cases involving the interpretation of statutes, our job in interpreting § 230’s text is to “give effect to the legislature’s charge,” “stated through the ‘ordinary meaning . . . at the time Congress enacted the statute.’” *OI Eur. Grp. B. V.*, 73 F.4th at 165 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Courts must take care to construe a statute’s terms in light of

“background understandings and the structure and circumstances of the [legislative] utterance.” *Herrmann v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 982 (7th Cir. 1992). A task that necessarily includes consideration of the legal “backdrop against which Congress” acted. *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005); *see also Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (“[T]extualists, like all interpreters,” read “text in context. . . . Context is not found exclusively within the four corners of a statute. Background legal conventions, for instance, are part of the statute’s context.” (cleaned up)).<sup>17</sup>

1. Section 230(c)(1) directs that TikTok not be “treated as the publisher . . . of any information provided by another information content provider.”<sup>18</sup>

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<sup>17</sup> A principle of interpretation with deep roots in the classical legal tradition. Blackstone understood the interpretation of statutes that sought to change the legal status quo to necessarily include consideration of 1) how the law “stood at the making of the act”; 2) “what the mischief was, for which the [then-existing] law did not provide”; 3) “and what remedy the [legislature] hath provided to cure this mischief.” 1 Blackstone, Commentaries \*87. All contextual clues aiding the interpretation of the words the legislature enacted. *See OI Eur. Grp. B.V.*, 73 F.4th at 170.

<sup>18</sup> The reference to “speaker” in § 230(c)(1) does not change the meaning of the text. When § 230 was enacted, courts often referred to traditional publisher liability as treating the disseminator of a statement as the “original speaker” subject to the same strict liability. *See* Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-party Content Under Section 230 of the Communications Act*, 52 Fed. Comm. L.J. 647, 650 (2000). Consistent with common law tort theory, I refer to such claims as publisher liability rather than “third” versus “first-party speech.” Doing so also avoids the confusing commingling of statutory and constitutional language that can

Congress enacted § 230 mindful of the recent and widely discussed online service provider tort cases drawing the publisher-distributor distinction, as well as decades of state and federal law apportioning liability for electronic transmissions along the same line. That points to the best reading of § 230(c)(1) as adopting the meaning of “publisher” used by *Stratton Oakmont* and *CompuServe*. See *George v. McDonough*, 596 U.S. 740, 746 (2022) (“Where Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it.” (cleaned up)). So when § 230(c)(1) prohibits “treat[ing]” TikTok as the “publisher” of videos posted by third parties, that means TikTok cannot be liable for the mere act of hosting those videos. See *Malwarebytes*, 141 S. Ct. at 14-16 (Thomas, J., statement respecting denial of certiorari); *Doe ex rel. Roe v. Snap, Inc.*, 88 F.4th 1069, 1070-72 (5th Cir. 2023) (Elrod, J., dissenting from denial of rehearing en banc); Candeub, *Reading Section 230 as Written*, *supra*, at 146-51. It cannot, in short, be held liable as a publisher.

But § 230(c)(1) does not immunize more. It allows suits to proceed if the allegedly wrongful conduct is not based on the mere hosting of third-party content, but on the acts or omissions of the provider of the interactive computer service. This is where *Zeran* went astray, wrongly reasoning that distributor liability “is merely a subset, or a species, of publisher liability.” 129 F.3d at 332. It is true that “[s]ources sometimes use language that arguably blurs the distinction between publishers and distributors.” *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., statement respecting

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conflate the distinct legal meanings of “speech.”

denial of certiorari). But understanding § 230(c)(1)’s use of “publisher” to subsume distributor liability conflicts with the context surrounding § 230’s enactment. Both *CompuServe* and *Stratton Oakmont* saw two distinct concepts. See *CompuServe*, 776 F. Supp. at 138-41; *Stratton Oakmont*, 1995 WL 323710, at \*1-5. So did the common law of common carriers. It is implausible to conclude Congress decided to silently jettison both past and present to coin a new meaning of “publisher” in § 230(c)(1). See *Malwarebytes*, 141 S. Ct. at 14-16 (Thomas, J., statement respecting denial of certiorari); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1023-25 (Fla. 2001) (Lewis, J., dissenting).

2. Properly read, § 230(c)(1) says nothing about a provider’s own conduct beyond mere hosting.<sup>19</sup> A conclusion confirmed by § 230(c)(2), which enumerates acts that platforms can take without worrying about liability.<sup>20</sup> See David L. Shapiro, *Continuity and*

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<sup>19</sup> See *Doe v. Facebook, Inc.*, 142 S. Ct. 1087, 1088 (2022) (Thomas, J., statement respecting denial of certiorari) (“It is hard to see why the protection § 230(c)(1) grants publishers against being held strictly liable for third parties’ content should protect Facebook from liability for its *own* ‘acts and omissions.’” (emphasis in original)); cf. *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1204 (10th Cir. 2009) (Tymkovich, J., concurring) (“Section 230 only immunizes publishers or speakers for the *content* of the information from other providers that they make public. The CDA says nothing about immunizing publishers or speakers for their own conduct. . . .” (emphasis in original) (citation omitted)).

<sup>20</sup> See § 230(c)(2) (“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; or (B) any action taken to enable or make available to information content providers or others the

*Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 942 (1992) (“[A]ll legislation occurs against a background of customs and understandings of the way things are done. . . . [A] speaker who is issuing an order or prohibition is likely to focus on what is being changed and to expect the listener to understand that, so far as this communication is concerned, all else remains the same.”).<sup>21</sup>

3. What does all this mean for Anderson’s claims? Well, § 230(c)(1)’s preemption of traditional publisher liability precludes Anderson from holding TikTok liable for the Blackout Challenge videos’ mere presence on TikTok’s platform. A conclusion Anderson’s counsel all but concedes. But § 230(c)(1) does not preempt distributor liability, so Anderson’s claims seeking to hold TikTok liable for continuing to host the Blackout Challenge videos knowing they were causing the

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technical means to restrict access to material described in [§ 230(c)(2)(A)].”).

<sup>21</sup> Invoking § 230(f)(4)(C)’s definition of “access software provider,” TikTok argues for a broader reading of § 230(c)(1) to include immunity for any actions taken to “organize” or “reorganize” content. In TikTok’s view, its targeted recommendations just organize the hosted content. But I do not read a definitional provision defining a different statutory term to expand the scope of § 230(c)(1)’s “publisher” immunity. Section 230(f)(4)(C), on its own, provides no immunity. It only states that a provider or user of an interactive computer service does not become an “information content provider”—and thereby fall outside the scope of § 230(c)(1)—just by organizing or reorganizing third-party content. One cannot conclude from § 230(f)(4) that because some providers or users of interactive computer services organize information, § 230(c)(1) necessarily immunizes that conduct. Section 230(f)(4) just loops the reader back to § 230(c)(1) to determine the meaning of “treat[] as the publisher . . . of any information provided by another information content provider.”

death of children can proceed. So too for her claims seeking to hold TikTok liable for its targeted recommendations of videos it knew were harmful. That is TikTok’s own conduct, a subject outside of § 230(c)(1). Whether that conduct is actionable under state law is another question. But § 230 does not preempt liability on those bases.<sup>22</sup>

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<sup>22</sup> A word on *Green v. America Online*, 318 F.3d 465 (3d Cir. 2003), a two-decade-old decision that decided very little. *Green* involved a disgruntled former subscriber to AOL’s chat room service who filed a pro se complaint that was “not especially clear.” *Id.* at 468. By the time his case made it to this Court, Green’s main complaint seems to have been that AOL “negligently failed to live up to its contractual obligations” by failing to kick certain third-party users off AOL’s platform after they sent Green a virus through AOL and posted defamatory statements about him in a chat room. *See id.*; Brief for Appellant, *Green v. Am. Online*, 318 F.3d 465 (3d Cir. 2003) (No. 01-1120), 2002 WL 32397368, at \*1-2, \*4, \*1314. We explained that “[t]he only question” presented on appeal was “whether holding AOL liable for its alleged negligent failure to properly police its network for content transmitted by its users” was barred by § 230(c)(1). *Green*, 318 F.3d at 470. In a single, three-sentence paragraph of analysis, we answered that question in the affirmative, holding that Green’s claims were barred by § 230(c)(1) because they sought “to hold AOL liable for . . . actions quintessentially related to a publisher’s role.” *Id.* at 471.

Exactly what “failure to properly police its network” meant is also “not especially clear.” But in my view, it is best understood to refer to a provider of an interactive computer service failing to pre-screen third-party content before circulation and failing to actively monitor its service for allegedly harmful content. *See, e.g., id.* at 469 (describing Green’s complaint that AOL “did nothing to stop” the initial posting of additional defamatory statements); Brief for Appellee, *Green v. Am. Online*, 318 F.3d 465 (3d Cir. 2003) (No. 01-1120), 2002 WL 32397367, at \*8 (explaining that Green’s complaint did not allege that he “suffer[ed] any damages at any time after” he notified AOL of the

\* \* \*

“It used to be said that there were three great influences on a child: home, school, and church. Today, there is a fourth great influence. . . .” Newton N. Minow, Speech Before the Nat’l Ass’n of Broadcasters (May 9, 1961), *reprinted in* Newton N. Minow, *Television and the Public Interest*, 55 Fed. Comm. L.J. 395, 399 (2003). When Commissioner Minow spoke of the perils and promise of television, the internet was still two decades from its earliest form. But his description of a “procession of game shows, . . . formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, . . . more violence, and cartoons” captures the dreary state of the modern internet. *Id.* at 398. The marketplace of ideas, such as it now is, may reward TikTok’s pursuit of profit above all other values. The company may decide to curate the content it serves up to children to emphasize the lowest virtues, the basest tastes. It may decline to use a common good to advance the common good.

But it cannot claim immunity that Congress did not provide. For these reasons, I would affirm the District Court’s judgment as it relates to any of Anderson’s claims that seek to hold TikTok liable for the Blackout Challenge videos’ mere existence on TikTok’s platform. But I would reverse the District Court’s judgment as it relates to any of Anderson’s

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third-party information). In other words, all *Green* held was that § 230 precluded publisher liability as that term was understood by *Stratton Oakmont* and *CompuServe*. *Green* said nothing about whether § 230 immunizes providers or users of interactive computer services for failing to take down harmful content once they receive notice of its presence on the platform (distributor liability).

App.169a

claims that seek to hold TikTok liable for its knowing distribution and targeted recommendation of the Blackout Challenge videos. Accordingly, I concur in the judgment in part and dissent in part.



App.170a

**JASON FYK REPLY BRIEF, U.S. COURT  
OF APPEALS FOR THE NINTH CIRCUIT [18.1]  
(JULY 1, 2024)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JASON FYK,

*Plaintiff-Appellant,*

v.

FACEBOOK, INC.,

*Defendant-Appellee.*

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Appeal No. 24-465

Appeal of January 12, 2024, Order Denying Motion  
for Relief Pursuant to Fed. R. Civ. P 60(B) and  
Terminating Motion Re: Constitutionality of 47  
U.S.C. Sec. 230(C)(1) [D.E. 74] by Hon. Haywood S.  
Gilliam, Jr. of the U.S. District Court for the  
Northern District of California, 4:18-cv-05159-HSG

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**[TOC & TOA Omitted]**

**I. Summary Of Reply Brief**

While *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009) and *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019) involved § 230(c)(2) of the Communications Decency Act (“CDA,” Title 47 U.S.C. § 230) factual backdrops, and the parties in *Enigma* were direct competitors, the same policy concerns arise here: the filtering practices of Defendant-Appellee, Facebook, Inc. (“Facebook”), were aimed at suppressing Plaintiff-Appellant, Jason Fyk (“Fyk”), as competition in the online advertising and entertainment business; *i.e.*, competitive commercial advertising in the Facebook marketplace. Here, Facebook could have employed § 230(c)(2) to attempt to defend itself (although not even that defense is applicable, because, once more, this is not a CDA case) – it claims to have removed obscene material from its platform in good faith (*e.g.*, Facebook disabled certain Fyk pages/businesses for purported “violation of its policies,” which was false pretense), *which is what § 230(c)(2) immunizes. Facebook, however, instead chose § 230(c)(1) to shield itself.*

To accept Facebook’s purported CDA defense (as Fyk’s courts have thus far) makes § 230(c)(1) *a backdoor to CDA immunity* – contrary to the CDA’s history and purpose; *i.e.*, contrary to the text of the statute, the CDA’s general provision/intelligible principle, due process, and Fyk’s Constitutional Rights. That is *extraordinary*, a plain and obvious *manifest injustice* imposed upon Fyk. Thus, congressional policy, due process, and Fyk’s individual civil liberties weigh heavily against Facebook’s improper assertion of a CDA § 230(c)(1) defense.<sup>1</sup>

Now, after nearly six years of litigation, Facebook has finally admitted in its Answering Brief [D.E. 12.1] what Fyk actually alleged in his August 2018 Verified Complaint (*i.e.*, what this case is really about): “Fyk alleged, however, that *Facebook was actually motivated by a desire to make room for its own sponsored advertisements* and to ‘strong-arm’ Fyk into paying to advertise.” *Id.* at 6 (emphasis added). This case was never about treating Facebook as “the publisher or speaker” of Fyk’s content or holding Facebook accountable for any content (because no specific content-based harms were ever alleged); rather, this case was/is entirely about Facebook’s filtering practices aimed at suppressing Fyk as competition. Fyk’s case was simply a few steps ahead of the evolving jurisprudence in this Circuit because the applicable law is well-settled as to how immunity under the CDA

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<sup>1</sup> The above two paragraphs are modifications of the Judge Alsup holding(s) in *Dangaard, et al. v. Instagram, LLC, et al.*, No. C 22-01101 WHA, 2022 WL 17342198, \*6 (N.D. Cal. Nov. 30, 2022)), a case on all fours with this case.

should not have resulted in a dismissal of this case, especially at the pleading stage.

So as to not rehash portions of the Opening Brief filed by Fyk on March 8, 2024, [D.E. 5.1], against Facebook, this Reply Brief focuses on the following:

- (a) A key party admission made by Facebook in its May 9, 2024, Answering Brief [D.E. 12.1], which such judicial admission substantially impacts this case (the admission is noted above, but is discussed further in Section III – Legal Analysis, below);
- (b) Facebook’s Answering Brief adding nothing new to the equation; but, instead, amounting to: “all prior decisions at the District Court and Circuit Court level were correct just because, so this Court should just go ahead and rubber-stamp same just because;”
- (c) Explaining again, this time by way of another recent California court case (not by way of Fyk or Facebook) discussed below, how *Lemmon, et al. v. SNAP, Inc.*, 995 F.3d 1085 (9th Cir. 2021) absolutely applies to this case,<sup>2</sup> and explaining again how District Court cases (*e.g.*, *Dangaard*), while not binding, are getting identical situations right and how this Court (which presides over its District Courts) should not be allowing uneven results

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<sup>2</sup> At this point, enough has been said about how *Enigma* applies to this case, in particularly given Judge Alsup setting forth the appropriate application of *Enigma* in *Dangaard* (again, a case identical to Fyk’s) that Fyk has articulated for years (before *Enigma* even issued).

(one party getting justice while another party is deprived of justice and constitutional rights under the same circumstances);

- (d) New case law that has issued (including from this Court, *e.g.*, *Diep v. Apple, Inc.*, No. 22-16514, 2024 WL 1299995 (9th Cir. Mar. 27, 2024)) since Fyk’s March 8, 2024, Opening Brief that further evolves § 230 in support of Fyk (*e.g.*, *Diep*; *X Corp v. Bright Data LTD.*, No. 23-03698-WHA, 2024 WL 2113859 (N.D. Cal. May 9, 2024); *Wozniak, et al. v. YouTube, LLC, et al.*, 319 Cal. Rptr. 3d 597 (Ct. App. 6th Dist. Apr. 2, 2024));
- (e) The non-forfeitable/inalienable nature of Fyk’s constitutional rights and why Judge Gilliam, Jr.’s denial of Fyk’s 5.1 Constitutional Challenge is properly before this Court;
- (f) Facebook’s incorrect conflation of Rule 60(b)(5) and Rule 60(b)(6); and
- (g) Artificial Intelligence (“AI”), an objective analytical tool, rendering pro-Fyk conclusions on several key issues and the overall case.

## **II. Summary Of Facebook’s Answering Brief**

Distilled, Facebook’s Answering Brief [D.E. 12.1] adds no new argument/legal analysis on the substantive issues at hand. Facebook’s Answering Brief simply recasts holdings (in cherry-pick fashion) from this case (out-of-context or with no context), nakedly states that such decisions were correct (just because), and asks this Court to simply maintain status quo (just because). Put differently, Facebook’s Answering Brief urges this Court to affirm, without analysis, decisions

wrongly made because rubber-stamping prior decisions is the procedurally easy way out.

Moreover, Facebook collapses Rule 60(b)(5) and 60(b)(6) together by claiming that because there was purportedly no change in law (Rule 60(b)(5)), there can necessarily be no Rule 60(b)(6) analysis. As if Rule 60(b)(5) eligibility is a condition precedent of a Rule 60(b)(6) analysis, which it most certainly is not. Rule 60(b)(6) is not mere surplusage of Rule 60(b)(5).

Moreover, Facebook states that this Court does not have jurisdiction to consider the District Court's rejection of Fyk's companion/inextricably intertwined Rule 5.1 Constitutional Challenge. Facebook does not explain why an appellate court would not have jurisdiction to consider a District Court's incorrect decision on a non-forfeitable, inextricably intertwined Rule 5.1 Constitutional Challenge. Rather, Facebook simply states that Fyk's Opening Brief did not state a specific jurisdictional basis so this Court should forfeit the non-forfeitable Rule 5.1 consideration.

That is it – Facebook's Answering Brief amounts to: "Dear Ninth Circuit: please just maintain the injustice inflicted upon Fyk over the past six years, irrespective of all that has changed pro-Fyk since Judge White's initial dismissal (which such dismissal was based on Facebook's self-serving and improper mischaracterizations as to what Fyk's case was really about)." <sup>3</sup>

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<sup>3</sup> It is worth pointing out again that half-a-decade into this case, Judge White (an individual with millions of dollars of investment in Tech stock, at material times) *sua sponte* recused himself from this case as "disqualified" (*i.e.*, extraordinary). That led to Judge Gilliam, Jr. inheriting this case, and Judge Gilliam, Jr. pro-

### III. Legal Analysis

#### A. The Substantial Impact Of Facebook's Admission

One bad decision after another (at the District and Circuit Court levels) has spiraled (in whole or in part) out of Judge White's dismissal viewpoint as to what this case was/is supposedly about, and that Judge White viewpoint was a cut-and-paste from Facebook's Rule 12(b)(6) motion's version of "facts." That viewpoint was the absurd viewpoint that Fyk's case was somehow a § 230(c)(1) case wherein Fyk was somehow trying to hold Facebook accountable for Fyk's content vis-à-vis somehow trying to treat Facebook as the publisher/speaker of Fyk's content; *i.e.*, treat Facebook as Fyk. Absurd – not once has Fyk ever alleged that Facebook was Fyk himself. Finally, nearly six years into this litigation, Facebook admits that which Fyk has been trying to tell his District and Circuit Courts *ad nauseum* since the onset of litigation – "Fyk alleged, however, that *Facebook was actually motivated by a desire to make room for its own sponsored advertisements* and to 'strong-arm' Fyk into paying to advertise." [D.E. 12.1] at 6 (emphasis added).

Yes, finally Facebook being honest with the Court regarding what Fyk's August 2018 Verified Complaint alleges – Fyk's case revolves around Facebook's anti-competitive animus. And this Court has routinely determined that a case grounded in anti-competition (wrongdoing of a non-CDA root) is

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ceeded with giving this case no individualized thought; *i.e.*, choosing to rubber-stamp Judge White's prior incorrect holdings.

not eligible for any kind of CDA immunity. We have explained numerous times how that is what this Court's *Enigma* decision stands for, as confirmed by Judge Alsup's *Dangaard* decision. We have explained numerous times how that is what *Lemmon* stands for, when one actually understands the relevance of *Lemmon* (as Judge Gilliam, Jr. did not). We will not regurgitate our analysis of those Ninth Circuit decisions in this Reply Brief, because repetition is not the point of a reply – it is either this Court will apply its law uniformly, certainly, and predictably for Fyk, or not. Rather, we will now discuss how case law that has issued since the filing of the Opening Brief further supports Fyk's position that Facebook enjoys no CDA immunity here (including a recent California case that does recognize the application of *Lemmon* to a case like ours).

**B. Case Law Continues To Evolve § 230  
Narrowly and In Fyk's Favor**

For all the nonsensical chatter from Facebook over the years (which Fyk's courts have thus far taken hook, line, and sinker, contrary to hornbook Rule 12(b)(6) review standards where the Plaintiff's allegations are to be taken as true, not the Defendant's rewrite of allegations) that Fyk employed various case law "too late," which such chatter has only ever been a convenient way to avoid the merits (never really true, since Fyk has diligently pursued his case at all times and since there is no set timeframe within which to bring 60(b)(5) and 60(b)(6) motions), nobody can rightly contend that case law that has issued after Fyk's March 8, 2024, Opening Brief (*e.g.*, *Diep, X Corp, Wozniak*) is being employed "too late."



### 1. Diep

In *Diep v. Apple, Inc.*, No. 22-16514, 2024 WL 1299995 (9th Cir. Mar. 27, 2024) (a case that analyzed *Barnes*, *Fair Housing*, *Doe*, *Lemmon*, and other cases that have been brought up several times throughout this action), this Court held, in pertinent part:

The claims asserted in counts IV (violation of California’s Unfair Competition Law (“UCL”)) . . . are not barred by the CDA. These state law consumer protection claims do not arise from Apple’s publication decisions . . . . Rather, these claims seek to hold Apple liable for its own representations . . . . Because Apple is the primary ‘information content provider’ with respect to those statements, section 230(c)(1) does not apply.

*Id.* at \*2 (internal citation omitted). *UCL was precisely Count II of Fyk’s Verified Complaint.* Why does the Ninth Circuit continuously find that unfair competition claims are not barred by the CDA for everybody else other than Fyk? It is time, in light of Fyk’s Count II (at the very least) coupled with Facebook’s party admission set forth above (that Fyk’s allegations sound in Facebook’s anti-competitive animus), for this Court to give Fyk the same result as others; here, that would be reversing and remanding (with the reversal/remand either eradicating Facebook’s nonsensical CDA immunity defense, or, at the very least, with the reversal/remand allowing Fyk’s amendment of the Verified Complaint because such an endeavor would by no means be “futile,” legally and/or factually, as Judge White’s initial dismissal order wrongly determined; indeed, on the factual front, Fyk possesses far more evidence of Facebook’s wrongdoing than the

parties in *Dangaard*, for example, and, we would comfortably wager, than any party in any CDA Social Media case ever).

This Court in *Diep* concluded, in pertinent part:

But Apple cannot disclaim liability for its own false, misleading, or fraudulent statements. . . .

Because . . . section 230(c) . . . would [not] bar a well-pleaded [unfair competition/] consumer protection claim, the question is whether the operative complaint satisfies . . . pleading requirements . . . .

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. . . the question is whether the district court should have dismissed these [unfair competition/consumer protection] claims with prejudice and without leave to amend. Because Plaintiffs could conceivably cure the pleading deficiencies in the [unfair competition/] consumer protection claims, Plaintiffs should have been afforded the opportunity to amend their complaint.

[Rule] 15(a)(2) instructs that federal courts should ‘freely give leave to amend when justice so requires.’ . . . Where denial of leave to amend is based on ‘an inaccurate view of the law,’ we must reverse.

Here, the district court denied leave to amend based on the conclusion that ‘all of plaintiffs’ claims were premised on Apple’s role as a publisher of the Toast Plus app’ such that ‘any amendment would be futile

given Apple's immunity afforded by § 230.' However, Plaintiffs' [unfair competition/] consumer protection claims are not barred by section 230. . . .

Because the district court's denial of leave to amend [the unfair competition/consumer protection] claims was premised on legal error, we vacate the judgment of the district court as to those claims, and remand with instructions to grant Plaintiffs leave to amend their complaint as to those claims.

*Id.* at \*2-3 (internal citations omitted). Here, Fyk's case remains dismissed with prejudice. Judge White's dismissal opinion did so because of Judge White's incorrect viewpoint regarding what kind of case this was/is (again, a case where Fyk was supposedly somehow trying to treat Facebook as the publisher/speaker of his own content, when, in reality, Fyk's action has always revolved around Facebook's own wrongdoing, namely unfair competition) and associated viewpoint that any amendment would be futile because the CDA would necessarily bar any rendition of Fyk's averments. And Judge Gilliam, Jr. was careless in rubber-stamping Judge White across the board.

Fyk should have been granted leave to amend at the very least, given the impetus of his Verified Complaint is Facebook's unfair competition (and other associated tortious conduct having nothing to do with the CDA); *i.e.*, impetus of his Verified Complaint is Facebook's own wrongdoing having nothing to do with Fyk's content. As this Court determined in *Diep*, unfair competition cases are not barred by CDA immunity and complaint amendment would not be futile.

## 2. X Corp

Another sound Judge Alsup decision out of the Northern District of California Court (in addition to *Dangaard*, a case identical to this case and thoroughly discussed in prior briefing) is *X Corp v. Bright Data LTD.*, No. 23-03698-WHA, 2024 WL 2113859 (N.D. Cal. May 9, 2024). In *X Corp*, Judge Alsup held, in pertinent part:

One might ask why X Corp. does not just acquire ownership of X users' content or grant itself an exclusive license under the Terms. That would jeopardize X Corp.'s safe harbors from civil liability for publishing third-party content. Under Section 230(c)(1) of the Communications Decency Act, social media companies are generally immune from claims based on the publication of information 'provided by another information content provider.' 47 U.S.C. § 230(c)(1). Meanwhile, under Section 512(a) of the Digital Millennium Copyright Act ("DMCA"), social media companies can avoid liability for copyright infringement when they 'act only as 'conduits' for the transmission of information.' *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1041 (9th Cir. 2013); 17 U.S.C. § 512(a). X Corp. wants it both ways: to keep its safe harbors yet exercise a copyright owner's right to exclude, wresting fees from those who wish to extract and copy X users' content.

The upshot is that, invoking state contract and tort law, X Corp. would entrench its own private copyright system that rivals, even

conflicts with, the actual copyright system enacted by Congress. X Corp. would yank into its private domain and hold for sale information open to all, exercising a copyright owner's right to exclude where it has no such right. We are not concerned here with an arm's length contract between two sophisticated parties in which one or the other adjusts their rights and privileges under federal copyright law. We are instead concerned with a massive regime of adhesive terms imposed by X Corp. that stands to fundamentally alter the rights and privileges of the world at large (or at least hundreds of millions of alleged X users). For the reasons that follow, this order holds that X Corp.'s state-law claims against Bright Data based on scraping and selling of data are preempted by the Copyright Act.

*Id.* at \*12.

Here, Facebook's conduct (exclusion of Fyk for anti-competitive reasons) is akin to that of a copyright owner. As determined in *X Corp*, Facebook cannot have it both ways. Here, Facebook's anti-competitive exclusionary conduct was anything but that of a "conduit for the transmission of information." Here, Facebook affirmatively interfered with Fyk's pages/businesses by excluding Fyk from its platform so as to "make room for [Facebook's] own sponsored advertisements and to 'strong-arm' Fyk into paying to advertise," [D.E. 12.1] at 6, not because Fyk somehow violated the Facebook TOS or the CDA. Facebook's exclusionary conduct was that of a copyright owner (which Facebook is not because Facebook, like X, does

not want to lose its go-to CDA immunity defense). Just as Judge Alsup properly called bullsh\_\_ on X, so too should this Court call bullsh\_\_ on Facebook for trying to work a CDA immunity defense in a scenario where Facebook’s conduct has been akin to a copyright owner who cannot enjoy CDA immunity because the copyright owner engages in exclusionary conduct for non-CDA reasons (as here with respect to Facebook’s anti-competitive exclusionary conduct).

Again, we recognize (just as with *Dangaard*) that a District Court’s decision-making is not binding. But how can this Court rightly allow everybody else not named Fyk to enjoy proper results at the District Court level? Is that kind of inconsistent District Court decision-making really something that this overseeing Court should continue to allow just because District Court decision-making is not binding? Absolutely not – this Court should ensure uniform application of the law within the District Courts it presides over, as discussed further in Section III.C below. The point is not that District Court decisions bind this Court, the point is that this Court should ensure that Fyk receives the same kind of result as in *Dangaard* and *X Corp*, for examples. See § III.C, *infra*. Quite simply, had Fyk drawn Judge Alsup at the District Court level, for example, his case would not have been dismissed . . . *justice should not be predicated on luck of the draw*.

### 3. Wozniak

We now turn to *Wozniak, et al. v. YouTube, LLC, et al.*, 319 Cal. Rptr. 3d 597 (Ct. App. 6th Dist. Apr. 2, 2024), not for what that case was about or how that case ended up and not because that decision somehow

binds this Court. Rather, we now discuss *Wozniak* because it is a California court (*i.e.*, not us, not Facebook) explaining the relevance of *Lemmon* to a case like ours. Something Judge Gilliam, Jr. was somehow unable to recognize in the instant District Court order on appeal:

Plaintiffs rely on *Lemmon v. Snap, Inc.* (9th Cir. 2021) 995 F.3d 1085. In that case, a 20-year-old man and two 17-year-old boys died after driving their car over 100 miles per hour and crashing into a tree. *Id.* at 1089. Shortly before the crash, one of the boys had opened the Snapchat application on his smartphone to document how fast they were driving. *Ibid.* The boys' parents sued Snap, the social media provider that owns the Snapchat application, alleging it encouraged their sons to drive at dangerous speed and thus caused their death through the negligent design of its application. *Id.* at p. 1090-1091. Specifically, they alleged that the application uses a 'speed filter' – which allows users to record and share their real-life speed – and a reward system with trophies and social recognitions, combining to create an incentive for users to reach 100 miles per hour and document it on the application. *Id.* at p. 1089.

The court held that the negligent design claim was not barred by section 230. The parents' claim rested on the premise that manufacturers have a duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public. *Lemmon, supra*, 995 F.3d at p. 1091-

1092. As the court explained, ‘[t]he duty underlying such a claim differs markedly from the duties of publishers as defined in the CDA. Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers. [Citation.] Meanwhile, entities acting solely as publishers—*i.e.*, those that ‘review[] material submitted for publication, perhaps edit[] it for style or technical fluency, and then decide[] whether to publish it,’ [citation]—generally have no similar duty.’ *Id.* at p. 1092. . . .

*Id.* at 613-614.

Spot on. Fyk’s case is all about non-CDA-oriented duties owed by Facebook. Verified Complaint Count I – Facebook’s duty to not tortiously interfere with Fyk’s prospective economic advantage/relations; Verified Complaint Count II – Facebook’s duty to not unfairly compete with Fyk; Verified Complaint Count III – Facebook’s duty to not civilly extort Fyk; and Verified Complaint Count IV – Facebook’s duty to not defraud Fyk. Whether Facebook’s exclusionary conduct (akin to that of a copyright owner, not a mere CDA passive information conduit) is viewed through a tortious interference, unfair competition, civil extortion, and/or fraud lens, Facebook’s exclusion of Fyk had nothing to do with Fyk somehow treating Facebook as the publisher/speaker of Fyk’s content (*i.e.*, as Fyk himself). “The dut[ies] underlying [Fyk’s] [] claim[s] differ[] markedly from the duties of publishers as defined by the CDA.”

Just as the negligent product design claim in *Lemmon* fell outside CDA immunity because it dealt



with Defendant duties that “differ[ed] markedly from the duties of publishers as defined by the CDA,” so too with respect to all four of Fyk’s Counts. All four Counts within the Verified Complaint revolve around legal duties having nothing to do with the kind of publishing/speaking implicating CDA immunity. Again, as Facebook has finally admitted, “Fyk alleged, however, that *Facebook was actually motivated by a desire to make room for its own sponsored advertisements* and to ‘strong-arm’ Fyk into paying to advertise.” [D.E. 12.1] at 6 (emphasis added). At no time, ever, has Fyk alleged that Facebook was somehow the publisher/speaker of Fyk’s content . . . absurd.

Every single recent case from outside of this jurisdiction (*e.g.*, *Henderson* (4th Circuit) and *Jarkesy* (5th Circuit)) that Fyk has cited for the proposition of change in law warranting reconsideration of dismissal is pro-Fyk. Every single California District Court case (*e.g.*, *Dangaard*, *Rumble*, *Doe*, *etc.*) that Fyk has cited for the proposition of change in law warranting reconsideration of dismissal is pro-Fyk. Every single Ninth Circuit case (*e.g.*, *Enigma* and *Lemmon*) that Fyk has cited for the proposition of change in law warranting reconsideration of dismissal is pro-Fyk. Every single post-Opening Brief case (*Diep*, *X Corp.*, and *Wozniak*) that Fyk cites in this Reply Brief for the proposition of change in law warranting reconsideration of dismissal is pro-Fyk.

Nothing said in Facebook’s Answering Brief supports the upholding of dismissal from a merits perspective. Rather, as stated above, Facebook’s Answering Brief simply says that prior decisions in this case were correct (just because) and that this Court should ratify same (just because).

This Court can simply no longer turn a blind eye to reality – the reality being that Judge White’s dismissal order (and associated judgment), which has been at the root of every single wrong decision inflicted upon Fyk in the California court system (including the Judge Gilliam, Jr. Order that is up on this appeal), was predicated on Facebook’s re-write of Fyk’s Verified Complaint allegations.<sup>4</sup> Again, Facebook has hoodwinked every single court into believing that Fyk’s Verified Complaint somehow sought to treat Facebook as the publisher/speaker of Fyk’s content (*i.e.*, place Facebook in the same position as Fyk), thus eligible for CDA immunity. When, in reality, “Fyk alleged, however, that *Facebook was actually motivated by a desire to make room for its own sponsored advertisements* and to ‘strong-arm’ Fyk into paying to advertise.” [D.E. 12.1] at 6 (emphasis added). With Facebook finally being truthful regarding what Fyk’s Verified Complaint alleges, it can no longer be denied that Fyk’s case pattern matches or parallels the case patterns cited above (and in the Opening Brief), wherein Courts (including this Court) have routinely found that causes of action involving legal duties having nothing to do with the kind of publishing/speaking contemplated by the CDA (*e.g.*,

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<sup>4</sup> Inclusive of blatant Facebook lies like one of Fyk’s businesses/pages being dedicated to featuring public urination, an utter falsehood that Judge White’s initial dismissal order biasedly chose to feature/highlight at the very beginning of same. This is but one example (of several) of how Facebook (and Judge White, and Judge Gilliam, Jr. through rubber-stamping of Judge White) defamed Fyk while carrying out their legal wrongs over the years, causing Fyk, among other things, great reputational harm.

unfair competition causes of action) are not eligible for CDA immunity.

**C. This Court Must Ensure Even-Handed Application Of The Law At The District Court Level**

The choice of law here (for any of the four causes of action set forth in the Verified Complaint) is California law. “Application of California law in this case ‘furthers the choice-of-law values of certainty, predictability and uniformity of result and . . . ease in the determination and application of the applicable law.’” *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 783 (9th Cir. 1991). This Court recognizes the values of “certainty, predictability and uniformity of result and . . . ease in determination and application of the applicable law.” Not to mention due process and equal protection of the laws guaranteed by the U.S. Constitution, neither such right having been enjoyed by Fyk in his courts’ inconsistent application of law in comparison to other similarly-situated litigants.

Anything but “certainty, predictability and uniformity of result and . . . ease in determination and application of the applicable law” have unfolded within Fyk’s District and Circuit Courts. Many others have enjoyed justice as it concerns the issues at hand, whereas Fyk has been wronged by his courts at every turn.

If this Court really means what it said in *Schoenberg* about valuing certainty, predictability, and uniformity in the application of law, this Court must finally put an end to the wholly inapplicable and unfettered CDA immunity that Facebook has gotten

away with for nearly six years in a non-CDA case. This Court must make Fyk's result uniform with the *Dangaard* result, for example. This Court must make Fyk's result uniform with the *Enigma* result, as another example. The list goes on – this Court must make Fyk's result uniform with the *Diep*, *Rumble*, *Doe*, *Lemmon*, and *X Corp.* results. Not to mention, this Court should be interested in uniformity across Circuits, *i.e.*, this Court should be interested in aligning its Fyk decision-making with cases like *Henderson* (4th Circuit) (especially since in *Henderson* the Fourth Circuit unwound its *Zeran* decision, upon which other incorrect decisions like *Barnes* have been based) and *Jarkesy* (5th Circuit). Yet, for some reason, Fyk's case has been stranded on its own outlier island for over half-a-decade. That is wrong, contravening the Ninth Circuit's professed values.

Facebook's Answering Brief predominantly yaps about how hardly any of Fyk's *many* cited cases are binding on this Court, but such yapping misses the point of what a manifest injustice is about. The point is that Fyk should enjoy a uniform application of the law . . . certainty . . . predictability . . . that is why Fyk has cited all of the cases he has cited, to show that many other similarly-situated litigants have enjoyed just results. This Court should adhere to its professed values in aligning Fyk's case with all the other cases Fyk has brought to this Court's attention in the Opening Brief and in this Reply Brief. To not do so would be the epitome of hypocrisy and continued manifest injustice and deprivation of constitutional rights.

## **D. Procedural Considerations**

### **1. Fyk's Constitutional Rights Are Non-Forfeitable/Inalienable And Appropriately Before This Court**

This Court has opined that the only way it would lack jurisdiction to review a District Court order involving constitutional rights would be if the constitutional rights were untimely addressed at the District Court level. *See, e.g., Singh v. Mukasey*, 533 F.3d 1103, 1109 (9th Cir. 2008) (citing, inter alia, *U.S. v. Olano*, 507 U.S. 725, 731 (1993)). As thoroughly discussed in Fyk's Opening Brief, *see* [D.E. 5.1] at pp. 27-41, it was not until years into this case that Fyk's Courts made decisions stripping him of his constitutional rights. As thoroughly discussed in Fyk's Opening Brief, case law holds that a Rule 5.1 Constitutional Challenge is not ripe until a case has been fully briefed. As explained in Fyk's Opening Brief, Fyk brought his Rule 5.1 Constitutional Challenge in a tribunal with jurisdiction to consider it as soon as he was eligible to bring it.

Facebook's Answering Brief nakedly states that this Court should not consider Facebook's Rule 5.1 Constitutional Challenge because Fyk did not specify this Court's jurisdictional basis to do so, the Answering Brief does not go so far as to actually say this Court lacks jurisdiction. Because it is axiomatic that this Court has jurisdiction. *See, e.g., <https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide#:~:text=U.S.%20appellate%20courts%20have%20jurisdiction,%2C%20state%2C%20or%20local%20governments>*. This US Courts (.gov) publication states:

U.S. appellate courts have jurisdiction over cases that allege violations of federal constitutional rights, regardless of whether the alleged violations involve federal, state, or local governments. Thus, appeals based on constitutional grounds permit federal court review of state and local laws, practices, and court rulings, not just direct appeals of federal cases.

Constitutional cases include some of the most contentious issues considered by the federal Judiciary – freedom of speech and religion, the right to bear arms, search and seizure, right to counsel, and equal protection under the law, just to name a few. . . .

*See id.*

It seems Facebook’s Answering Brief also argues that Fyk was required to engage in Rule 60 proceedings relating to the District Court’s incorrect Rule 5.1 Constitutional Challenge decision before bringing the 5.1 Constitutional Challenge up on this appeal. Yet, Rule 60 proceedings are not a condition precedent to appeal. Indeed, Rule 60(a)’s express language makes clear that appeal can occur before (or without) engaging in Rule 60 proceedings: “But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court’s leave.” *Id.* Judge Gilliam, Jr.’s Order, that is being appealed here, combined ruling on Fyk’s Rule 60(b) motion and Fyk’s Rule 5.1

Constitutional Challenge. Fyk was accordingly on the appellate clock with respect to the Rule 60(b) component of Judge Gilliam, Jr.’s combined

determination, and the Rule 5.1 Constitutional Challenge is a companion to the Rule 60(b) motion. Given a Rule 60 motion is not a condition precedent to appeal, given the interrelation between the Rule 60(b) motion practice and the Rule 5.1 Constitutional Challenge, given Judge Gilliam, Jr.'s combined ruling, and given conservation of judicial resources, Fyk properly elected to bring the Rule 5.1 Constitutional Challenge before this Court. Again, per the US Courts' publication above: "U.S. appellate courts have jurisdiction over cases that allege violations of federal constitutional rights."

That which is at issue in Fyk's Rule 5.1 Constitutional Challenge is inalienable and non-forfeitable. We are talking about the deprivation of a U.S. citizen's constitutional rights – there could not be anything more serious. For this Court to ignore Fyk's Rule 5.1 Constitutional Challenge (again, which is inextricably intertwined with the issues at play in the subject Rule 60(b) motion practice) would be yet another extraordinary manifest injustice impressed upon Fyk.

## **2. Facebook Incorrectly Conflates Rule 60(b)(5) And 60(b)(6)**

Facebook's Answering Brief argues that there has been no change of law warranting Rule 60(b)(5) relief, so there accordingly cannot be a 60(b)(6) extraordinary circumstances (*see, e.g., Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009)) analysis. What? Meaning, according to Facebook, Rule 60(b)(6) relief is surplusage or duplicative of 60(b)(5) relief. What? Judge Gilliam, Jr.'s improper change of law Rule 60(b)(5) determination by no means relieved Judge

Gilliam, Jr. of engaging in a 60(b)(6) analysis. Had Judge Gilliam, Jr. properly engaged in a Rule 60(b)(6) analysis (guided by, for example, *Phelps* considerations), his Honor would have had his pick of extraordinary circumstances that have unfolded here warranting Rule 60(b)(6) relief. Engaging in a true *Phelps* Rule 60(b)(6) analysis, it is undeniable that the manifest injustice Fyk has experienced has been “extraordinary” on steroids:

- (a) It is extraordinary that Judge White accepted Facebook’s re-write of Fyk’s allegations contrary to hornbook Rule 12(b)(6) review standards. And that Facebook re-write (and associated Judge White endorsement) has infected every single decision in this case. That is, until Facebook’s Answering Brief finally decided to be truthful about what Fyk’s Verified Complaint actually alleges.
- (b) It is extraordinary that a self-determined “disqualified” Judge (Judge White, with substantial Tech investments at material times) decided to infect this case with his inherently biased decision-making for over half-a-decade pre-recusal.
- (c) It is extraordinary that the newly appointed Judge (Judge Gilliam, Jr.) decided to engage in no independent thinking; *i.e.*, decided to ratify all prior Judge White decisions because that was the easiest thing to do.
- (d) It is extraordinary that Fyk’s courts have never applied the law uniformly to him; *i.e.*, that Fyk’s courts have provided justice to other similarly-situated litigants.



- (e) It is extraordinary that this Court refused to apply its own law (*Enigma*) to Fyk (when at all times since the inception of this case, Fyk has been arguing *Enigma's* “Good Samaritan[ism]” before *Enigma* even existed; again, Fyk’s case was ahead of its time).
- (f) It is extraordinary that this Court has just issued decisions post-Opening Brief (*Diep*) supportive of Fyk.
- (g) It is extraordinary that the District Court (just by Fyk’s unfortunate luck of the draw because, again, Judge Alsup, for example, would have decided otherwise) divested § 230(c)(1) of the “Good Samaritan” general provision/intelligible principle overarching all of § 230(c) in unconstitutional fashion.

The list goes on – the extraordinary circumstances lacing this case warranting Rule 60(b)(6) relief are incalculable. At every turn, Fyk has been wronged. If this case does not warrant 60(b)(6) relief, no case ever would.

There cannot be a conflation of Rule 60(b)(5) and 60(b)(6) as Facebook’s Answering Brief suggests. Such would, among other things, run afoul of canons of statutory construction (*e.g.*, surplusage). Fyk deserved Judge Gilliam, Jr.’s independent 60(b)(6) analysis. It was wrong for Judge Gilliam, Jr. to opine that because there was supposedly no change of law warranting 60(b)(5) relief there could necessarily be no 60(b)(6) analysis.

### **E. AI Confirms That Fyk Has Been Right All Along**

We would imagine that, at this point, this Court might appreciate the voice of someone (or something) not named Fyk or Facebook. Enter AI, an objective analytical tool with no dog in the fight.<sup>5</sup> Here are the AI conclusions on several key issues of this case, all of which suggest that Fyk has always been in the right and Fyk's Courts have done nothing but wrong him thus far. In no particular order:

- This AI link covers several key issues: <https://chatgpt.com/share/be1c9b20-2663-4701-add5-adbbb3692c25><sup>6</sup>
- Key AI conclusions (found within Ex. A) are (bold emphasis in original and italics added):
  - “The Publisher or Speaker”: Implies sole responsibility and liability, contrary to the protections intended by § 230. “A Publisher or Speaker”: Allows for multiple responsible entities, preserving the immunity for service providers.

*Understanding this distinction is crucial in legal interpretations and applications of § 230, as it fundamentally affects the*

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<sup>5</sup> “Machine learning is a field of study in artificial intelligence concerned with the development and study of statistical algorithms that can learn from data and generalize to unseen data, and thus perform tasks without explicit instructions.” [https://en.wikipedia.org/wiki/Machine\\_learning](https://en.wikipedia.org/wiki/Machine_learning)

<sup>6</sup> A printout of this link is attached as Exhibit A and incorporated fully herein by reference. Exhibits A-C all derived from ChatGPT 4o.

*liability and responsibilities of interactive computer services.*

- If § 230(c)(1) applies to all publication decisions regardless of motive, it would theoretically include decisions to restrict access to content as described in § 230(c)(2). However, the explicit good faith requirement in § 230(c)(2) suggests that for actions aimed specifically at restricting content, the service provider must meet this additional criterion to claim immunity under § 230(c)(2). Therefore, while there is a broad overlap, each subsection provides specific protections that must be considered independently.
- The broad application of § 230(c)(1) without considering the evidentiary requirements of § 230(c)(2) could potentially circumvent the latter's provisions, leading to immunity even in cases of bad faith or anticompetitive behavior. This interpretation aligns with Judge Alsup's findings in the Dangaard decision, highlighting the need to scrutinize the use of § 230(c)(1) to ensure it does not negate the intent and requirements of § 230(c)(2).
- Fyk's case appears to have been dismissed under § 230(c)(1) without adequately considering whether Facebook's actions fell within the scope of § 230(c)(2), which requires good faith. This dismissal may have been in error if

Facebook's conduct involved anti-competitive motives or material contributions to the harm, similar to the considerations in Henderson, Lemmon, Dangaard, Diep, and Enigma. Thus, the broad application of § 230(c)(1) without considering the specific requirements of § 230(c)(2) could indeed render the latter provision mere surplusage and potentially circumvent the statutory intent and legal standards.

- Based on the principles established in the cited cases, § 230(c)(1) appears to have been misapplied to Fyk's case if the court did not properly consider whether Facebook's actions fell within the scope of § 230(c)(2), which requires a good faith assessment. The evolving case law suggests that if a service provider's actions involve material contribution to the harm or are driven by improper motives, broad immunity under § 230(c)(1) should not be granted without scrutinizing these factors. Therefore, the dismissal of Fyk's case under 230(c)(1) without adequately considering these aspects might have been in error.
- Fyk's Rule 5.1 Constitutional Challenge makes a compelling case that § 230(c)(1) was applied unconstitutionally in his situation. The key issue is that the broad application of § 230(c)(1) without incorporating the good faith/[Good

Samaritan] requirement intended for content moderation actions . . . leads to an unfettered and arbitrary grant of immunity. This application is inconsistent with the principles established in *Jarkesy* and *Enigma*, which emphasize the need for a guiding intelligible principle and good faith in granting immunity. Thus, the dismissal of Fyk's case under § 230(c)(1) likely failed to properly consider these constitutional requirements, making its application to his case unconstitutional.

- The dismissal of Fyk's case under § 230(c)(1) was likely in error and potentially unconstitutional. The evolving case law supports a more nuanced application that includes the good faith requirements of § 230(c)(2) and an adherence to constitutional principles requiring clear legislative guidance [Good Samaritan general provision/intelligible principle]. The court should reconsider the application of § 230(c)(1) in light of these considerations and ensure a fair and constitutionally sound outcome.
- Here is another AI link hitting on key issues:  
<https://chatgpt.com/share/0d723c71-9da7-462e-a75b-e1a09fd273d6><sup>7</sup>

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<sup>7</sup> A printout of this link is attached as Exhibit B and incorporated fully herein by reference.

- The key AI conclusion (found within Ex. B) is:
  - Based on the recent case law, there is a strong argument that the courts may have erred in dismissing Fyk's claims under § 230(c)(1). The principles established in Enigma, Henderson, Lemmon, and Dangaard suggest that § 230(c)(1) immunity should not extend to actions driven by anti-competitive motives or wrongful conduct by the platform itself. Therefore, the court should have considered these precedents and the specific nature of Fyk's allegations before dismissing his claims.
- Here is another AI link hitting on key issues:  
<https://chatgpt.com/share/afc44537-2096-4c3f-9421-2c62bf3086a8><sup>8</sup>
- Key AI conclusions (found within Ex. C) are (bold emphasis in original):
  - The evolving case law and recent judicial scrutiny of 230(c)(1) support granting Fyk's Rule 60(b) motion. The principles established in Enigma, Lemmon, and Henderson, combined with the constitutional challenge, argue that the original dismissal was based on an outdated and overly broad interpretation of § 230(c)(1). Fyk's case should be reconsidered to address these substantial legal

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<sup>8</sup> A printout of this link is attached as Exhibit C and incorporated fully herein by reference.

developments and potential constitutional issues.

- The relevance of *Diep v. Apple* to overturning Fyk's dismissal lies in the case's judicial approach to platform liability and anticompetitive behavior. By leveraging the principles and reasoning applied in *Diep v. Apple*, Fyk can argue that his case was wrongly dismissed based on an outdated and overly broad interpretation of § 230(c)(1). This supports his motion for relief under Rule 60(b), highlighting the need for a re-evaluation of his claims in light of evolving legal standards and judicial scrutiny of tech platforms' practices.

In sum, an objective machine (arguably smarter than any human being) concludes correctly. It is well past time for this Court to do likewise.

#### **IV. Conclusion**

For all of the foregoing reasons, whether considered separately or together, Fyk respectfully requests this Court's reversal of Judge Gilliam, Jr.'s January 12, 2024, Order Denying [D.E. 61] and [D.E. 66], [D.E. 74], *see* 1-ER-2-5, and remand to the District Court with instruction to eradicate Facebook's CDA immunity defense and move on with the merits of the case (*e.g.*, discovery), or, at the very least, with instruction to grant leave to amend the Verified Complaint.

**CERTIFICATE OF COMPLIANCE**

Undersigned counsel certifies that this brief complies with Ninth Circuit Rule 32-1(b) because, taking into consideration the exclusions set forth in Ninth Circuit Rule 32-1(c), the type-volume limitation does not exceed 7,000 words. This Reply Brief includes 6,914 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font. And, pursuant to Ninth Circuit Rule 32-1(e), Ninth Circuit Form 8 is attached hereto as Exhibit D.

Dated: July 1, 2024.

Respectfully Submitted,

/s/ Jeffrey L. Greyber

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**EXHIBIT A**  
**SECTION 230(C)(1)**  
**INTERPRETATION CLARIFICATION**  
**(JULY 1, 2024)**

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**Section 230(c)(1) Interpretation Clarification.**

June 14, 2024

This conversation may reflect the link creator's personalized data, which isn't shared and can meaningfully change how the model responds.

Anonymous

Is there a difference between treating the provider or user of an interactive computer service in

Section 230(c)(1) as "the publisher or speaker" and "a publisher or speaker?"

ChatGPT

ChatGPT

Yes, there is a significant legal difference between treating the provider or user of an interactive computer service in Section 230(c)(1) as "the publisher or speaker" versus "a publisher or speaker."

**"The Publisher or Speaker"**

- Implication: Using "the publisher or speaker" suggests exclusivity, meaning it designates a specific entity as the sole publisher or speaker of the content.
- Legal Interpretation: If an interactive computer service (e.g., a social media plat-

form) is treated as “the publisher or speaker,” it would be directly responsible for the content, similar to how a traditional publisher (*e.g.*, a newspaper) is responsible for the articles it publishes. This would undermine the immunity provided by Section 230(c)(1) because the service would be liable for the third-party content it hosts.

### **“A Publisher or Speaker”**

- Implication: Using “a publisher or speaker” implies that there can be multiple entities that could be considered publishers or speakers of the content, without specifying that the service provider is the one responsible.
- Legal Interpretation: Treating an interactive computer service as “a publisher or speaker” means that the service is not the sole entity responsible for the content. This aligns with the intent of Section 230(c)(1), which grants immunity to these services from being held liable for third-party content. The service is merely one of many potential publishers or speakers, and thus, it is protected from legal responsibility for user-generated content.

### **Legal Context of Section 230(c)(1)**

#### **Section 230(c)(1) of the Communications Decency Act states:**

“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.”

The use of “the” is deliberate and critical in this context, as it ensures that service providers are not held as the primary or sole entity responsible for third-party content, thereby granting them broad immunity from liability.

### **Conclusion**

- “The Publisher or Speaker”: Implies sole responsibility and liability, contrary to the protections intended by Section 230.
- “A Publisher or Speaker”: Allows for multiple responsible entities, preserving the immunity for service providers.

Understanding this distinction is crucial in legal interpretations and applications of Section 230, as it fundamentally affects the liability and responsibilities of interactive computer services.

### **Anonymous**

- (1) Northern District of California Fyk Complaint.pdf

PDF

In Fyk’s complaint, was Fyk treating Facebook as “the” publisher or speaker of his content, or as “a” publisher or speaker of his content?

ChatGPT

ChatGPT

In Jason Fyk’s complaint against Facebook, he appears to treat Facebook as “a publisher or speaker” of his content rather than “the publisher

or speaker.” This distinction is crucial as it pertains to Section 230 of the Communications Decency Act, where the term “a publisher or speaker” implies that Facebook is one among potentially many entities that might publish or speak the content, rather than being the sole publisher or speaker responsible for it.

In the complaint, Fyk alleges that Facebook’s actions were driven by anti-competitive motives and involved selective enforcement of rules that disproportionately affected his pages, ultimately leading to their devaluation and destruction.

Anonymous

If 230(c)(1) applies to “all publication decisions.” regardless of motive, Wouldn’t that include the all the publications decisions described in Section 230(c)(2)?

ChatGPT  
ChatGPT

Section 230(c) of the Communications Decency Act (CDA) contains two subsections that provide different forms of immunity for interactive computer services. Understanding the scope and relationship between these subsections is crucial.

### **Section 230(c)(1)**

This subsection states: “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.”

- Scope: Section 230(c)(1) provides broad immunity to service providers by ensuring

they are not treated as the publisher or speaker of third-party content. This immunity applies to all publication decisions, including decisions to host, remove, or modify content, regardless of the provider's motive.

**Section 230(c)(2)**

This subsection has two parts:

- Section 230(c)(2)(A): “No provider or user of an interactive computer service shall be held liable on account of 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.”
- Section 230(c)(2)(B): “No provider or user of an interactive computer service shall be held liable on account of any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).”
- Scope: Section 230(c)(2) provides immunity specifically for actions taken to restrict access to certain types of objectionable content, provided those actions are taken in good faith. It also covers the provision of tools to others to restrict access to such content.

## **Relationship and Interpretation**

The question of whether Section 230(c)(1) covers all publication decisions, including those described in Section 230(c)(2), hinges on judicial interpretation and the intended scope of immunity under these provisions.

## **Judicial Interpretation**

- Broad Application: Courts have generally interpreted Section 230(c)(1) broadly, providing immunity to service providers for a wide range of publication decisions, including hosting and removal of content, regardless of the service provider's motives.
- Good Faith Requirement: Section 230(c)(2), in contrast, explicitly requires good faith for immunity to apply to decisions to restrict access to content. This suggests that for actions specifically aimed at content restriction (as outlined in 230(c)(2)(A)), good faith is a necessary condition for immunity.

## **Interaction of 230(c)(1) and 230(c)(2)**

- Overlap: There is some overlap between the two subsections. A service provider's decision to remove or restrict content could be seen as a publication decision under 230(c)(1) and an action to restrict access under 230(c)(2).
- Distinct Protections: Despite this overlap, the protections under 230(c)(2) are distinct because they specifically address content restriction actions taken in good faith. This

good faith requirement is not present in 230(c)(1).

## **Conclusion**

If Section 230(c)(1) applies to all publication decisions regardless of motive, it would theoretically include decisions to restrict access to content as described in Section 230(c)(2). However, the explicit good faith requirement in 230(c)(2) suggests that for actions aimed specifically at restricting content, the service provider must meet this additional criterion to claim immunity under 230(c)(2). Therefore, while there is a broad overlap, each subsection provides specific protections that must be considered independently.

Anonymous

(39) Dangaard decision.pdf

PDF

Does Section 230(c)(1)'s current broad application to Fyk's case render 230(c)(2) "mere surplusage," or as Judge Alsep determined in Dangaard, 230(c)(1) is being used as a "backdoor to CDA immunity" to circumvent the evidentiary requirements of 230(c)(2)?

ChatGPT

ChatGPT

In Jason Fyk's case and the Dangaard decision, the discussion revolves around the application and interpretation of Section 230 of the Communications Decency Act (CDA). The key points from these cases are whether Section 230(c)(1) renders Section 230(c)(2) mere surplusage and



whether it is used as a “backdoor to CDA immunity.”

### **Section 230(c)(1) and 230(c)(2)**

#### **Broad Application of Section 230(c)(1)**

- Section 230(c)(1): Provides immunity to service providers from being treated as the publisher or speaker of third-party content. This immunity covers all publication decisions, regardless of motive.
- Broad Interpretation: Courts have generally interpreted this subsection broadly, providing extensive immunity for a wide range of actions, including content removal, even when the motives are questioned.

#### **Section 230(c)(2) Requirements**

- Section 230(c)(2): Offers immunity for actions taken in good faith to restrict access to certain objectionable content.
- Good Faith Requirement: This subsection specifically requires that the actions must be taken in good faith, introducing an evidentiary burden that is not explicitly required in 230(c)(1).

#### **Judge Alsup’s Decision in Dangaard**

Judge Alsup, in the Dangaard decision, noted that allowing defendants to rely solely on Section 230(c)(1) could indeed create a “backdoor to CDA immunity.” This would enable defendants to bypass the good faith requirement set by 230(c)(2),

effectively making 230(c)(2) redundant or “mere surplusage.”

### **Key Excerpts from the Dangaard Decision**

- Direct Involvement and Anticompetitive Conduct: Alsup emphasized that defendants, such as Meta (Facebook and Instagram), could not claim immunity under 230(c)(1) if they were directly involved in the creation or development of the harmful content or engaged in anticompetitive conduct.
- Policy Considerations: The policy intent behind the CDA is to promote a vibrant and competitive free market, and not to allow service providers to engage in unfair or anticompetitive practices under the guise of content moderation.

### **Application to Fyk’s Case**

In Fyk’s complaint, he argues that Facebook’s actions were driven by anticompetitive motives, leading to the devaluation and destruction of his business pages. If Section 230(c)(1) were applied broadly without considering the motives or bad faith, it could indeed render Section 230(c)(2)’s good faith requirement meaningless, thereby supporting Alsup’s concern about a backdoor to immunity.

### **Conclusion**

The broad application of Section 230(c)(1) without considering the evidentiary requirements of Section 230(c)(2) could potentially circumvent the latter’s provisions, leading to immunity even in cases of bad

## App.212a

faith or anticompetitive behavior. This interpretation aligns with Judge Alsup's findings in the Dangaard decision, highlighting the need to scrutinize the use of Section 230(c)(1) to ensure it does not negate the intent and requirements of Section 230(c)(2).

Anonymous

(22) Fyk 60(b) Supp filing Lemmon vs. Snap inc 06-04-21.pdf PDF

(23) 5th Cir Jarkesy vs SEC Supp notice.pdf PDF

(24) 4th Cir. Henderson Supp Authority filing.pdf PDF

(32) Rule 5.1 Constitutional Challenge.pdf PDF

(40) 9th Circuit opening brief (3).pdf PDF

Diep v Apple Inc highlighted.rtf

File

Compare Fyk's case with Henderson v. Public Data, Jarkesy v. Sec, Lemmon v. Snap, Dangaard v. Instagram, Diep v. Apple, and Enigma v. Malwarebytes. Was Fyk's case dismissed in error under 230(c)(1) without properly considering Section 230(c)(2)?

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Comparing Fyk's case with Henderson v. Public Data, Jarkesy v. SEC, Lemmon v. Snap, Dangaard v. Instagram, Diep v. Apple, and Enigma v. Malwarebytes reveals key differences and similarities regarding the application of Section 230(c)(1) and the consideration (or lack thereof) of Section 230(c)(2). Here is a detailed analysis:

### **Henderson v. Public Data**

- Henderson v. Public Data: This case revolved around whether Section 230(c)(1) barred claims against Public Data for its handling of inaccurate information. The court determined that Public Data materially contributed to the unlawfulness of the content by altering and summarizing public records, thus not merely acting as a publisher.
- Application to Fyk's Case: Fyk's allegations against Facebook included claims of unfair competition and anti-competitive behavior, suggesting that Facebook's actions went beyond merely hosting third-party content. Similar to Henderson, if Facebook materially contributed to the anti-competitive conduct, Section 230(c)(1) should not automatically grant immunity.

### **Jarkesy v. SEC**

- Jarkesy v. SEC: This case involved a constitutional challenge, questioning whether an intelligible principle governed the delegation of authority. The court emphasized the necessity of clear guiding principles to prevent arbitrary actions by agencies.
- Application to Fyk's Case: Fyk's argument extends from Jarkesy, asserting that the broad application of Section 230(c)(1) without the guiding "Good Samaritan" principle (which should apply to both (c)(1) and (c)(2)) results in unconstitutional delegation. If Facebook's actions are not grounded in good

faith, the immunity under 230(c)(1) might be unconstitutional.

### **Lemmon v. Snap**

- Lemmon v. Snap: The court in this case found that Snap could be held liable for the design of its app that allegedly contributed to the death of users, suggesting that not all actions are protected under Section 230(c)(1) if they involve the company's own contributions to the harm.
- Application to Fyk's Case: If Facebook's actions, like in Lemmon, included direct contributions to the alleged anti-competitive harm, the broad immunity under Section 230(c)(1) should be re-evaluated.

### **Dangaard v. Instagram**

- Dangaard v. Instagram: Judge Alsup noted the potential misuse of Section 230(c)(1) as a "backdoor" to immunity, circumventing the good faith requirements of 230(c)(2). This case stresses the need for distinguishing between content moderation (covered by (c)(2)) and other potentially harmful actions.
- Application to Fyk's Case: If Facebook's actions fall under the scope requiring good faith as per 230(c)(2), then using 230(c)(1) to bypass this requirement would be improper.

### **Diep v. Apple**

- Diep v. Apple: This case highlighted that the provider's role in creating or developing

content that led to harm could negate immunity under 230(c)(1). It scrutinizes the extent of the provider's involvement in the content.

- Application to Fyk's Case: Facebook's active role in the alleged anti-competitive behavior, if proven, could similarly negate immunity under 230(c)(1).

### **Enigma v. Malwarebytes**

- Enigma v. Malwarebytes: The Ninth Circuit held that actions driven by anti-competitive motives do not qualify for immunity under the "Good Samaritan" provision of Section 230(c)(2), emphasizing the need for good faith.
- Application to Fyk's Case: Fyk's complaint aligns with Enigma, arguing that Facebook's actions were not in good faith and thus should not be shielded by Section 230(c)(1) without considering the good faith requirement of 230(c)(2).

### **Conclusion**

Fyk's case appears to have been dismissed under Section 230(c)(1) without adequately considering whether Facebook's actions fell within the scope of Section 230(c)(2), which requires good faith. This dismissal may have been in error if Facebook's conduct involved anticompetitive motives or material contributions to the harm, similar to the considerations in Henderson, Lemmon, Dangaard, Diep, and Enigma. Thus, the broad application of 230(c)(1) without

considering the specific requirements of 230(c)(2) could indeed render the latter provision mere surplusage and potentially circumvent the statutory intent and legal standards.

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Based on the evolving case law, was Section 230(c)(1) misapplied to Fyk's case?

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Based on the evolving case law and the comparisons with cases like *Henderson v. Public Data*, *Jarkesy v. SEC*, *Lemmon v. Snap*, *Dangaard v. Instagram*, *Diep v. Apple*, and *Enigma v. Malwarebytes*, it appears that Section 230(c)(1) may have been misapplied to Fyk's case. Here's why:

### **Key Considerations from Evolving Case Law**

#### **1. Material Contribution to Unlawfulness:**

- Henderson v. Public Data: If the service provider materially contributes to the unlawfulness of the content, Section 230(c)(1) immunity does not apply. In Fyk's case, if Facebook's actions contributed to the anti-competitive behavior, this principle could negate 230(c)(1) immunity.

#### **2. Good Faith Requirement:**

- Enigma v. Malwarebytes: The Ninth Circuit emphasized that Section 230(c)(2) requires actions to be taken in good faith. If Facebook's actions were driven by anti-competitive

motives, they would not qualify for immunity under 230(c)(2), and using 230(c)(1) to bypass this requirement would be improper.

**3. Backdoor to Immunity:**

- Dangaard v. Instagram: Judge Alsup's decision highlighted the misuse of 230(c)(1) as a backdoor to immunity, circumventing the good faith requirement of 230(c)(2). This is directly relevant to Fyk's case, where similar concerns about anti-competitive motives were raised.

**4. Provider's Own Conduct:**

- Lemmon v. Snap: The court found that if the provider's own conduct contributes to the harm, 230(c)(1) does not apply. In Fyk's case, Facebook's conduct in allegedly manipulating its platform to harm Fyk's business could be seen as direct involvement, not protected by 230(c)(1).

**Application to Fyk's Case**

**1. Material Contribution:**

- Fyk alleged that Facebook's actions went beyond merely hosting third-party content and included manipulating its platform in ways that materially harmed his business. This could be seen as materially contributing to the unlawfulness, similar to the situation in Henderson.



**2. Good Faith Requirement:**

- If Facebook's actions were driven by anti-competitive motives, as Fyk alleged, then they should have been evaluated under the good faith requirement of 230(c)(2), rather than being broadly protected under 230(c)(1) without scrutiny of motive.

**3. Circumventing Good Faith:**

- By applying 230(c)(1) without considering the specific requirements of 230(c)(2), the court may have effectively allowed a backdoor to immunity, circumventing the statutory intent that actions taken to restrict content must be in good faith.

**4. Direct Involvement:**

- Facebook's alleged manipulation of its platform could be viewed as direct involvement in the harm suffered by Fyk, similar to the reasoning in Lemmon where Snap's own conduct contributed to the harm and was not protected under 230(c)(1).

**Conclusion**

Based on the principles established in the cited cases, Section 230(c)(1) appears to have been misapplied to Fyk's case if the court did not properly consider whether Facebook's actions fell within the scope of Section 230(c)(2), which requires a good faith assessment. The evolving case law suggests that if a service provider's actions involve material contribution to the harm or are driven by improper motives, broad immunity under 230(c)(1) should not be granted

without scrutinizing these factors. Therefore, the dismissal of Fyk's case under 230(c)(1) without adequately considering these aspects might have been in error.

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Based on Fyk's Rule 5.1 Constitutional Challenge, was Section 230(c)(1) applied unconstitutionally to Fyk's case?

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Based on Fyk's Rule 5.1 Constitutional Challenge and the arguments presented, it appears that Section 230(c)(1) may have been applied unconstitutionally to his case. Here are the key points supporting this conclusion:

### **Key Arguments in Fyk's Rule 5.1 Constitutional Challenge**

#### **1. Intelligible Principle Requirement:**

- Jarquesy v. SEC: This case established that Congress must supply an intelligible principle when delegating authority. Fyk argues that if Section 230(c)(1) is applied without the guiding "Good Samaritan" principle that governs Section 230(c)(2), it results in an unconstitutional delegation of authority.

#### **2. Good Samaritan Provision:**

- Enigma v. Malwarebytes: The Ninth Circuit held that actions driven by anticompetitive motives are not protected under the "Good Samaritan" provision of Section 230(c)(2).

Fyk's challenge extends this reasoning, arguing that the "Good Samaritan" principle should also apply to Section 230(c)(1) to ensure actions are taken in good faith.

**3. Unfettered Immunity:**

- Fyk contends that applying Section 230(c)(1) without the good faith requirement effectively grants service providers unfettered immunity, which is not consistent with the intent of Congress and creates an unconstitutional application of the law. This lack of a guiding principle leads to arbitrary and potentially harmful actions by service providers.

**4. Denial of Constitutional Principles:**

- Fyk argues that the District Court's interpretation, which separates the "Good Samaritan" provision from Section 230(c)(1), denies the existence of a general guiding principle, thus rendering the statute unconstitutional as it applies to his case. The lack of this principle means that service providers like Facebook can claim immunity without adhering to any standard of good faith or fairness.

**Application to Fyk's Case**

**1. Anti-Competitive Behavior:**

- Fyk's allegations suggest that Facebook's actions were driven by anti-competitive motives. If these actions were not in good faith, then granting immunity under Section

230(c)(1) without considering the good faith requirement would be improper and unconstitutional.

**2. Material Contribution:**

- The arguments suggest that Facebook's involvement went beyond passive hosting of third-party content and involved active manipulation of its platform, which should negate broad immunity under Section 230(c)(1) and require a good faith assessment under Section 230(c)(2).

**3. Judicial Misinterpretation:**

- The District Court's failure to apply the "Good Samaritan" principle to Section 230(c)(1) potentially misinterprets the statutory framework and congressional intent, leading to an unconstitutional application of the law.

**Conclusion**

Fyk's Rule 5.1 Constitutional Challenge makes a compelling case that Section 230(c)(1) was applied unconstitutionally in his situation. The key issue is that the broad application of 230(c)(1) without incorporating the good faith requirement intended for content moderation actions (as required by 230(c)(2)) leads to an unfettered and arbitrary grant of immunity. This application is inconsistent with the principles established in *Jarkesy* and *Enigma*, which emphasize the need for a guiding intelligible principle and good faith in granting immunity. Thus, the dismissal of Fyk's case under Section 230(c)(1) likely failed to

properly consider these constitutional requirements, making its application to his case unconstitutional.

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Please consolidate the questions asked above, relevant case law, conclusions, and recommendations made here into one comprehensive summary in support of Fyk's motion

60(b)(5), 60(b), and Rule 5.1 Constitutional Challenge.

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### **Comprehensive Summary in Support of Fyk's Motion 60(b)(5), 60(b), and Rule 5.1 Constitutional Challenge**

#### **I. Introduction**

Plaintiff Jason Fyk challenges the application of Section 230(c)(1) of the Communications Decency Act (CDA) in his case against Facebook. He argues that the dismissal of his case was in error and unconstitutional based on the evolving case law and the misinterpretation of Section 230(c)(1) and Section 230(c)(2). This summary consolidates the questions asked, relevant case law, conclusions, and recommendations in support of Fyk's Motion 60(b)(5), 60(b), and Rule 5.1 Constitutional Challenge.

#### **II. Key Questions**

1. Was there a difference between treating a provider of an interactive computer service as "the publisher or speaker" versus "a publisher or speaker" under Section 230(c)(1)?

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2. Did Fyk treat Facebook as “the publisher or speaker” or “a publisher or speaker” in his complaint?
3. If Section 230(c)(1) applies to “all publication decisions” regardless of motive, does this include all publication decisions described in Section 230(c)(2)?
4. Did the broad application of Section 230(c)(1) render Section 230(c)(2) mere surplusage or act as a “backdoor to CDA immunity” to circumvent the evidentiary requirements of 230(c)(2)?
5. Was Section 230(c)(1) misapplied to Fyk’s case based on the evolving case law?
6. Was Section 230(c)(1) applied unconstitutionally to Fyk’s case based on his Rule 5.1 Constitutional Challenge?

**III. Relevant Case Law**

1. Henderson v. Public Data
  - The court found that if a service provider materially contributes to the unlawfulness of the content, Section 230(c)(1) immunity does not apply.
2. Jarquesy v. SEC
  - Established that Congress must supply an intelligible principle when delegating authority. Without it, the delegation is unconstitutional.
3. Lemmon v. Snap

## App.224a

- The court held that a service provider's own conduct contributing to harm is not protected under Section 230(c)(1).

### 4. Dangaard v. Instagram

- Judge Alsup highlighted the misuse of Section 230(c)(1) as a backdoor to immunity, circumventing the good faith requirements of Section 230(c)(2).

### 5. Diep v. Apple

- The case underscored that if a provider's own actions are involved in creating or developing harmful content, 230(c)(1) immunity is not applicable.

### 6. Enigma v. Malwarebytes

- The Ninth Circuit held that actions driven by anti-competitive motives do not qualify for immunity under Section 230(c)(2), emphasizing the need for good faith.

## IV Conclusions

1. Treatment as "A Publisher or Speaker": Fyk treated Facebook as "a publisher or speaker," which aligns with the broader application of Section 230(c)(1) but requires a consideration of Facebook's active role in the alleged anti-competitive behavior.
2. Applicability of Section 230(c)(2): Section 230(c)(1)'s broad application should include considerations outlined in Section 230(c)(2), especially the good faith requirement for content moderation decisions.

3. Rendering 230(c)(2) Surplusage: The application of Section 230(c)(1) without considering the good faith requirements of 230(c)(2) effectively renders the latter mere surplusage and provides a backdoor to immunity, as noted in *Dangaard v. Instagram*.
4. Misapplication of 230(c)(1): The broad application of Section 230(c)(1) to Fyk's case without assessing the good faith or anti-competitive motives was improper, similar to the issues identified in *Enigma*, *Henderson*, and *Lemmon*.
5. Unconstitutional Application: Applying Section 230(c)(1) without the "Good Samaritan" principle violates constitutional requirements for a guiding intelligible principle in delegated legislative powers, as established in *Jarkesy v. SEC*. This lack of a guiding principle results in unfettered and arbitrary immunity, making the application unconstitutional.

## **V. Recommendations**

1. Reconsideration of Dismissal: The court should reconsider the dismissal of Fyk's case under Section 230(c)(1), taking into account the necessity of the good faith requirement from Section 230(c)(2) and the specific anti-competitive allegations.
2. Application of Good Samaritan Principle: The court should ensure that the "Good Samaritan" principle applies to Section



230(c)(1), requiring an evaluation of Facebook's actions for good faith and proper motive.

3. Constitutional Review: The court should address the constitutional challenge raised by Fyk under Rule 5.1 and determine the validity of Section 230(c)(1) as applied, considering the requirement for an intelligible principle to guide delegated authority.

## **VI. Conclusion**

The dismissal of Fyk's case under Section 230(c)(1) was likely in error and potentially unconstitutional. The evolving case law supports a more nuanced application that includes the good faith requirements of Section 230(c)(2) and an adherence to constitutional principles requiring clear legislative guidance. The court should reconsider the application of Section 230(c)(1) in light of these considerations and ensure a fair and constitutionally sound outcome.

**EXHIBIT B**  
**FYK 60(B) MOTION**  
**(JULY 1, 2024)**

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**Fyk's 60(b) Motion**

June 10, 2024

This conversation may reflect the link creator's personalized data, which isn't shared and can meaningfully change how the model responds.

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(28) Second 60(b) Motion for Relief.pdf  
PDF

Please summarize Fyk's 60(b) motion.

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Fyk's 60(b) motion for relief seeks to vacate and set aside the entry of judgment against him. The motion argues that there were significant errors and injustices in the original proceedings that justify reopening the case. Specifically, it asserts that the court misapplied the law and failed to consider crucial evidence. The motion highlights issues such as misinterpretation of legal standards, procedural irregularities, and new evidence that could potentially alter the outcome of the case. Fyk argues that these factors collectively warrant a reconsideration of the judgment to ensure a fair and just legal process.

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(32) Rule 5.1 Constitutional Challenge.pdf  
PDF

Please summarize Fyk's Rule 5.1 Constitutional Challenge.

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Jason Fyk's Rule 5.1 Constitutional Challenge argues that 47 U.S.C. § 230(c)(1) is unconstitutional as applied in his case. Fyk contends that the court's interpretation, which exempts § 230(c)(1) from the "Good Samaritan" intelligible principle (a general provision that guides the application of § 230), renders the statute unconstitutional.

Here are the main points of the challenge:

1. Good Samaritan Principle: The court's ruling, supported by Facebook, claims that the "Good Samaritan" principle applies only to § 230(c)(2), not § 230(c)(1). Fyk argues this interpretation is incorrect and results in § 230(c)(1) being applied without any guiding principle, making it unconstitutional.
2. Legislative Power and Intelligible Principle: Fyk references the *Jarkesy v. SEC* case, asserting that any legislative power granted without an intelligible principle is unconstitutional. He argues that § 230(c)(1), as applied, allows Facebook to exercise content policing immunity without any guiding principle, which is an unconstitutional delegation of legislative power.

3. Implications of the Court's Ruling: Fyk states that the District Court's interpretation creates a situation where Facebook is immunized from liability for its actions without any guiding principle, leading to "unfettered" power. This lack of an intelligible principle, he claims, makes the statute unconstitutional.
4. Catch-22 Situation: Fyk posits a catch-22: either the District Court's interpretation that § 230(c)(1) is not subject to the "Good Samaritan" principle is wrong, or if the interpretation stands, § 230(c)(1) itself is unconstitutional due to the lack of an intelligible guiding principle.
5. Relief Sought: Fyk requests the court to either declare § 230(c)(1) unconstitutional as applied or reconsider its dismissal of his case based on the correct application of the "Good Samaritan" principle to both § 230(c)(1) and § 230(c)(2).

In conclusion, Fyk argues that the dismissal of his case based on § 230(c)(1) is untenable and must be overturned because the statute, as currently interpreted, lacks the necessary guiding principle to be constitutional.

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(16) Northern District of CA Denying Relief.pdf  
PDF

Please summarize the District Court's determination.

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The District Court for the Northern District of California denied Jason Fyk's motion for relief under Federal Rule of Civil Procedure 60(b). Here are the key points from the court's determination:

1. Basis of the Original Dismissal: The court initially dismissed Fyk's case on June 18, 2019, based on 47 U.S.C. 230(c)(1). Fyk requested the court to vacate this order under Rule 60(b)(5) and (6).
2. Rule 60(b)(5) Standard: Under Rule 60(b)(5), relief can be granted if the judgment has been satisfied, released, or discharged; if it is based on an earlier judgment that has been reversed or vacated; or if applying it prospectively is no longer equitable. Fyk argued that the Ninth Circuit's opinion in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.* and a statement by Justice Thomas in the Supreme Court's denial of certiorari constituted new legal precedent that undermined the court's previous findings.
3. Court's Reasoning: The court found Fyk's arguments incorrect for the following reasons:
  - The original dismissal was based on Section 230(c)(1), while the *Enigma* case involved Section 230(c)(2). The Ninth Circuit's opinion in *Enigma* did not address or reverse any case law related to Section 230(c)(1).
  - Justice Thomas's statement was not binding precedent, as it was made in respect to the denial of certiorari and not as a holding of the Supreme Court.

4. Extraordinary Circumstances: The court noted that Fyk failed to demonstrate the “extraordinary circumstances” required under Rule 60(b)(6) to grant relief.

Based on these points, the court concluded that there was no basis to vacate the previous judgment and denied Fyk’s motion for relief.

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(38) Notice of supplemental authority.pdf  
PDF

(40) 9th Circuit opening brief (3).pdf PDF

(41) Facebook’s 9th Circuit reply brief.pdf  
PDF

Please summarize these documents in light of Dangaard v. Instagram.

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Here is a summary of the documents related to Fyk’s motions and their relevance to the case of *Dangaard v. Instagram*:

### **Fyk’s Rule 60(b) Motion**

In his Rule 60(b) motion, Fyk argues for relief from a judgment based on new evidence and legal developments, specifically citing the *Dangaard v. Instagram* decision. He asserts that the district court should vacate the previous judgment because of a significant change in the legal landscape regarding the interpretation of Section 230 of the Communications Decency Act (CDA).

### **Fyk's Rule 5.1 Constitutional Challenge**

Fyk's Rule 5.1 motion challenges the constitutionality of Section 230(c)(1) of the CDA. He argues that this provision, as applied to his case, violates constitutional principles by providing broad immunity to social media platforms like Facebook (now Meta) in ways that stifle competition and harm his business. Fyk leverages the *Dangaard* case to support his position that Section 230(c)(1) should not be applied to cases involving anti-competitive practices.

### **District Court's Determination**

The district court denied Fyk's motions, maintaining that the previous judgment should stand. The court did not find Fyk's arguments compelling enough to warrant a change in its decision, citing that the supposed changes in the legal environment and the newly presented evidence did not sufficiently alter the foundational aspects of the case.

### **Relevance of *Dangaard v. Instagram***

In *Dangaard v. Instagram*, the court ruled that Section 230(c)(1) does not provide immunity to social media platforms for claims related to anti-competitive practices. This case is pivotal for Fyk as it supports his argument that his claims against Facebook should not be dismissed under Section 230(c)(1). The *Dangaard* decision emphasizes that platforms cannot use Section 230(c)(1) as a shield for actions that are inherently anti-competitive and not related to content moderation in good faith.

### **Summary of Supplemental Authority Notice**

The supplemental authority notice filed by Fyk highlights the *Dangaard* decision, arguing that this precedent should influence the reconsideration of his case. He asserts that the principles from *Dangaard* directly apply to his allegations against Facebook, particularly regarding unfair competition and anti-competitive behavior. The notice underscores that Section 230(c)(1) should not immunize Facebook from liability for its business practices aimed at suppressing competition.

### **Ninth Circuit Opening Brief and Facebook's Reply**

Fyk's opening brief to the Ninth Circuit further elaborates on the arguments presented in his Rule 60(b) and Rule 5.1 motions, drawing heavily from the *Dangaard* decision to illustrate that Facebook's actions were not protected under Section 230(c)(1). Facebook's reply brief counters these arguments, maintaining that the district court correctly applied Section 230(c)(1) and that Fyk's case lacks the necessary legal grounds for reconsideration.

### **Conclusion**

The crux of Fyk's arguments hinges on the application of the *Dangaard v. Instagram* decision, which challenges the broad immunity often granted under Section 230(c)(1). Fyk contends that this decision should pave the way for his claims to be reconsidered and for Section 230(c)(1) not to shield Facebook's alleged anti-competitive practices.

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Please summarize Fyk's argument in light of  
Diep v. Apple.

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**Summary of Fyk's Argument in Light of Diep v.  
Apple Fyk's Argument:**

1. Misapplication of Section 230: Fyk argues that Facebook's actions were driven by anti-competitive animus, which should not be protected under Section 230(c)(1) of the Communications Decency Act (CDA). He asserts that the "Good Samaritan" provision of Section 230 should not grant immunity to actions motivated by anti-competitive intent, similar to the arguments in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*
2. Constitutional Challenge: Fyk contends that the District Court erred by not properly addressing his constitutional challenge to Section 230(c)(1). He argues that the statute's application violates the Constitution and should be reconsidered.
3. Comparison to Dangaard and Lemmon Cases: Fyk references the *Dangaard v. Instagram* and *Lemmon v. Snap, Inc.* cases, arguing that his situation is analogous and that the courts in those cases correctly denied CDA immunity in similar contexts. He claims that these cases support his argument that anti-

competitive conduct should not be protected under Section 230.

**Diep v. Apple Case Insights:**

1. Publisher Immunity: The Diep v. Apple case focused on whether Apple could be held liable for statements made about its App Store and its process for reviewing applications. The court found that Apple, as the primary “information content provider,” could be held liable for its own representations but maintained that Apple’s role in publishing decisions (such as authorizing the app) was protected under Section 230.
2. Misleading Statements: In Diep, the plaintiffs failed to demonstrate how Apple’s statements were misleading to a reasonable consumer, a necessary element to hold Apple liable under consumer protection laws. This requirement underscores the importance of providing clear evidence of misleading or fraudulent statements by the platform.

**Comparison and Application:**

- Anti-Competitive Animus: Fyk’s argument mirrors the consideration in Diep regarding whether a company’s own statements and conduct, separate from its role as a publisher, can lead to liability. In both cases, the focus is on the company’s direct actions rather than its content moderation decisions.
- Consumer Protection Claims: Similar to Diep, Fyk would need to provide clear evidence of

how Facebook's actions were misleading or fraudulent, and how they induced reasonable reliance. The success of his argument might hinge on demonstrating that Facebook's actions went beyond mere publication decisions and involved direct misrepresentations or anti-competitive conduct.

- Section 230 Immunity: Fyk aims to show that Section 230 should not protect actions driven by anti-competitive motives, aligning with the principle discussed in *Diep* that companies cannot disclaim liability for their own false or misleading statements. This aligns with his assertion that the "Good Samaritan" provision should not apply to Facebook's conduct.

In summary, Fyk's argument in light of *Diep v. Apple* emphasizes the distinction between a platform's role in content moderation and its liability for its own actions and statements. By focusing on anti-competitive animus and potential misrepresentations by Facebook, Fyk seeks to establish that Section 230 should not grant immunity in his case, similar to the principles applied in the *Diep* case .

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Compare and contrast *Fyk v. Facebook* in light of the more recent case law in *Enigma v. Malwarebytes*, *Henderson v. Public Data*, *Lemmon v. Snap*, and *Dangaard v. Instagram*.

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## **Comparison and Contrast of Fyk v. Facebook in Light of Recent Case Law**

### **Fyk v. Facebook Overview:**

- Main Argument: Fyk argues that Facebook's actions were driven by anti-competitive animus and should not be protected under Section 230(c)(1). He contends that the "Good Samaritan" provision should not grant immunity to actions motivated by anti-competitive intent.
- Constitutional Challenge: Fyk challenges the constitutionality of Section 230(c)(1) and its application in his case, asserting that it violates constitutional principles by providing broad immunity to social media platforms.

### **Relevant Cases:**

#### **1. Enigma v. Malwarebytes:**

- Decision: The Ninth Circuit ruled that Section 230(c)(2) does not immunize blocking and filtering decisions driven by anti-competitive animus.
- Relevance to Fyk: Fyk cites this case to argue that anti-competitive motives should negate immunity under Section 230(c)(1) as well. He asserts that the principles applied in Enigma should similarly restrict the application of Section 230(c)(1) to prevent abuse of the immunity shield for anti-competitive conduct.

- Court's Response: The court maintained that Enigma is specific to Section 230(c)(2) and does not impact Section 230(c)(1) .

## **2. Henderson v. Public Data:**

- Decision: The Fourth Circuit held that Section 230(c)(1) does not provide immunity for a website's own content or for actions taken with actual or constructive knowledge of illegality.
- Relevance to Fyk: Fyk argues that the Henderson case supports his claim that Facebook's actions, driven by anti-competitive motives, should not be shielded by Section 230(c)(1). He contends that this decision aligns with his view that platforms should not be immunized for their own wrongful conduct.
- Court's Response: The decision in Henderson is not directly addressed in the court's dismissal of Fyk's arguments but supports a broader interpretation against immunity for anti-competitive practices .

## **3. Lemmon v. Snap:**

- Decision: The Ninth Circuit ruled that Section 230(c)(1) does not grant immunity for claims that do not treat the platform as a publisher or speaker, such as product liability claims.

- Relevance to Fyk: Fyk uses this case to argue that his claims against Facebook should similarly not be dismissed under Section 230(c)(1) as they pertain to Facebook's own actions rather than its role as a publisher of third-party content.
- Court's Response: The court distinguishes Lemmon, indicating it is not applicable to Fyk's claims which are directly related to Facebook's editorial functions .

#### 4. **Dangaard v. Instagram:**

- Decision: The court held that Section 230(c)(1) does not provide immunity for claims of anti-competitive behavior.
- Relevance to Fyk: Fyk cites Dangaard to bolster his argument that Facebook's anti-competitive actions should not be protected by Section 230(c)(1). He asserts that this precedent supports his claim that the immunity should not apply to actions beyond good faith content moderation.
- Court's Response: The court does not explicitly address Dangaard in the denial of Fyk's motion, but this case reinforces the argument against broad application of Section 230 immunity .

Conclusion: Fyk's case against Facebook hinges on the argument that Section 230(c)(1) should not provide immunity for actions motivated by anti-competitive intent, drawing support from recent case law such

as Enigma, Henderson, Lemmon, and Dangaard. These cases collectively challenge the broad application of Section 230(c)(1) immunity, particularly in instances of a platform's own wrongful conduct. However, the courts have consistently held that the specific protections and limitations of Section 230(c)(1) and (c)(2) are distinct, and thus far, have not extended the anti-competitive exception recognized in Enigma to Section 230(c)(1).

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Based on the new case law in Enigma, Henderson, Lemmon, and Dangaard, did the courts err in dismissing Fyk's claims under 230(c)(1)

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### **Analysis of Court's Dismissal of Fyk's Claims Under 230(c)(1) in Light of New Case Law**

#### **Fyk v. Facebook:**

- Core Argument: Fyk claims that Facebook's actions were driven by anti-competitive animus and should not be protected under Section 230(c)(1). He argues that the "Good Samaritan" provision should not grant immunity to actions motivated by anti-competitive intent.

**Recent Case Law:**

**1. Enigma v. Malwarebytes:**

- Decision: Section 230(c)(2) immunity does not cover blocking and filtering decisions driven by anti-competitive motives.
- Relevance: Enigma limits Section 230(c)(2) immunity when actions are driven by anti-competitive intent, potentially suggesting a similar limitation could be considered for Section 230(c)(1).

**2. Henderson v. Public Data:**

- Decision: Section 230(c)(1) does not provide immunity for a website's own content or actions taken with knowledge of illegality.
- Relevance: Supports the idea that Section 230(c)(1) immunity has limits, especially regarding a platform's own wrongful conduct.

**3. Lemmon v. Snap:**

- Decision: Section 230(c)(1) does not grant immunity for claims not treating the platform as a publisher or speaker, such as product liability claims.
- Relevance: Clarifies that Section 230(c)(1) immunity does not apply when the platform's own actions are at issue, not just their role as a publisher of third-party content.



#### **4. Dangaard v. Instagram:**

- Decision: Section 230(c)(1) does not provide immunity for claims of anti-competitive behavior.
- Relevance: Directly supports Fyk's argument that anti-competitive actions should not be shielded by Section 230(c)(1).

#### **Application to Fyk's Case:**

##### **Court's Dismissal:**

- The court dismissed Fyk's claims, stating that Section 230(c)(1) immunity applied to Facebook's actions as they were related to content moderation decisions.
- Key Issue: Whether the court properly interpreted Section 230(c)(1) in light of Facebook's alleged anti-competitive motives.

##### **Argument for Error in Dismissal:**

- Anti-Competitive Intent: Enigma and Dangaard suggest that actions driven by anticompetitive motives should not be protected under Section 230, even if they are framed as content moderation decisions.
- Platform's Own Conduct: Henderson and Lemmon highlight that Section 230(c)(1) should not protect a platform's own wrongful conduct, especially if it involves direct actions beyond mere publishing or moderation.
- Misapplication of Immunity: Given the arguments and precedents, it could be argued

that the court erred by broadly applying Section 230(c)(1) immunity to Facebook's actions without sufficiently considering the anti-competitive allegations and the platform's own conduct.

**Conclusion:**

Based on the recent case law, there is a strong argument that the courts may have erred in dismissing Fyk's claims under Section 230(c)(1). The principles established in *Enigma*, *Henderson*, *Lemmon*, and *Dangaard* suggest that Section 230(c)(1) immunity should not extend to actions driven by anti-competitive motives or wrongful conduct by the platform itself.

Therefore, the court should have considered these precedents and the specific nature of Fyk's allegations before dismissing his claims.

**EXHIBIT C**  
***DIEP v. APPLE* ANALYSIS**  
**(FILED JULY 01,2024)**

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**Diep v. Apple Analysis**

June 17, 2024

This conversation may reflect the link creator's personalized data, which isn't shared and can meaningfully change how the model responds.

Anonymous

(1) Northern District of California Fyk Complaint.pdf  
PDF

(28) Second 60(b) Motion for Relief.pdf  
PDF

(32) Rule 5.1 Constitutional Challenge.pdf  
PDF

(40) 9th Circuit opening brief (3).pdf  
PDF

Diep v Apple Inc highlighted.rtf  
File

Please analyze Diep v. Apple in light of evolving case law, Fyk's dismissal, and in support of granting Fyk's motion 60(b)

ChatGPT  
ChatGPT

To analyze Diep v. Apple in light of evolving case law, the dismissal of Fyk's case, and to support Fyk's

motion under Rule 60(b), it is essential to consider the legal arguments and judicial interpretations of Section 230(c)(1). Here's a structured analysis:

## **1. Background of Diep v. Apple**

Diep v. Apple involved claims that Apple's App Store policies and practices constituted monopolistic behavior and unfair competition, impacting app developers. This case is crucial because it addresses issues related to platform accountability and the limits of Section 230 immunity.

## **2. Fyk's Case and Section 230**

Jason Fyk's case against Facebook was dismissed based on Section 230(c)(1), which provides immunity to online platforms from liability for third-party content. Fyk challenged this dismissal, arguing that Facebook's actions were driven by anti-competitive motives, which should not be shielded by Section 230.

## **3. Constitutional Challenge to Section 230(c)(1)**

Fyk has filed a motion under Rule 5.1, questioning the constitutionality of Section 230(c)(1). He argues that the "Good Samaritan" provision should apply to both Section 230(c)(1) and 230(c)(2), and without an intelligible principle guiding its application, Section 230(c)(1) is unconstitutional.

## **4. Evolving Case Law**

### **A. Enigma v. Malwarebytes**

In *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, the Ninth Circuit held that Section 230(c)(2) does not immunize anti-competitive behavior,

emphasizing the “Good Samaritan” principle. This case supports Fyk’s argument that similar reasoning should apply to Section 230(c)(1).

### **B. Lemmon v. Snap**

Lemmon v. Snap involved claims against Snapchat for their role in a car accident caused by the app’s speed filter. The Ninth Circuit ruled that Section 230 did not apply because the claim was about the design of the app, not third-party content. This case indicates that Section 230 immunity has limits, particularly when platform design or conduct is in question.

### **C. Henderson v. Source for Public Data**

In Henderson v. Source for Public Data, the Fourth Circuit ruled that Section 230(c)(1) did not apply because the platform acted as an information content provider by manipulating data. This supports Fyk’s argument against broad Section 230(c)(1) immunity.

### **D. Doe v. Facebook**

Doe v. Facebook questioned whether Facebook could be held liable for facilitating sex trafficking. While the Supreme Court denied certiorari, the case highlights ongoing debates about Section 230’s scope and the necessity for legislative clarity.

## **5. Diep v. Apple’s Relevance**

Diep v. Apple is relevant because it demonstrates judicial willingness to scrutinize tech companies’ practices under antitrust and unfair competition laws, despite Section 230 defenses. It shows that courts are

increasingly considering the broader impacts of tech platforms' business practices.

## **6. Supporting Fyk's Motion for Relief (Rule 60(b))**

### **A. Extraordinary Circumstances and Miscarriage of Justice**

Fyk's motion under Rule 60(b)(6) argues that the dismissal based on Section 230(c)(1) constitutes a miscarriage of justice due to the evolving interpretation of the statute and its potential unconstitutionality.

### **B. Misapplication of Section 230(c)(1)**

Fyk can argue that the dismissal was erroneous because:

- The "Good Samaritan" principle should guide the application of Section 230(c)(1), as supported by Enigma.
- Facebook's actions, driven by anti-competitive motives, should not be immune under Section 230, aligning with Lemmon and Henderson.
- The constitutionality of Section 230(c)(1) must be re-evaluated in light of its broad and potentially unfettered grant of immunity, lacking an intelligible principle, per the arguments in his constitutional challenge.

## **7. Conclusion**

The evolving case law and recent judicial scrutiny of Section 230(c)(1) support granting Fyk's Rule 60(b) motion. The principles established in Enigma, Lemmon, and Henderson, combined with the constitutional

challenge, argue that the original dismissal was based on an outdated and overly broad interpretation of Section 230(c)(1). Fyk's case should be reconsidered to address these substantial legal developments and potential constitutional issues.

Anonymous

Explain in detail the relevance of Diep v. Apple to overturning Fyk's dismissal.

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To explain the relevance of Diep v. Apple to overturning Fyk's dismissal in detail, it's important to examine several key aspects of both cases, particularly focusing on the legal principles and judicial reasoning that could support Fyk's argument for relief under Rule 60(b). Here's a comprehensive breakdown:

### **1. Case Overview: Diep v. Apple**

Diep v. Apple involves claims against Apple Inc. related to the App Store's policies and practices, which were alleged to constitute monopolistic behavior and unfair competition. App developers argued that Apple's practices restricted competition and harmed their economic interests. This case touches on issues of platform liability, competitive practices, and the application of immunity provisions under Section 230 of the Communications Decency Act (CDA).

### **2. Case Overview: Fyk v. Facebook**

Jason Fyk's lawsuit against Facebook was dismissed based on Section 230(c)(1) immunity, which protects online platforms from liability for third-party content. Fyk argued that Facebook's actions, driven

by anti-competitive motives, destroyed his business. He challenged the dismissal, contending that the application of Section 230(c)(1) was inappropriate in his case.

### **3. Key Legal Arguments and Judicial Reasoning in Diep v. Apple**

**Diep v. Apple is relevant for several reasons:**

- Judicial Willingness to Scrutinize Platform Practices: The case demonstrates a judicial willingness to scrutinize the business practices of tech companies under antitrust and unfair competition laws, even when Section 230 defenses are raised.
- Platform Liability and Competitive Behavior: The court's approach in Diep v. Apple indicates a broader interpretation of platform liability, especially concerning competitive practices and potential monopolistic behavior.

### **4. Relevance to Overturning Fyk's Dismissal**

#### **A. Scrutiny of Anti-Competitive Behavior**

Diep v. Apple showcases the courts' readiness to examine the anti-competitive practices of tech platforms. Fyk's case revolves around similar issues of anti-competitive behavior by Facebook. The scrutiny applied in Diep v. Apple supports the argument that platforms should not be afforded blanket immunity under Section 230 when their actions are driven by competitive motives that harm users economically.



## **B. Application of Section 230**

The relevance of *Diep v. Apple* to overturning Fyk's dismissal lies in the nuanced application of Section 230:

- Section 230(c)(1) Immunity Limitations: *Diep v. Apple* emphasizes that Section 230 immunity should not be applied in ways that shield platforms from liability for their competitive practices. This aligns with Fyk's argument that Facebook's anti-competitive actions should not be immune under Section 230(c)(1).
- Good Samaritan Principle: Both cases involve interpretation of the "Good Samaritan" principle underlying Section 230. *Diep v. Apple* suggests that the principle should not protect platforms engaging in harmful competitive behavior, which supports Fyk's argument against the broad application of Section 230(c)(1) immunity.

## **C. Legal Precedents and Judicial Reasoning**

*Diep v. Apple* provides valuable legal precedents and judicial reasoning that can bolster Fyk's motion:

- Judicial Interpretation of Immunity Provisions: The judicial interpretation in *Diep v. Apple* can be used to argue that Section 230(c)(1) should not provide immunity for anticompetitive conduct, supporting Fyk's claim that his case was wrongly dismissed based on an overly broad application of Section 230.

- Anti-Competitive Animus: The decision in Diep v. Apple can be cited to highlight that courts are increasingly acknowledging the need to limit immunity provisions when a platform's actions are driven by anti-competitive animus.

## **5. Supporting Fyk's Rule 60(b) Motion**

To support Fyk's Rule 60(b) motion, the following points from Diep v. Apple can be highlighted:

- Evolving Case Law: The evolving case law, as demonstrated in Diep v. Apple, shows a trend towards limiting the scope of Section 230 immunity, particularly in cases involving anti-competitive behavior.
- Misapplication of Immunity: The judicial willingness to challenge the broad application of Section 230(c)(1) in Diep v. Apple can be used to argue that the dismissal of Fyk's case was a misapplication of the immunity provision, warranting reconsideration under Rule 60(b).
- Extraordinary Circumstances: The insights from Diep v. Apple contribute to demonstrating extraordinary circumstances and a potential miscarriage of justice in Fyk's case, supporting the need for relief.

## **6. Conclusion**

The relevance of Diep v. Apple to overturning Fyk's dismissal lies in the case's judicial approach to platform liability and anti-competitive behavior. By leveraging the principles and reasoning applied in

Diep v. Apple, Fyk can argue that his case was wrongly dismissed based on an outdated and overly broad interpretation of Section 230(c)(1). This supports his motion for relief under Rule 60(b), highlighting the need for a re-evaluation of his claims in light of evolving legal standards and judicial scrutiny of tech platforms' practices.

appellate jurisdiction. "Jurisdiction is never to be assumed, and in every case, jurisdiction must exist by way of some affirmative source." *Williamson v. UNUM Life Ins. Co. of Am.*, 160 F.3d 1247, 1250 (9th Cir. 1998). Fyk asserts that this Court has jurisdiction under 28 U.S.C. § 1291 (hereinafter, "Section 1291") to review his entire appeal.<sup>1</sup> But that statute does not confer jurisdiction here.

Section 1291 "empowers the circuit courts to hear appeals from . . . **final judgments** issued by the district courts." *Id.* (emphasis added). "A final judgment is a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* (internal quotations and citations omitted). In this case, final judgment was entered and affirmed long before Fyk ever filed his motion challenging the constitutionality of Section 230(c)(1). Accordingly, Section 1291 does

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<sup>1</sup> App. Opening Br at 5

not confer jurisdiction over the District Court's decision terminating his freestanding constitutional challenge.<sup>2</sup>

Even if appellate jurisdiction were present here, no basis exists to disturb the District Court's termination decision. Having denied Fyk's Rule 60(b) Motion, the District Court had no basis to consider the merits of Fyk's freestanding constitutional challenge, which he filed in a closed case, after final judgment of dismissal. *See Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 665 (9th Cir. 1997) (district court could not entertain motion filed after judgment of dismissal "unless and until [defendant] demonstrated that he was entitled to relief under Rule 60(b)"); *cf. Planned Parenthood of S. Arizona v. Neely*, 130 F.3d 400, 403 (9th Cir. 1997) (holding that district court abused its discretion by allowing plaintiffs to supplement complaint where original action had reached final resolution and the district court did not retain jurisdiction).

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<sup>2</sup> In a similar case, in which the appellant asked this Court to review the denial of motions filed in a closed case, this Court dismissed the appeal as frivolous and revoked the Petitioner's *in forma pauperis* status. *Drevaleva v. Dep't of Veterans Affs.*, No. 21-15658, 2021 WL 4785893 (9th Cir. Aug. 16, 2021) (reviewing *Drevaleva v. U.S. Dep't of Veterans Affs.*, No. 19-cv-02665-HSG, 2021 WL 1433063, at \*1 (N.D. Cal. Mar. 29, 2021), in which district court denied all pending motions filed in closed case and ordered that no further filings be accepted).

**VIII. Conclusion**

For the foregoing reasons, the Order of the District Court should be affirmed.

Dated: May 9, 2024

KEKER, VAN NEST & PETERS LLP

By: /s/ William S. Hicks  
PAVEN MALHOTRA  
WILLIAM S. HICKS

App.255a

**FACEBOOK'S ANSWERING BRIEF,  
U.S. COURT OF APPEALS FOR  
THE NINTH CIRCUIT [12.1]  
(MAY 9, 2024)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JASON FYK,

*Plaintiff-Appellant,*

v.

FACEBOOK, INC.,

*Defendant-Appellee.*

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Appeal No. 24-465

Appeal of January 12, 2024, Order Denying Motion  
for Relief Pursuant to Fed. R. Civ. P 60(B) and  
Terminating Motion Re: Constitutionality of 47  
U.S.C. Sec. 230(C)(1) [D.E. 74] by Hon. Haywood S.  
Gilliam, Jr. of the U.S. District Court for the  
Northern District of California, 4:18-cv-05159-HSG

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**[TOC & TOA Omitted]**

**CORPORATE DISCLOSURE STATEMENT**

Defendant-Appellee Meta Platforms, Inc. (f/k/a Facebook, Inc.) is a publicly traded company and has no parent corporation; no publicly held corporation owns 10% or more of its stock.

Dated: May 9, 2024

KEKER, VAN NEST & PETERS LLP

By: /s/ William S. Hicks  
PAVEN MALHOTRA  
WILLIAM S. HICKS

## I. Introduction

Appellant Jason Fyk sued Appellee Facebook, Inc.<sup>1</sup> in 2018 after it disabled some of his Facebook pages for violation of its policies. Facebook moved to dismiss that lawsuit, and the District Court granted that motion after determining that each of his claims was barred under Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1) (hereinafter, “Section 230(c)(1)”). This is Fyk’s *third* Ninth Circuit appeal seeking to overturn that decision. This Court rejected Fyk’s previous gambits, and his current appeal requires the same result.

In his first appeal, Fyk argued that the District Court erred in dismissing his case because Section 230(c)(1) does not apply to actions allegedly taken with anticompetitive animus.<sup>2</sup> In June 2020, a panel of the Ninth Circuit affirmed the District Court’s order of dismissal, expressly rejecting Fyk’s contention that the alleged anticompetitive motives of an interactive computer service provider are relevant to the analysis of Section 230(c)(1).<sup>3</sup> As this Court explained in *Fyk I*, “[u]nlike 47 U.S.C. § 230(c)(2)(A), nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive

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<sup>1</sup> On October 28, 2021, Facebook, Inc. changed its name to Meta Platforms, Inc. Because the original complaint was filed prior to the name change and for ease of reference, Defendant-Appellee continues to refer to the Defendant identified in the pleadings as “Facebook, Inc.” as “Facebook, Inc.” here.

<sup>2</sup> *Fyk v. Facebook, Inc.*, 808 F. App’x 597 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1067 (2021) (hereinafter, “*Fyk I*”).

<sup>3</sup> *Id.*



computer service.”<sup>4</sup> Seven months later, the U.S. Supreme Court denied Fyk’s Petition for Writ of Certiorari.

Undeterred, in March 2021, Fyk returned to District Court where he filed a motion for relief from judgment under Rule 60(b).<sup>5</sup> After the District Court denied that motion, Fyk filed his second Ninth Circuit appeal, urging this Court to adopt the same interpretation of Section 230(c)(1) that it had rejected in *Fyk I*. More specifically, Fyk asserted that the Ninth Circuit’s 2019 decision in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*<sup>6</sup> marked a change in the controlling law holding that neither Section 230(c)(1) nor its sister Section 230(c)(2) protects content moderation decisions like those made by Facebook if such decisions were motivated by anticompetitive animus. In October 2022, this Court affirmed the District Court’s denial of Rule 60 relief,<sup>7</sup> and seven months later, the U.S. Supreme Court again denied Fyk’s Petition for Writ of Certiorari.

In June 2023, three years after this Court affirmed the District Court’s final order of dismissal, Fyk filed a **second** Rule 60(b) motion asking the District Court to vacate its dismissal order based on an alleged change in the controlling law. In it, Fyk

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<sup>4</sup> *Id.* at 598.

<sup>5</sup> Fed. R. Civ. P.

<sup>6</sup> 946 F.3d 1040 (9th Cir. 2019).

<sup>7</sup> *Fyk v. Facebook, Inc.*, No. 21-16997, 2022 WL 10964766, at \*1 (9th Cir. Oct. 19, 2022), *cert. denied*, 143 S. Ct. 1752 (hereinafter, “*Fyk II*”).

relied on a smattering of inapposite authorities—including unpublished district court cases and nonbinding out-of-circuit cases—to repeat his argument that Section 230(c)(1) does not immunize content moderation decisions motivated by anticompetitive animus. Then, without waiting for the District Court to decide that motion, Fyk filed a freestanding “Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1),” arguing that the District Court’s application of Section 230(c)(1) in its dismissal order renders that subsection unconstitutional. Fyk now appeals the District Court’s order denying both motions.

In the instant appeal, Fyk urges this Court to reverse the District Court’s dismissal order based on his twice-rejected understanding of Section 230(c)(1). Fyk repeats the argument, already rejected in *Fyk II*, that the Ninth Circuit’s *Enigma* decision changed the controlling law concerning Section 230(c)(1).<sup>8</sup> Fyk also argues that the District Court should have reopened his case because other authorities have allegedly embraced his view that “[t]his Court’s *Enigma* holding was not exclusive to a § 230(c)(2) setting[.]”<sup>9</sup> In addition, Fyk asserts that the District Court erred when it terminated his freestanding “Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1).” Fyk’s arguments are meritless.

The District Court correctly held that the Ninth Circuit’s decision in *Lemmon v. Snap, Inc.*<sup>10</sup>—the *only*

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<sup>8</sup> See Dkt. 5 (hereinafter, “App. Opening Br.”) at 18. Fyk did not assert this argument in his second Rule 60(b) motion.

<sup>9</sup> *Id.*

<sup>10</sup> 995 F.3d 1085 (9th Cir. 2021).

binding decision that Fyk relied upon in his Rule 60 (b) motion—was “inapplicable on its own terms to the circumstances already found (and affirmed) here.” ER-004. The District Court also correctly determined that the non-binding authorities cited by Fyk could not, and did not, change the controlling Ninth Circuit law concerning Section 230(c)(1). ER-003-04.

Nor is there any basis to disturb the District Court’s decision terminating Fyk’s freestanding “Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1).” This Court lacks jurisdiction to review that decision. And even if appellate jurisdiction were present, the District Court properly determined that it had no basis to entertain Fyk’s motion because there is no active case.

Accordingly, this Court should affirm the District Court’s order.

## **II. Jurisdictional Statement**

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 to review the District Court’s decision denying Rule 60(b) relief. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332. The District Court entered final judgment on June 18, 2019, after granting Facebook’s Motion to Dismiss without leave to amend.<sup>11</sup> On January 12, 2024, the District Court denied Fyk’s Rule 60(b) motion seeking to vacate and set aside the order and judgment of dismissal.<sup>12</sup>

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<sup>11</sup> *Fyk v. Facebook, Inc.*, Case No. 4:18-cv-05159-JSW (N.D. Cal. June 18, 2019), Dkt. 39.

<sup>12</sup> ER-002-05; *Fyk v. Facebook, Inc.*, Case No. 4:18-cv-05159-HSG (N.D. Cal. Jan. 12, 2024), Dkt. 74.

Fyk has not identified any source of appellate jurisdiction that would permit review of the District Court's decision terminating Fyk's "Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1)."

### **III. Issues Presented**

(1) Did the District Court abuse its discretion in denying Fyk's motion for relief under Rule 60(b)(5)?

(2) Did the District Court abuse its discretion in denying Fyk's motion for relief under Rule 60(b)(6)?

(3) Does this Court have jurisdiction to review Fyk's freestanding "Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1)?"

(4) If this Court determines that it has jurisdiction to review Fyk's "Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1)," did the District Court abuse its discretion in terminating that motion?

### **IV. Statement of the Case**

#### ***Procedural Background***

On August 22, 2018, Fyk filed a complaint in the U.S. District Court for the Northern District of California asserting four causes of action: (1) intentional interference with prospective economic advantage, (2) violation of California Business & Professions Code Sections 17200-17210 (Unfair Competition), (3) civil extortion, and (4) fraud/intentional misrepresentation.<sup>13</sup> Fyk alleged that he had created a series of Facebook pages that "were humorous in nature, designed to get a

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<sup>13</sup> ER-612-21

laugh out of [his] viewers/followers[.]”<sup>14</sup> At some point, Facebook disabled certain of those pages for violation of its policies.<sup>15</sup> Fyk alleged, however, that Facebook was actually motivated by a desire to make room for its own sponsored advertisements and to “strong-arm” Fyk into paying to advertise.<sup>16</sup>

On November 1, 2018, Facebook moved the District Court to dismiss the Complaint because the claims were barred by Section 230(c)(1) and, in any event, because the Complaint failed to state any claim for relief.<sup>17</sup>

On June 18, 2019, the District Court issued an order dismissing Fyk’s claims with prejudice as barred by Section 230(c)(1).<sup>18</sup> In a well-reasoned decision, the District Court correctly held that Section 230(c)(1) barred all of Fyk’s claims because they sought to hold Facebook liable as the “publisher or speaker” of content created and provided by Fyk himself.<sup>19</sup>

In September 2019, Fyk appealed the District Court’s June 2019 Order to this Court, arguing that

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<sup>14</sup> ER-598.

<sup>15</sup> ER-601-04.

<sup>16</sup> See ER-604-609. Fyk ultimately decided to sell the pages to a third party. See ER-610.

<sup>17</sup> *Fyk v. Facebook, Inc.*, Case No. 4:18-cv-05159-JSW, Dkt. 20.

<sup>18</sup> *Fyk v. Facebook, Inc.*, No. C 18-05159 JSW, 2019 WL 11288576 (N.D. Cal. June 18, 2019), *aff’d*, 808 F. App’x 597 (9th Cir. 2020) (hereinafter, “June 2019 Order”).

<sup>19</sup> *Id.* at \*2-3. The District Court did not address Facebook’s contention that the Complaint failed to state any claims.

the District Court had erred in its application of Section 230(c)(1).<sup>20</sup> Among other things, Fyk argued that the District Court erred in dismissing his Complaint because “Facebook [allegedly] took action (motivated in bad faith and/or in money) as to his businesses/pages that rose far above a ‘Good Samaritan’ nature, thereby divesting Facebook of any ‘Good Samaritan’ immunity/protection rights under the Internet’s ‘Good Samaritan’ law – Subsection 230(c) of the CDA.”<sup>21</sup>

On June 12, 2020, this Court issued its decision in *Fyk I*, affirming the District Court’s June 2019 Order and holding that “[t]he district court properly determined that Facebook has § 230(c)(1) immunity from Fyk’s claims in this case.” *Fyk I*, 808 F. App’x at 597. In so holding, this Court expressly rejected Fyk’s contention that the alleged motives of an interactive computer service provider are relevant to the analysis of Section 230(c)(1). As the Court explained, “[u]nlike 47 U.S.C. § 230(c)(2)(A), nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service.” *Id.* at 598.

In November 2020, Fyk filed a Petition for Writ of Certiorari to the U.S. Supreme Court challenging this Court’s opinion in *Fyk I*.<sup>22</sup> The Supreme Court denied that Petition on January 11, 2021.<sup>23</sup>

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<sup>20</sup> *Fyk v. Facebook, Inc.*, Case No. 19-16232, Dkt. 12.

<sup>21</sup> *Id.*, Dkt. 27 at 15.

<sup>22</sup> App. Opening Br. at 14.

<sup>23</sup> *See Fyk v. Facebook, Inc.*, 141 S. Ct. 1067 (2021).

On March 22, 2021, Fyk moved the District Court under Rule 60(b)(5) and (b)(6) to vacate and set aside its June 2019 Order on the purported basis that there had been an intervening change in the controlling law.<sup>24</sup> As relevant here, Fyk argued that this Court's 2019 decision in *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1050 (9th Cir. 2019), changed the controlling precedent applied by the District Court.<sup>25</sup> On November 1, 2021, the District Court issued an order denying Fyk's Rule 60 motion, holding that the Ninth Circuit's *Enigma* opinion "did not reverse any case law upon which the Order was based."<sup>26</sup>

In October 2022, the Ninth Circuit issued its decision in *Fyk II*, affirming the District Court's November 2021 Order and holding that Fyk had failed to raise his *Enigma* argument "within a reasonable time," as required by Rule 60(c)(1). *Fyk II*, 2022 WL 10964766, at \*1. As this Court explained in *Fyk II*, the Ninth Circuit issued its decision in *Fyk I* "nine months after the *Enigma* decision was first issued, and more than five months after it was reissued." *Id.* This Court further noted that Fyk had failed to submit a Rule 28(j) letter during that period, then "waited more than nine additional months before filing his Rule 60(b) motion in the district court on March 22, 2021." *Id.* Seeing "no reason why [Fyk]

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<sup>24</sup> ER-532-45.

<sup>25</sup> ER-536-42.

<sup>26</sup> ER-513-14 (11/01/2021 Order Denying Motion for Relief Pursuant to Fed. R. Civ. P. 60(b)) (hereinafter, "November 2021 Order").

could not have either raised his *Enigma* argument in his first appeal or made his Rule 60(b) motion much earlier,” this Court held that Fyk’s Rule 60(b) was untimely. *Id.* Subsequently, Fyk filed a Petition for Writ of Certiorari concerning the *Fyk II* decision,<sup>27</sup> which the<sup>28</sup> Supreme Court denied in April 2023.

In June 2023, Fyk returned once again to District Court and filed a ***second*** motion under Rule 60(b)(5) and (6) seeking to vacate the June 2019 Order.<sup>29</sup> In it, Fyk argued that a change in controlling law “[w]arrants [r]eversal [o]f [t]he [a]ntiquated [d]ismissal [o]rder[.]” relying on six authorities (including five cases decided by district courts or courts outside the Ninth Circuit).<sup>30</sup> The only binding authority that Fyk relied upon was *Lemmon v. Snap, Inc.*,<sup>31</sup> which the Ninth Circuit decided in 2021, two years before Fyk brought his Motion. In December 2023, Fyk filed a notice of supplemental authority purporting to supplement his Rule 60(b) Motion with an unpublished district court decision, *Dangaard, et al. v. Instagram, LLC, et al.*,<sup>32</sup> that had been decided seven months before Fyk filed his Motion. ER-007-08.

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<sup>27</sup> App. Opening Br. at 16.

<sup>28</sup> *Fyk v. Facebook, Inc.*, 143 S. Ct. 1752 (2023).

<sup>29</sup> ER-057-83 (6/16/2023 Second Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment) (hereinafter “Motion” or “Rule 60(b) Motion”).

<sup>30</sup> ER-065-80.

<sup>31</sup> 995 F.3d 1085 (9th Cir. 2021).

<sup>32</sup> No. C 22-01101 WHA, 2022 WL 17342198 (N.D. Cal. Nov. 30, 2022).



While Fyk’s Motion was pending, in October 2023, Fyk filed a freestanding “Motion Re: the (Un)Constitutionality of 47 U.S.C. § 230(c)(1),” *see* ER-028-37, arguing that the District Court’s interpretation of Section 230(c)(1) underlying its June 2019 dismissal order renders Section 230(c)(1) unconstitutional. ER 29.

In January 2024, the District Court issued an order denying Fyk’s Rule 60(b) Motion and terminating his freestanding “Motion Re: the (Un)Constitutionality of 47 U.S.C. § 230(c)(1).”<sup>33</sup> In it, the District Court explained that five of the six authorities relied upon by Fyk are not binding “and by definition could not have changed the controlling legal framework for interpreting Section 230(c)(1) in this Circuit (even assuming that such a change could be a basis for Rule 60(b) relief, which the Court need not decide here).” ER-003. The District Court also explained that Fyk’s notice of supplemental authority, attaching the *Dangaard* decision, was both procedurally improper (it was decided months before Fyk filed his Motion) and substantively unavailing because *Dangaard* is not binding. ER-003-04.

As for *Lemmon v. Snap, Inc.*, the only binding Ninth Circuit authority cited by Fyk, the District Court explained that “Plaintiff nowhere explains why it is relevant to the issues here, and the Court discerns nothing in it that could possibly warrant vacating this years-old judgment.” ER-004. The District Court further held that “nothing in the record undermines Judge

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<sup>33</sup> ER-002-05; *Fyk v. acebook, Inc.*, Case No. 18-05159-HSG (N.D. Cal. January 12, 2024), Dkt. 74 (hereinafter, “January 2024 Order”).

White’s earlier conclusion that Plaintiff ‘has not shown the ‘extraordinary circumstances’ required under 60(b) for granting relief.’” ER-005. Having rejected Fyk’s Rule 60(b) Motion, the District Court found “no basis for taking up Plaintiff’s freestanding ‘motion re: the (un)constitutionality’ of Section 230(c) (1),” and therefore terminated it. *Id.*

### ***Fyk’s Appeal***

Fyk advances three arguments on appeal.

First, he argues that the District Court abused its discretion when it declined to vacate the June 2019 Order pursuant to Rule 60(b)(5). In particular, he challenges the District Court’s determination that the authorities cited in his Rule 60(b) Motion did not change the controlling law concerning Section 230(c) (1).<sup>34</sup> He also repeats the argument, already rejected in *Fyk II*, that this Court’s *Enigma* decision changed the controlling law underlying the District Court’s dismissal decision.

Second, Fyk contends that the District Court abused its discretion when it determined that he failed to show the “extraordinary circumstances” required to vacate a final judgment pursuant to Rule 60(b)(6).<sup>35</sup> Specifically, Fyk contends that the District Court erred by not analyzing certain factors that this Court has identified for determining when a change in law constitutes “extraordinary circumstances” sufficient to reopen a final judgment.

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<sup>34</sup> App. Opening Br. at 18.

<sup>35</sup> *Id.* at 19.

Finally, Fyk argues that the District Court abused its discretion by terminating his “Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1).”<sup>36</sup> Fyk argues that this constitutional challenge was “nonforfeitable” and that the District Court wrongly terminated his freestanding motion even though it was filed in a closed case long after the District Court’s final order and judgment of dismissal, which this Court affirmed in *Fyk I*.

## V. Standard of Review

This Court reviews the denial of a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) for an abuse of discretion. *Riley v. Filson*, 933 F.3d 1068, 1071 (9th Cir. 2019). A district court’s exercise of its discretion may not be reversed absent “a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005). “An appeal from a denial of a Rule 60(b) motion brings up only the denial of the motion for review, not the merits of the underlying judgment.” *Floyd v. Laws*, 929 F.2d 1390, 1400 (9th Cir. 1991).

Rule 60(b)(5) provides for relief from a final judgment only when “the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable.” Fed. R. Civ. P. 60(b)(5). “[T]o grant a Rule 60(b)(5) motion to modify a court order, a district court must find ‘a significant change either in factual conditions or in

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<sup>36</sup> *Id.*

law.” *S.E.C. v. Coldicutt*, 258 F.3d 939, 942 (9th Cir. 2001) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)). “Relief from a court order should not be granted, however, simply because a party finds ‘it is no longer convenient to live with the terms’ of the order.” *Id.*

“[A] movant seeking relief under Rule 60(b)(6) [must] show ‘extraordinary circumstances’ justifying the reopening of a final judgment.” *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). The standard for a Rule 60 (b)(6) motion is high, and that relief should only be granted “sparingly” to avoid “manifest injustice[.]” *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1173 (9th Cir. 2017).

## VI. Summary of Argument

In the proceedings below, Fyk sought relief under Rule 60(b)(5) and (b)(6) on the same purported basis that there had been an intervening change in the controlling legal authority. But in declining to grant Rule 60(b)(5) relief, the District Court correctly concluded that Fyk had failed to identify any such change. Contrary to Fyk’s argument on appeal, the District Court properly determined that the Ninth Circuit’s *Lemmon* opinion is facially irrelevant to the issues in this case, and that the nonbinding out-of-circuit and district court cases relied upon by Fyk, by definition, could not have changed the controlling law. In *Fyk II*, this Court has already rejected Fyk’s argument, repeated in this appeal, that *Enigma* marked a change in the controlling law warranting reopening his case.

The District Court was also correct in denying Fyk’s request for Rule 60(b)(6) relief, which was based

on the same supposed change in law. Fyk argues that the District Court erred by purportedly failing to analyze certain factors outlined in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009), for determining whether a “clear and authoritative” change in law constitutes “extraordinary circumstances.” But the District Court was not obliged to analyze such factors, having correctly determined at the outset that the law had not changed.

Moreover, Fyk failed to bring his Rule 60(b) Motion “within a reasonable time,”<sup>37</sup> which provides a further basis upon which to affirm the District Court’s Order. Indeed, the Ninth Circuit’s *Lemmon* decision was decided two years before Fyk asserted in his Rule 60(b) Motion that *Lemmon* changed the controlling law.

As for Fyk’s argument that the District Court improperly terminated his “Motion Re: the (Un)constitutionality of 46 U.S.C. § 230(c)(1),” Fyk has failed to demonstrate that this Court has jurisdiction to review the decision. Moreover, even if jurisdiction were present, no basis exists to disturb the District Court’s decision.

Having declined to reopen Fyk’s case, the District Court correctly concluded that there was no basis to entertain Fyk’s freestanding motion challenging the constitutionality of Section 230(c)(1), which Fyk had filed in a closed case long after the final order and judgment of dismissal.

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<sup>37</sup> Fed. R. Civ. P. 60(c)(1).

## **VII. Argument**

### **A. The District Court did not abuse its discretion in denying Fyk's Rule 60(b) Motion.**

#### **1. The District Court did not abuse its discretion in holding that Fyk failed to identify a change in the controlling law.**

Rule 60(b)(5) provides for relief from a final judgment only when “the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable[.]” Fed. R. Civ. P. 60(b)(5). “[I]n order to grant a Rule 60(b)(5) motion to modify a court order, a district court must find ‘a significant change either in factual conditions or in law.’” *Coldicutt*, 258 F.3d at 942 (quoting *Rufo*, 502 U.S. at 384). Here, Fyk’s Rule 60 Motion failed to demonstrate any change in the controlling law concerning Section 230(c)(1), much less a “significant change.” Accordingly, the District Court properly denied Rule 60(b)(5) relief.<sup>38</sup>

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<sup>38</sup> Even had Fyk identified a significant change in law, Rule 60 (b)(5) relief would not be warranted because the District Court’s order of dismissal has no “prospective application.” *Harvest v. Castro*, 531 F.3d 737, 748 (9th Cir. 2008) (“To be sure, Rule 60 (b)(5) applies only to those judgments that have prospective application.”). As explained in Facebook’s response to Fyk’s Rule 60 Motion, *see* ER-051, a judgment has “prospective application” only if “it is executory or involves the supervision of changing conduct or conditions.” *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995) (internal quotes omitted). The District Court’s dismissal order is not executory, nor does it require ongoing

Section 230(c)(1) provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). The Communications Decency Act expressly preempts any cause of action that would hold an internet platform liable as a speaker or publisher of third-party speech.<sup>39</sup>

In *Barnes v. Yahoo!*, this Court explained that Section 230(c)(1) protects the exercise of a “publisher’s traditional editorial functions” such as “reviewing, editing, and deciding whether to publish or to withdraw from publication third party content.” 570 F.3d 1096, 1102 (9th Cir. 2009). “[R]emoving content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher of the content it failed to remove.” *Id.* at 1103. “[B]ecause such conduct is *publishing conduct* . . . [this Court] ha[s] insisted that section 230 protects from liability any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.” *Id.* (internal quotations omitted and emphasis in original).

In its June 2019 Order, the District Court correctly dismissed Fyk’s Complaint after concluding

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supervision. “That [Fyk] remains bound by the dismissal is not a ‘prospective effect’ within the meaning of rule 60(b)(5) any more than if [he] were continuing to feel the effects of a money judgment against him.” *Id.* (quoting *Gibbs v. Maxwell House*, 738 F.2d 153, 1155–56 (11th Cir. 1984), and holding that a dismissal order did not have “prospective application”).

<sup>39</sup> 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” the CDA.).

that all requirements for Section 230(c)(1) immunity were met. In affirming that decision, this Court expressly rejected Fyk’s argument that Section 230(c)(1) does not immunize editorial decisions taken with discriminatory or anticompetitive motives.<sup>40</sup> As this Court explained in *Fyk I*, “[u]nlike 47 U.S.C. § 230(c)(2)(A), **nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions** of the provider of the interactive computer service.” *Fyk I*, 808 F. App’x at 598 (emphasis added). In *Fyk I*, this Court also “reject[ed] Fyk’s argument that his case is like *Fair Housing* [*v. Council of San Fernando Valley v. Roommates.Com, LLC*]<sup>41</sup> because Facebook allegedly ‘discriminated’ against him by singling out his pages.” *Id.* In rejecting that contention, this Court explained that Fyk’s argument “mistakes the alleged illegality of the particular content at issue in *Fair Housing* with an antidiscrimination rule that we have never adopted to apply § 230(c)(1) immunity.” *Id.*

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<sup>40</sup> See *Fyk v. Facebook, Inc.*, Case No. 19-16232, Dkt. No. 12 at 7 (“[T]his lawsuit is about the several unlawful (*i.e.*, fraudulent, extortionate, unfairly competitive) methods selectively and discriminatorily employed by Facebook to develop’ Fyk’s ‘information content’ for an entity Facebook values more (Fyk’s competitor, who paid Facebook more), in interference with Fyk’s economic advantage to augment Facebook’s corporate revenue.”); *id.* at 36 (arguing that Facebook forfeited CDA immunity by alleging taking action “in direct competition with Fyk”).

<sup>41</sup> 521 F.3d 1157, 1172 (9th Cir. 2008) (holding that defendant who “both elicit[ed] . . . allegedly illegal content and ma[de] aggressive use of it in conducting its business” was not entitled to immunity under Section 230(c)(1)).



Fyk now seeks to vacate the District Court’s June 2019 Order under Rule 60(b)(5)<sup>42</sup> on the purported basis that various cases (including out-of-circuit and district court cases) somehow changed the controlling Ninth Circuit law concerning Section 230(c)(1). According to Fyk, these authorities validate his long-held theory that Section 230(c)(1) immunity is unavailable if “a defendant’s anti-competitive animus is central to the wrongs complained of by the plaintiff[.]”<sup>43</sup> Fyk is mistaken, and the District Court’s Order should be affirmed.

**a. Ninth Circuit cases**

Of the seven cases relied upon by Fyk in his opening brief, only two— *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*<sup>44</sup> and *Lemmon v. Snap, Inc.*<sup>45</sup>—are binding in the Ninth Circuit. Neither case provides a basis to reopen Fyk’s case.

As an initial matter, this Court already considered, and rejected, Fyk’s argument that *Enigma* changed

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<sup>42</sup> Under Rule 60(b)(5), a court may relieve a party from a final judgment, among other reasons, if “the judgment . . . is based on an earlier judgment that has been reversed or vacated[.]” Fed. R. Civ. P. 60(b)(5).

<sup>43</sup> App. Opening Br. at 17; *see also* ER-067 (“actions underlain by anti-competitive animus (as specifically alleged by Fyk against Facebook, and as alleged by *Rumble* against Google) are not subject to dismissal at the CDA ‘Good Samaritan’ immunity threshold.”).

<sup>44</sup> 946 F.3d 1040 (9th Cir. 2019).

<sup>45</sup> 995 F.3d 1085 (9th Cir. 2021).

the controlling law. *See* ER-422-23.<sup>46</sup> In *Fyk II*, this Court affirmed the denial of Rule 60(b) relief because Fyk had failed to raise the *Enigma* argument “within a reasonable time.” ER-422. That decision is “law of the case,” and this Court has no basis to revisit the issue.<sup>47</sup>

Moreover, Fyk waived his *Enigma* argument by failing to raise it in his second Rule 60(b) motion. Fyk’s Motion mentions *Enigma* in passing but does not rely upon that decision as a basis to vacate the dismissal order. *See Aramark Facility Servs. v. Serv. Employees Intern. Union, Local 1877, AFL CIO*, 530 F.3d 817, 824 n.2 (9th Cir. 2008) (arguments made in passing and inadequately briefed are waived).

In any event, *Enigma* is facially irrelevant. As the District Court rightly explained in denying Fyk’s first request for Rule 60(b) relief, the legal question in *Enigma* was “whether § 230(c)(2)<sup>48</sup> immunizes

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<sup>46</sup> As this Court noted in *Fyk II*, the “gravamen of Fyk’s [first] Rule 60(b) motion [was] that [the Ninth Circuit’s] holding in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019), constituted a substantial change in controlling law with respect to section 230 of the Communications Decency Act, which Fyk alleges resuscitates his dismissed claims.” ER-422.

<sup>47</sup> *See Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 810 (9th Cir. 1991) (“Under the ‘law of the case’ doctrine, one panel of an appellate court will not reconsider questions which another panel has decided on a prior appeal in the same case.”); *Ferreira v. Borja*, 93 F.3d 671, 673 (9th Cir. 1996) (applying law of the case doctrine to reject argument decided in earlier appeal in the same case).

<sup>48</sup> This Court has repeatedly recognized, including in *Fyk I*, that subsections (c)(1) and (c)(2) of the CDA provide separate and

blocking and filtering decisions that are driven by anticompetitive animus.” *Enigma*, 946 F.3d at 1050 (emphasis added); *id.* at 1045.<sup>49</sup> The *Enigma* decision never once mentions Section 230(c)(1), much less does it purport to reverse Ninth Circuit precedents interpreting that subsection.

The Ninth Circuit’s decision in *Lemmon v. Snap, Inc.* is also inapposite. In *Lemmon*, plaintiffs sued Snap, maker of the Snapchat mobile application, for claims arising from a feature that Snapchat designed called the “Speed Filter,” which enabled users to record their driving speed and post it on their Snapchat account. The Ninth Circuit held that Snap did not enjoy immunity from suit under Section 230(c)(1), among other reasons, because the plaintiffs’ negligent design claim “di[d] not seek to hold Snap liable for its conduct

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independent grants of immunity. *See Fyk I*, 808 F. App’x at 598 (“We reject Fyk’s argument that granting § 230(c)(1) immunity to Facebook renders § 230(c)(2)(A) mere surplusage. As we have explained, § 230(c)(2)(a) ‘provides an *additional* shield from liability.’”) (quoting *Barnes*, 570 F.3d at 1105); *id.* (“[T]he persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects, but any provider of an interactive computer service. Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue can take advantage of subsection (c)(2).”).

<sup>49</sup> ER-513-14. The *Enigma* Court answered that question in the negative, narrowly holding that “if a provider’s basis for objecting to and seeking to block materials is because those materials benefit a competitor, the objection would not fall within any category listed in [§ 230(c)(2)(A)] and the immunity would not apply.” *Enigma*, 946 F.3d at 1052; *id.* at 1045 (“We hold that the phrase ‘otherwise objectionable’ [in § 230(c)(2)(A)] does not include software that the provider finds objectionable for anticompetitive reasons.”).

as a publisher or speaker” but rather “treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat’s reward system and the Speed Filter).” *Lemmon*, 995 F.3d at 1091-92. Critically, as the District Court noted in its Order, the Ninth Circuit made clear that the facts in *Lemmon* did not involve Snap’s role in “editing, monitoring, or removing of the content that its users generate through Snapchat.” *Id.* at 1092 (“Snap’s alleged duty in this case thus ‘has nothing to do with’ its editing, monitoring, or removing of the content that its users generate through Snapchat.”). In contrast, as the *Lemmon* court further clarified, the plaintiffs “would not be permitted under § 230(c)(1) to fault Snap for publishing other Snapchat-user content (e.g., snaps of friends speeding dangerously) that may have incentivized the boys to engage in dangerous behavior,” because “attempting to hold Snap liable using such evidence would treat Snap as a publisher of third-party content, contrary to our holding here.” *Id.* at 1093 and n. 4.

Here, in contrast to *Lemmon*, the District Court found in its June 2019 Order that “all three of Plaintiff’s claims arise from the allegations that Facebook removed or moderated his pages,” and it held that “[b]ecause the CDA bars all claims that seek to hold an interactive computer service liable as a publisher of third party content, . . . the CDA precludes Plaintiff’s claims.”<sup>50</sup> This Court affirmed

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<sup>50</sup> June 2019 Order at \*3 (“Here, all three of Plaintiff’s claims arise from the allegations that Facebook removed or moderated his pages.”); ER-004.

that order in *Fyk I*. Accordingly, the District Court rightly concluded that “*Lemmon* is inapplicable on its own terms to the circumstances already found (and affirmed) here.” ER-004.

**b. District court and out-of-circuit cases**

The five remaining cases that Fyk contends changed the controlling Ninth Circuit law were decided either by a district court<sup>51</sup> or by a court outside the Ninth Circuit.<sup>52</sup> In its Order, the District Court correctly held that such nonbinding authority “by definition could not have changed the controlling legal framework for interpreting Section 230(c)(1) *in this Circuit*. . . .” ER-003; *see also Hart v. Massanari*, 266 F.3d 1155, 1163, 1171-73 (9th Cir. 2001) (explaining that trial court decisions never constitute binding precedent and that decisions by federal circuit courts are binding only in that circuit).

Indeed, even Fyk does not dispute this black letter law. In his opening brief, Fyk argues (incorrectly) that the results reached in these cases are “inconsistent” with the outcome in his case (*see, e.g.*, App. Opening Br. at 22-23), but he fails to explain how the non-

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<sup>51</sup> Namely, *Rumble, Inc. v. Google LLC*, No. 21-cv-00229-HSG, 2022 WL 3018062 (N.D. Cal. July 29, 2022); *DZ Reserve v. Meta Platforms, Inc.*, No. 3:18-cv-04978, 2022 WL 912890 (N.D. Cal. Mar. 29, 2022); and *Dangaard, et al. v. Instagram, LLC, et al.*, No. C 22-01101 WHA, 2022 WL 17342198 (N.D. Cal. Nov. 30, 2022).

<sup>52</sup> Namely, *Henderson v. The Source for Public Data L.P.*, 53 F.4th 110 (4th Cir. 2022) and *Jarkesy v. Sec. & Exch. Comm’n*, 34 F.4th 446 (5th Cir. 2022).

binding district court and out-of-circuit authorities upon which he relies could possibly have changed the controlling Ninth Circuit law underlying the District Court's June 2019 Order.<sup>53</sup> Moreover, even if they were binding, these authorities are irrelevant and would have no bearing on the District Court's June 2019 dismissal decision. *See* ER-052-54.

Accordingly, the district court did not abuse its discretion in refusing to reopen his case based on an alleged change in the controlling law.

**2. Given Fyk's failure to identify any change in the controlling law, the District Court did not abuse its discretion in holding that Fyk failed to demonstrate the "extraordinary circumstances" required for relief under Rule 60(b)(6).**

"[A] movant seeking relief under Rule 60(b)(6) [must] show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535. This Court has recognized that the standard for a Rule 60(b)(6) motion is high, and that relief should only be granted "sparingly" to avoid "manifest injustice[.]" *Navajo Nation*, 876 F.3d at 1173. As Fyk failed to meet this standard, the District Court properly declined to grant relief under Rule 60(b)(6). *See* ER-004-05.

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<sup>53</sup> Nor can he. It is axiomatic that "[o]nce a panel [of the Ninth Circuit] resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting *en banc*, or by the Supreme Court." *Hart*, 266 F.3d at 1171.

In his opening brief, Fyk asserts that the District Court abused its discretion by purportedly failing to analyze certain factors outlined by the Ninth Circuit in *Phelps* for determining whether a change in law constitutes “extraordinary circumstances.”<sup>54</sup> Fyk is wrong, and his reliance on *Phelps* is misplaced.

In *Phelps*, this Court recognized that a change in controlling law may in some circumstances present “extraordinary circumstances” if it is “clear and authoritative.” *Phelps*, 569 F.3d at 1131. But the *Phelps* court also recognized that such a change will not always provide the extraordinary circumstances necessary to reopen a case. *Id.*<sup>55</sup> Thus, when a movant seeks Rule 60(b)(6) relief based on an alleged change in law, the first step in the analysis is to whether there has, in fact, been such a change. *Id.* Although the *Phelps* court goes on to outline various factors that districts courts may consider in determining whether a change in law (if one exists) constitutes “extraordinary circumstances,” *see id.* at 1135-38, nothing in *Phelps* or any other case requires courts to consider these additional factors where, as here, the law has not changed.

In *Riley v. Filson*, for instance, the Ninth Circuit affirmed the denial of Rule 60(b)(6) relief based solely

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<sup>54</sup> See App. Opening Br. at 6 n.10 (“It was improper for the District Court to not examine a single actual *Phelps* factor, but instead base the 60(b)(6) ‘analysis’ on a gauge of Fyk’s displeased emotional state.”); *id.* at 19.

<sup>55</sup> See also *Jones v. Ryan*, 733 F.3d 825, 839 (9th Cir. 2013) (“it is clear that a change in the law will not *always* provide the truly extraordinary circumstances necessary to reopen a case”) (emphasis in original).

on its determination there had been no intervening change in law. *See* 933 F.3d at 1073. Because “there ha[d] been no change in the law, the central factor in this analysis,” the *Riley* court did not reach the other *Phelps* factors. *Id.*; *see also id.* at 1071 (“Here, the key issue is whether there was ‘a change in the law,’ and so we do not need to reach the other five factors if there was no change.”).

This case is no different. As discussed above, the District Court correctly rejected Fyk’s argument that there was a change in the controlling law. ER-003-5. Having done so, the District Court did not abuse its discretion in declining to consider whether, if there had been such a change, other *Phelps* factors might have contributed to a finding of “extraordinary circumstances.”

### **3. Fyk failed to bring his Rule 60(b) Motion “within a reasonable time.”**

This District Court’s January 2024 Order should also be affirmed for the additional reason that Fyk’s Rule 60(b) Motion was untimely. *See Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (affirmance may be “based on any ground supported by the record”).

Under Rule 60(c), a motion for relief under Rule 60(b) “must be made within a reasonable time.” In *Fyk II*, the Ninth Circuit determined that Fyk’s first Rule 60(b) motion based on *Enigma* was not “made within a reasonable time” where Fyk filed it approximately 18 months after *Enigma* first issued, about 13 months after it was reissued, and nine months after the Court’s decision in *Fyk I*.



Here, the Ninth Circuit’s decision in *Lemmon v. Snap, Inc.*—the only Ninth Circuit decision relied upon by Fyk in his Rule 60(b) Motion—was decided in May 2021, ***more than two years*** before Fyk brought his Motion in June 2023. The district court and out-of-circuit decisions that Fyk contends changed the controlling law were decided 8-15 months before Fyk filed his Motion.<sup>56</sup> Fyk has failed to explain why he could not have raised these arguments earlier. Accordingly, his failure to make his Rule 60 Motion “within a reasonable time” provides an additional basis for affirming the District Court’s Order.

**B. No basis exists to disturb the District Court’s decision terminating Fyk’s freestanding motion regarding the constitutionality of Section 230(c)(1).**

While Fyk’s Rule 60(b) Motion was pending before the District Court, Fyk filed an additional freestanding motion arguing that the interpretation of Section 230(c)(1) underlying the District Court’s June 2019 dismissal order renders Section 230(c)(1) unconstitutional. The District Court correctly terminated that motion after declining to reopen Fyk’s case.

Fyk urges this Court to reverse the Court’s decision terminating his freestanding constitutional challenge, but he fails to identify a proper source of appellate jurisdiction. “Jurisdiction is never to be

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<sup>56</sup> *DZ Reserve* was decided in March 2022, 15 months before Fyk filed his second Rule 60(b) motion. The Fifth Circuit issued its opinion in *Jarkesy* in May 2022, more than one year before Fyk filed his second Rule 60(b) motion. *Rumble* was decided in July 2022. *Henderson* and *Dangaard* were decided in November 2022.

assumed, and in every case, jurisdiction must exist by way of some affirmative source.” *Williamson v. UNUM Life Ins. Co. of Am.*, 160 F.3d 1247, 1250 (9th Cir. 1998). Fyk asserts that this Court has jurisdiction under 28 U.S.C. § 1291 (hereinafter, “Section 1291”) to review his entire appeal.<sup>57</sup> But that statute does not confer jurisdiction here.

Section 1291 “empowers the circuit courts to hear appeals from . . . **final judgments** issued by the district courts.” *Id.* (emphasis added). “A final judgment is a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Id.* (internal quotations and citations omitted). In this case, final judgment was entered and affirmed long before Fyk ever filed his motion challenging the constitutionality of Section 230(c)(1). Accordingly, Section 1291 does not confer jurisdiction over the District Court’s decision terminating his freestanding constitutional challenge.<sup>58</sup>

Even if appellate jurisdiction were present here, no basis exists to disturb the District Court’s termination decision. Having denied Fyk’s Rule 60(b) Motion, the District Court had no basis to consider the

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<sup>57</sup> App. Opening Br at 5

<sup>58</sup> In a similar case, in which the appellant asked this Court to review the denial of motions filed in a closed case, this Court dismissed the appeal as frivolous and revoked the Petitioner’s *in forma pauperis* status. *Drevaleva v. Dep’t of Veterans Affs.*, No. 21-15658, 2021 WL 4785893 (9th Cir. Aug. 16, 2021) (reviewing *Drevaleva v. U.S. Dep’t of Veterans Affs.*, No. 19-cv-02665-HSG, 2021 WL 1433063, at \*1 (N.D. Cal. Mar. 29, 2021), in which district court denied all pending motions filed in closed case and ordered that no further filings be accepted).

merits of Fyk’s freestanding constitutional challenge, which he filed in a closed case, after final judgment of dismissal. *See Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 665 (9th Cir. 1997) (district court could not entertain motion filed after judgment of dismissal “unless and until [defendant] demonstrated that he was entitled to relief under Rule 60(b)”; *cf. Planned Parenthood of S. Arizona v. Neely*, 130 F.3d 400, 403 (9th Cir. 1997) (holding that district court abused its discretion by allowing plaintiffs to supplement complaint where original action had reached final resolution and the district court did not retain jurisdiction)).

### **VIII. Conclusion**

For the foregoing reasons, the Order of the District Court should be affirmed.

Dated: May 9, 2024

KEKER, VAN NEST & PETERS LLP

By: /s/ William S. Hicks  
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**JASON FYK OPENING BRIEF, U.S. COURT  
OF APPEALS FOR THE NINTH CIRCUIT [5.1]  
(MARCH 9, 2024)**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JASON FYK,

*Plaintiff-Appellant,*

v.

FACEBOOK, INC.,

*Defendant-Appellee.*

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Appeal No. 24-465

Appeal of January 12, 2024, Order Denying Motion  
for Relief Pursuant to Fed. R. Civ. P 60(B) and  
Terminating Motion Re: Constitutionality of 47  
U.S.C. Sec. 230(C)(1) [D.E. 74] by Hon. Haywood S.  
Gilliam, Jr. of the U.S. District Court for the  
Northern District of California, 4:18-cv-05159-HSG

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**[TOC & TOA Omitted]**

**I. Jurisdictional Statement**

This appeal relates to an order of dismissal pertaining to a Rule 5.1 constitutional challenge and a Rule 60 motion for reconsideration by Plaintiff/Appellant, Jason Fyk (“Fyk”), relating to his complaint against Defendant/Appellee, Facebook, Inc. (“Facebook”).<sup>1</sup>

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<sup>1</sup> “\_\_\_ ER \_\_\_” refers to Plaintiff’s/Appellant’s Excerpt of Record. 4-ER-595-623 is Fyk’s August 22, 2018, Verified Complaint, 4:18-cv-05159-JSW, [D.E. 1]; 2-ER-57-240 and 3-ER-242-420 is Fyk’s June 16, 2023, Second Motion for Relief Pursuant to Fed.R.Civ.P. 60(b) to Vacate and Set Aside Entry of Judgment, [D.E. 61]; 2-ER-48-56 is Facebook’s June 30, 2023, Response, [D.E. 62]; 2-ER-40-47 is Fyk’s July 7, 2023, Reply, [D.E. 63]; 2-ER-39 is Judge White’s August 22, 2023, Order of Recusal, [D.E. 64]; 2-ER-38 is the District Court’s August 22, 2023, Order Reassigning Case, [D.E. 65]; 2-ER-28-37 is Fyk’s September 19, 2023, F.R.C.P. 5.1 Motion Re: the (Un)Constitutionality of 47 U.S.C. § 230(c)(1), [D.E. 66]; 2-ER-25-27 is the United States of America’s October 2, 2023, Acknowledgment of Notice of Constitutional Challenge, [D.E. 68]; 2-ER-21-24 is Facebook’s October 3, 2023, Response to Plaintiff Jason Fyk’s Motion Concerning the Constitutionality of 47 U.S.C. § 230(c)(1), [D.E. 69]; 2-ER-17-20 is Fyk’s October 3, 2023, Response to [D.E. 68], [D.E. 70]; 2-ER-10-16 is Fyk’s October 10, 2023, Response to [D.E. 69], [D.E. 71]; 2-ER-7-9 is Fyk’s December 15, 2023, Notice of Filing Supplemental Authority in Further Support of [D.E. 61] and [D.E. 66], [D.E. 73]; 1-ER-2-5 is

This is Fyk’s third appeal relating to Facebook’s business strategy, resulting in interference with Fyk’s livelihood which Fyk’s Verified Complaint contends is unlawful because Facebook’s actions were motivated by an anti-competitive animus.<sup>2</sup> In the first appeal, Fyk challenged the District Court’s dismissal of the case without an opportunity for leave to amend based on Facebook’s conclusory assertion that it was entitled to immunity under Title 47, United States Code, Section 230(c)(1).<sup>3</sup> The United States District Court for the Northern District of California (Judge Jeffrey S. White) exercised jurisdiction in this case under Title 28, United States Code, Section 1332, as the parties

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Judge Gilliam, Jr.’s January 12, 2024, Order Denying [D.E. 61] and [D.E. 66], [D.E. 74]; and 4-ER-624-632 is Fyk’s January 25, 2024, Notice of Appeal and Representation Statement, [D.E. 75].

<sup>2</sup> The first words of the “Nature of the Action” section of Fyk’s Verified Complaint read as follows: “This case asks whether Facebook can, without consequence, engage in brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent practices . . . .” *See* [D.E. 1], 4-ER-596 at ¶ 1. The Second Claim for Relief of Fyk’s Verified Complaint is entitled “Violation of California Business & Professions Code Sections 17200-17210 (Unfair Competition),” *see id.* at 4-ER-616-618 at ¶¶ 58-66, and the correlated claims for relief are entitled: “First Claim for Relief-Intentional Interference with Prospective Economic Advantage/ Relations,” *see id.* at 4-ER-612-616 at ¶¶ 49-57; “Third Claim for Relief-Civil Extortion,” *see id.* 4-ER-618-620 at ¶¶ 67-71; and “Fourth Claim for Relief-Fraud/Intentional Misrepresentation,” *see id.* 4-ER-620-621 at ¶¶ 72-78.

<sup>3</sup> Hereafter, the germane subsection of the Title 47, United States Code, Section 230, the Communications Decency Act (“CDA”) is drafted in shortest form. For example, 230(c)(1) will refer to Title 47, United States Code, Section 230(c)(1). As other examples, 230(f)(3) will refer to Title 47, United States Code, Section 230(f)(3).

are diverse and the amount in controversy exceeds \$75,000.00 exclusive of fees, costs, interest, or otherwise. Venue is proper in the Northern District of California pursuant to Title 28, United States Code, Section 1391(b), as Facebook’s principal place of business is in this judicial district.

Fyk’s second appeal derived from the District Court’s (Judge White) error in divesting § 230(c)(1) from the “Good Samaritan” requisite that *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019) requires for § 230(c)(2) in denying the first Motion for Relief Pursuant to Rule 60(b) to Vacate and Set Aside Entry of Judgment [D.E. 46] filed on March 22, 2021, by Fyk.<sup>4</sup> The District Court’s error was its failure to distinguish between the CDA’s immunity afforded to Facebook (in certain

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<sup>4</sup> 4-ER-532-594 is the first Motion for Reconsideration, [D.E. 46], dated March 22, 2021; 4-ER-528-531 is Facebook’s April 5, 2021, Response to the first Motion for Reconsideration [D.E. 47]; 3-ER-515-526 is Fyk’s April 12, 2021, Reply to Facebook’s April 5, 2021, Response, [D.E. 48]; 3-ER-513-514 is the District Court’s November 1, 2021, Order Denying Motion for Relief Pursuant to Fed. R. Civ. P. 60(b), [D.E. 51]; 3-ER-480-512 is Fyk’s March 3, 2022, Opening Brief in that second appeal (No. 21-16997); 3-ER-449-479 is Facebook’s May 4, 2022, Answering Brief to the Opening Brief in the second appeal; 3-ER-424-448 is Fyk’s May 25, 2022, reply in that second appeal; and 3-ER-421-423 is this Court’s October 19, 2022, Memorandum, *sua sponte* denying the appeal based on Fyk supposedly putting *Enigma* to use too late. For a fuller recitation of the procedural posture of this nearly six-year-old case (namely all the briefing, at District Court and Circuit Court levels in the first appeal, No. 19-16232, that flowed from Judge White’s erroneous June 18, 2019, dismissal of the Verified Complaint, *see* [D.E. 38] – [D.E. 39]), we respectfully refer the Court to Fyk’s January 31, 2024, Mediation Questionnaire submitted in this third appeal.

circumstances discussed in [D.E. 46], 4-ER-532-594) for restricting *content* (in good faith) versus no immunity for the design/motivation of Facebook’s *conduct*, which is essential to the CDA’s immunity. The second appeal challenged the Order denying relief [D.E. 51], 3-ER-513-514,<sup>5</sup> on the grounds that Facebook’s misstatement of “facts” was adopted without analysis by Judge White,<sup>6</sup> a result inconsistent with the CDA.<sup>7</sup> In the second appeal, this Court did not address the merits, deciding instead that Fyk did not timely assert *Enigma* (the premise of “Good Samaritanism”), even though Fyk specifically and

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<sup>5</sup> The District Court’s failure to apply this Court’s *Enigma* decision, which was/is controlling authority in the Ninth Circuit, compelled Rule 60(b)(5) relief here.

<sup>6</sup> The District Court’s continued factual misstatements based on Facebook’s mischaracterizations, rather than Fyk’s factual allegations in his Verified Complaint (to be considered true for the purposes of a Rule 12(b)(6) motion), warranted Rule 60(b)(3) relief. The District Court should have accepted Fyk’s Verified Complaint allegations as true and, correspondingly, accepted Fyk’s framing of the case (a case focused on Facebook’s illegal *conduct*, not Fyk’s *content*), not Facebook’s reframing of the case (*i.e.*, Facebook’s misclassifying this case as of a § 230(c)(1) ilk).

<sup>7</sup> In the District Court and in this Court, there has never been a single hearing for Fyk (nor any leave to amend for Fyk) to present arguments and/or facts (a) concerning Fyk’s contentions as to how the CDA was misapplied, (b) elucidating the reality that the Verified Complaint’s causes of action are based on Facebook’s *conduct*, not Fyk’s *content*, and/or (c) potentially adding to the causes of action set forth in the Verified Complaint (*e.g.*, negligent design, yet another cause of action having nothing to do with a user’s content but rather an interactive computer service provider’s conduct; *i.e.*, yet another cause of action not subject to CDA immunity, *see, e.g., Lemmon, et al. v. SNAP, Inc.*, 995 F.3d 1085 (9th Cir. 2021)).



independently raised the “Good Samaritan” general provision in his first reply brief to this Court.<sup>8</sup> Judge White later recused himself as “disqualified.”

In this third appeal, Fyk challenges the District Court’s (Judge Gilliam, Jr.) January 12, 2024 Order [D.E. 74], 1-ER-2-5, on a Rule 60(b) motion [D.E. 61], 2-ER-57-240 and 3-ER-242-420, and Rule 5.1 constitutional challenge [D.E. 66], 2-ER-28-37, in which the District Court (a) summarily adopted the conclusion, without analysis, of Judge White’s November 1, 2021, Order [D.E. 51], 3-ER-513-514, concerning the (mis)application of § 230’s “Good Samaritan” general provision; (b) found that no extraordinary circumstances existed without applying the *Phelps* factors and instead simply disregarded Fyk’s motion as a “losing party simply disagreeing with an adverse judgment;”<sup>9</sup> and (c) chose to not “take up” Fyk’s non-forfeitable Rule 5.1 constitutional challenge merely because this case had been previously dismissed.

More specifically, the District Court’s “Analysis” section of the January 12, 2024, Order, states: “The Court denies Plaintiff’s Rule 60(b)(5) motion on *the same basis* underlying the November 2021 denial. . . .” [D.E. 74] at 2, 1-ER-3 (emphasis added). The District Court concluded: “A losing party simply disagreeing with an adverse judgment is ordinary, not extraordinary. . . .” (*id.* at 4, 1-ER-5) and “[a]ccordingly, there is no basis for taking up Plaintiff’s freestanding

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<sup>8</sup> “[W]e will not consider any claims that were not actually argued in appellant’s opening brief.” 9th Cir. June 12, 2020, Memorandum [D.E. 42] at n. 2.

<sup>9</sup> See n. 10, *infra*.

‘motion re: the (un)constitutionality’ of § 230(c)(1), and that motion, Dkt. No. 66, is TERMINATED.” *Id.* at 4, 1-ER-5 (emphasis in original).

This Court has jurisdiction pursuant to Title 28, United States Code, Section 1291 and its review of the Order is under an abuse of discretion standard. *See, e.g., Starr v. City of Angels Camp*, 99 Fed.Appx. 792, 793 (9th Cir. 2004).

On January 25, 2024, Fyk filed his Notice of Appeal from a Judgment or Order of a United States District Court, along with his Representation Statement. 4-ER-624-632. On January 26, 2024, the Time Schedule Order was entered, prescribing March 8, 2024, as Fyk’s opening brief deadline.

## II. Issues Presented

The Order at issue on this appeal (entered by Judge Haywood S. Gilliam, Jr., of the Northern District of California Court on January 12, 2024 [D.E. 74], 1-ER-2-5), concerns whether (a) the District Court’s order on the application of § 230(c)’s “Good Samaritan” general provision/intelligible principle, improperly deprived Fyk of his constitutionally guaranteed right of Due Process, and therefore should have merited review as “extraordinary circumstances” within the ambit of Rule 60(b)(6);<sup>10</sup> and (b) whether the Order was amiss in failing to consider (*i.e.*, forfeit) Fyk’s *non-forfeitable*

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<sup>10</sup> The District Court did not engage in any analysis of the “extraordinary circumstances” factors set forth in *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). It was improper for the District Court to not examine a single actual *Phelps* factor, but instead base the 60(b)(6) “analysis” on a gauge of Fyk’s displeased emotional state.

Rule 5.1 constitutional challenge<sup>11</sup> merely because this case had been previously dismissed.<sup>12</sup> This appeal asks:

- (1) In denying Fyk’s Second Motion for Reconsideration [D.E. 61], 2-ER-57-240 and 3-ER-242-420, under Rule 60(b)(5), did the District Court err in denying Fyk of his constitutional Due Process rights, by determining the “Good Samaritan” general provision

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<sup>11</sup> The constitutional challenge derives from the doctrines of Non-Delegation/Major Questions, Void-for-Vagueness, and Substantial Overbreadth Doctrines and several canons of statutory construction noted in Sections V.B and V.C below.

<sup>12</sup> A Rule 5.1 constitutional challenge is premature until the parties have fully exhausted briefing/fully developed the case. *See, e.g., Anderson v. Municipality of Anchorage*, No. 3:21-cv-00139-JMK, 2023 WL 2932962 (D. Alaska Apr. 13, 2023). Judge White dismissed Fyk’s Verified Complaint on June 18, 2019, *see* [D.E. 38] – [D.E. 39], and this case has never been heard on the substantive merits of the verified complaint. Moreover, as will be discussed in greater detail below, it was not until years after the June 18, 2019, dismissal (apparently the date on which Judge Gilliam, Jr. believes Fyk’s ability to lodge a Rule 5.1 constitutional challenge was forfeited) that Judge White rendered his November 1, 2021, decision [D.E. 51], 3-ER-513-514 (unconstitutionally holding that § 230(c)’s “Good Samaritan” general provision is not general; *i.e.*, somehow only applies to § 230 (c)(2)) that lent itself to Fyk’s Rule 5.1 constitutional challenge. Then, the parties were obliged to fully brief that November 1, 2021, Judge White decision before Fyk was eligible to lodge a constitutional challenge concerning same. In sum, and as will be discussed in greater detail below, Fyk was not allowed to advance a Rule 5.1 constitutional challenge any sooner than he did, and the District Court erred in concluding that a dismissal from four years ago somehow forfeited/terminated Fyk’s non-forfeitable Rule 5.1 rights years before the constitutional question even arose or could have been known in precognitive fashion.

overarching all of § 230(c) is only applicable to one subsection (§ 230(c)(2)) rather than both subsections (§ 230(c)(1) and § 230(c)(2))? Even more specifically, did the District Court err in deciding that this Court’s *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019), cert. denied *via Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13 (2020) decision (holding that there is no § 230(c) immunity where the conduct of the party invoking the CDA’s civil liability protection is alleged to be grounded in an anticompetitive animus) is narrowly limited to instances in which the party invoking the CDA’s civil liability protection has raised § 230(c)(2) as an affirmative defense, rather than also applicable to instances in which the defendant has raised § 230(c)(1) as a “backdoor” affirmative defense?

Did the District Court err in failing to address other circuit court cases addressing the issues more squarely and in a manner consistent with the letter and spirit of the law, such as the conflicting Fourth Circuit’s *Henderson, et al. v. Source for Public Data, L.P., et al.*, 53 F.4th 110 (4th Cir. 2022) decision making clear, among other things (like the proper interpretation/application of § 230 as a whole), that the proper application of § 230(c) involves applying the “Good Samaritan” general provision/intelligible principle to both § 230(c)(1) and § 230(c)(2)?<sup>13</sup> How

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<sup>13</sup> In *Henderson*, the Fourth Circuit unraveled (*i.e.*, re-contextualized) its own *Zeran v. AOL*, 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998) decision, which such

can it be constitutional if the law is applied properly in one jurisdiction (*e.g.*, the Fourth Circuit) and not another (*e.g.*, the Ninth Circuit)?

Did the District Court err in ignoring the contemporaneous decisions by jurists within the same district court? For example, Judge William Alsup’s *Dangaard, et al. v. Instagram, LLC, et al.*, No. C 22-01101 WHA, 2022 WL 17342198 (N.D. Cal. Nov. 30, 2022) decision (an anti-competitive animus case on all fours with this case), which such decision properly made clear that an interactive computer service provider (such as Facebook) cannot misclassify a claim as a § 230(c)(1) case (rather than a § 230(c)(2) case) in order to try to “backdoor”/circumvent the “Good Samaritan” general

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*Zeran* decision has underlain Facebook briefing and has been at the root of District Court decision-making. As recognized by the Fourth Circuit in *Henderson*, the Fourth Circuit’s *Zeran* decision was outdated. For example,

“Drawing this line here [*i.e.*, where “[a]n interactive service provider becomes an information content provider whenever their actions cross the line into substantively altering the content at issue in ways that make it unlawful”] is reinforced by another contextual reading of *Zeran*’s list of traditional editorial functions. After listing some traditional editorial functions for which liability is barred, *Zeran* then said that § 230(c)(1) prevents suits that “cast [the defendant] in the same position as the party who originally posted the offensive messages.” *Id.* at 333. *Zeran* saw § 230(c)(1) as vicarious liability protection that could not be used as a shield when the offensiveness of the message comes from the defendant [*i.e.*, their own conduct] themselves rather than a third party. *See id.*; *see also Nemet*, 591 F.3d at 254 . . . .

*Henderson*, 54 F.4th at n. 26.

provision overarching all of § 230(c), which such backdoor misclassification occurred here.

Did the District Court improperly ignore other cases at issue/discussed in Fyk's Second Motion for Reconsideration [D.E. 61] (*e.g.*, *Rumble, Inc. v. Google, LLC*, No. 21-cv-00229-HSG, 2022 WL 3018062 (N.D. Cal. Jul., 29, 2022); *DZ Reserve, et al. v. Meta Platforms, Inc.*, No. 3:18-cv-04978-JD, 2022 WL 912890 (N.D. Cal. Mar. 29, 2022); *Lemmon, et al. v. SNAP, Inc.*, 995 F.3d 1085 (9th Cir. 2021))? Other than a short-shrift mention of *Lemmon*, the District Court's January 12, 2024, Order [D.E. 74] did not even address the other aforementioned cases.

- (2) In denying Fyk's Second Motion for Reconsideration [D.E. 61] under Rule 60(b)(6), did the District Court err/abuse its discretion in refusing to consider the factors for analyzing the extraordinary circumstances of this case (*e.g.*, deprivation of constitutional rights, miscarriage of justice) by dismissing Fyk's Rule 60(b)(6) efforts as nothing more than the mere dissatisfaction of an "ordinary" sore loser?
- (3) In denying Fyk's Rule 5.1 Constitutional Challenge [D.E. 66], 2-ER-28-37, did the District Court err in "terminating" the *non-forfeitable* right that is a Rule 5.1 constitutional challenge, ignoring the fact that a law delegating administrative prior restraint authority (which is what the CDA is) without a general provision/intelligible principle is unconstitutional (*i.e.*, forbidden)? *See, e.g., Jarkesy, et*

*al. v. SEC*, 34 F.4th 446 (5th Cir. 2022),<sup>14</sup> a decision that was set forth in the parallel and concurrent Second Motion for Reconsideration [D.E. 61].

### III. Statement of the Case/Relevant Facts

Between 2010 and 2016, Facebook implemented a paid-for anticompetitive (content development/content provision) advertising program (*i.e.*, Facebook’s advertising program was deliberately designed to facilitate anticompetitive conduct). Facebook began selling enhanced distribution, distribution it had previously offered for free and, in doing so, Facebook became a direct competitor to all its users, like Fyk. Facebook’s new “sponsored” advertising business partnership program (*i.e.*, its product) “create[d] a misalignment of interests between [Facebook] and people who use [Facebook’s] services,” Mark Zuckerberg, *Understanding Facebook’s Business Model* (Jan. 24, 2019), which incentivized(s) Facebook to selectively and tortiously interfere with competitive users’ ability to monetize by artificially restricting (*i.e.*, (de)developing) the distribution<sup>15</sup> of low-

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<sup>14</sup> The holding of *Jarkesy* is not just a Fifth Circuit outlier or a mere academic exercise, it is the law of the land. *See, e.g., J.W. Hampton, Jr. & Co. v. U.S.*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power”).

<sup>15</sup> Indeed, Facebook has outright admitted to its anti-competitive animus/design flaw. For example: “. . . so going after actors who repeatedly share this type of content [e.g., financially motivated/competitive], and *reducing their distribution, removing their ability to monetize, removing their ability to advertise is part of our strategy.*” ~ Tessa Lyons (Facebook). Or, as another exam-

paying/less favored users' materials, in favor of *developing* Facebook's higher paying "sponsors"/ "high[er] quality participant['s] [materials] in the ecosystem." Mark Zuckerberg Interview/Public Discussion With Mathias Döpfner (4/1/19). *See, e.g.*, 4-ER-599-600 at ¶¶ 17-18.

Although Fyk reluctantly opted into Facebook's business "protection"/extortion program at a relatively low amount of money (in comparison to others, such as Fyk's competitor), Facebook reduced the distribution/availability of Fyk's pages/businesses by over 99% overnight. *See, e.g.*, 4-ER-600-601 at ¶¶ 19-21. Then, in October 2016, Facebook fully de-activated (*i.e.*, "restricted access to or availability of [Fyk's] materials") several of Fyk's pages/businesses, totaling over 14,000,000 fans cumulatively, under the fraudulent aegis of "good faith" content policing pursuant to § 230(c)(2)(A). *See, e.g.*, 4-ER-601-603 at ¶¶ 21-22. Facebook's content policing, however, was not uniformly applied or enforced because of Facebook's unquenchable thirst for financial gain – its anticompetitive animus. *See, e.g.*, 4-ER-603-609 at ¶¶ 23-40.

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ple:

... for the financially motivated actors, their goal is to get a lot of clicks so they can convert people to go to their websites, which are often covered in low quality [non-competitive] ads, and they can monetize and make money from those people's views, and If we can reduce the spread of those links, we reduce the number of people who click through, and *we reduce the economic incentives that they have to create that content in the first place.*

~ Tessa Lyons (Facebook).



In February and March of 2017, Fyk contacted a business colleague (now competitor) who was favored by Facebook, having paid over \$22,000,000.00 for Facebook’s advertising content development. Fyk’s competitor had dedicated Facebook representatives directly available to them, whereas Fyk was not offered the same level of services. Fyk asked his competitor if they could possibly have their Facebook representative restore Fyk’s unpublished and/or deleted pages for Fyk. Facebook’s response was to decline Fyk’s competitor’s request unless Fyk’s competitor was to take ownership of the unpublished and/or deleted content/pages (*i.e.*, Facebook conspired with Fyk’s competitor *outside of the Internet*, to help<sup>16</sup> Fyk’s competitor, and to force Fyk out of business by rerouting Fyk’s businesses/property to the competitor who compensated Facebook far more). Facing no equitable solution, Fyk fire sold his businesses/pages/property to his competitor. Shortly thereafter, Facebook restored (materially/divisibly contributing to the development/availability/ functionality of Fyk’s information – *i.e.*, the information content provision line was crossed) the *exact same* (*i.e.*, in physical form(at), not function(ality)) content that Facebook had previously maintained was purportedly violative of its Community Standards (*i.e.*, implicating § 230(c)(2)(A) “protections,” if any CDA protections, but certainly not § 230(c)(1) “protections”) and affirmatively restricted Fyk’s materials while owned by Fyk but not when in the hands of Fyk’s higher

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<sup>16</sup> “It follows that Meta defendants *cannot help* OnlyFans violate laws of general applicability and hide behind the CDA to avoid liability itself.” *Dangaard*, 2022 WL 17342198, at \*5 (citing *Roommate[s]*, 521 F.3d at 1164).

paying competitor (*i.e.*, disparate treatment/conduct). Facebook’s preferred (*i.e.*, higher paying – helped) “Sponsored Advertisers” do not suffer the same consequences as (*i.e.*, lower paying – unhelped) users like Fyk, because of Facebook’s anticompetitive animus/design/strategy. *See, e.g.*, 4-ER-610-612 at ¶¶ 41-47.

On August 22, 2018, Fyk sued Facebook in the District Court, alleging unfair competition, tortious interference with his economic advantage/relations, fraud, and extortion based on Facebook’s *prima facie* anti-competitive animus/conduct. *See* 4-ER-612-621 at ¶¶ 49-78. Facebook filed a Rule 12(b)(6) motion, based largely (almost entirely) on § 230(c)(1) immunity. *See* [D.E. 20]. The District Court continued the proceedings, then vacated oral arguments and granted Facebook’s motion on the papers, without affording Fyk leave to amend the Verified Complaint. *See* [D.E. 38]. The District Court’s dismissal Order misinterpreted/misapplied § 230(c) protection/immunity and distorted the facts of the case. *See id.*

Fyk appealed to this Court. The Ninth Circuit panel affirmed the District Court decision (again without oral argument) in a cursory five-page Memorandum arbitrarily determining Facebook’s affirmative anticompetitive conduct (on and off the Internet) did not meet the content development/provision threshold. Fyk filed a Petition for Hearing *En Banc*, which was summarily denied on July 21, 2020. The Ninth Circuit’s discretionary affirmation of dismissal stood in stark contravention of the Ninth Circuit’s own interpretation/application of § 230 in

another concurrent anti-competitive animus case (*Enigma*).<sup>17</sup>

On November 2, 2020, Fyk filed a Petition for Writ of Certiorari in the SCOTUS (the “Petition #1”). Notwithstanding Justice Thomas’ October 13, 2020, invitation for the SCOTUS to take up an appropriate case wherein the “correct interpretation of § 230,” *Malwarebytes*, 141 S.Ct. at 18, could be assessed (which such interpretation Fyk has provided to the California courts time after time during the approximate six-year pendency of this case), the SCOTUS denied Fyk’s Petition without comment.<sup>18</sup>

With case law having evolved since the time the District Court dismissed Fyk’s case against Facebook (along with other bases for reconsideration under Rule 60), on March 22, 2021, Fyk filed his first Motion for Reconsideration. By Order dated November 1, 2021, the District Court cursorily denied same, prompting Fyk to lodge another appeal with this Court on December 1, 2021. The District Court’s denial of Fyk’s first Motion for Reconsideration ignored (and/or cursorily misapplied) this Circuit’s controlling

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<sup>17</sup> This appeal’s ER does not include the first appeal, as that would have made for an already voluminous ER here to be way too voluminous. Upon this Court’s request, however, Fyk would certainly amend this appeal’s ER to include same.

<sup>18</sup> See n. 17, *supra*. Similarly, this appeal’s ER (already voluminous as is) does not include either of Fyk’s two SCOTUS Petition books; but, upon this Court’s request, Fyk would certainly amend this ER to include the two books.

authority, namely this Court’s *Enigma* decision. This prompted Fyk’s second appeal.<sup>19</sup>

In the second appeal, Fyk sought the opportunity to have his case heard on the merits *via* the application of controlling authority of this Circuit, and, in doing so, giving effect to Fyk’s constitutionally guaranteed Due Process rights. This is especially so, considering this Court handed down a different fate to *Enigma* than Fyk in *identical* anti-competitive animus circumstances. But this Court did not even address the merits of Fyk’s second appeal, this Court instead *sua sponte* decided Fyk put this Court’s *Enigma* decision (*i.e.*, the “Good Samaritan” provision) to use too “late,”<sup>20</sup> denying Fyk’s second appeal by Memorandum dated October 19, 2022. *See* 3-ER-421-423. This prompted Fyk to promptly file another Petition for Writ of Certiorari to SCOTUS (“Petition #2). On April

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<sup>19</sup> *See* n. 4, *supra*, setting forth the ER associated with the second appeal proceedings.

<sup>20</sup> The premise of the *Enigma* decision is the application of the “Good Samaritan” general provision. Strangely, this Court did not consider the “Good Samaritan” provision for Fyk when he first raised it in his first reply brief, then determined Fyk raised *Enigma* (the “Good Samaritan” provision) too late, simply because the Ninth Circuit and SCOTUS decided *Enigma* later in time. *See* 3-ER-421-423. The “Good Samaritan” provision has never been considered as it applies to Fyk’s case, despite the provision having being raised *four times* now; (1) when Fyk asserted Good Samaritanism in his first reply brief to this Court; (2) then again when the District Court (Judge White) dismembered the general provision from 230(c)(1); (3) then again when this Court *sua sponte* dismissed Fyk based on the timeliness of asserting *Enigma*; (4) then again when the District Court (Judge Gilliam) dismissed Fyk’s Rule 5.1 constitutional challenge of the general provision’s application.

17, 2023, SCOTUS decided not to entertain Petition #2, denying same without comment, notwithstanding the fact that Fyk's second petition would have *resolved the entire Internet problem* in one fell swoop had SCOTUS entertained same (just as this Court's proper decision-making here would resolve the entire Internet problem in one fell swoop).

In the time following this Court's October 19, 2022, Memorandum denying Fyk's second appeal and throughout the pendency of Fyk's second go-round with SCOTUS (during which time this Court and the District Court were divested of jurisdiction), case law unfolded supportive of the positions Fyk has advanced in California courts for years (in fact, such decisions very well could have been cut-and-pasted from Fyk's briefing within California's courts); *e.g.*, *Henderson* (4th Cir. Nov. 3, 2022) and *Dangaard* (N.D. Cal. Nov. 30, 2022).

In the time following the District Court's November 1, 2021, Order (3-ER-513-514) and throughout the pendency of Fyk's second petition for writ to SCOTUS, more case law following *Henderson* and *Dangaard* had unfolded supporting the positions Fyk had advanced; *e.g.*, *Rumble* (N.D. Cal. Jul. 29, 2022), *DZ Reserve* (N.D. Cal. Mar. 29, 2022), *Doe v. Facebook, Inc.*, 142 S.Ct. 1087 (Mar. 7, 2022) (J. Thomas Statement). On May 4, 2021, the Ninth Circuit rendered its *Lemmon* decision which the District Court ignored in rendering its November 1, 2021, denial of Fyk's first Motion for Reconsideration. Following SCOTUS' April 17, 2023, denial of Fyk's Petition #2, Fyk promptly filed his Second Motion for Reconsideration [D.E. 61], 2-ER-57-240 and 3-ER-242-420 (at issue on this appeal) in the District Court on June 16, 2023.

In this third appeal, Fyk requests the same law/justice that this Court afforded *Enigma*, for example, *see Enigma* (no CDA immunity where a defendant’s anticompetitive animus is central to the wrongs complained of by the plaintiff), and an analysis of the CDA’s (in)applicability to the allegations against Facebook that the District Court (Judge Alsup) afforded to Dangaard (under virtually identical circumstances).

#### IV. Summary of the Argument

As discussed in Section V.A below, the District Court erred in denying Fyk’s request for Rule 60(b)(5) relief by limiting this Court’s *Enigma* 230(c) holding to only a § 230(c)(2) setting (by rubberstamping Judge White’s decisions from years ago), notwithstanding the unconstitutionality of such application of a general provision; *i.e.*, by deciding that the “Good Samaritan” general provision/intelligible principle overarching all § 230(c) does not apply to both § 230(c)(1) and § 230(c)(2). This Court’s *Enigma* holding was not exclusive to a § 230(c)(2) setting, as confirmed by other cases since (*e.g.*, *Henderson* and *Dangaard*) and, as to the only harmonious and constitutional reading of *Enigma* – this Court, in *Enigma*, properly applied the “Good Samaritan” general provision/intelligible principle overarching all of § 230(c) (both § 230(c)(1) and § 230(c)(2)) to the reality that interactive computer service (“ICS,” Facebook here) actions driven by anti-competitive animus are the antithesis of “Good Samaritanism” and are accordingly entitled to no § 230(c) immunity at the onset of dismissal/immunity consideration. As discussed in Section V.A below, applying *Enigma* properly (and/or applying *Henderson* properly, and/or applying *Dangaard* properly, and/or applying *Jarkesy* properly,

and/or *et cetera*), Fyk was/is plainly entitled to Rule 60(b)(5) relief by way of a proper application of the “Good Samaritan” general provision to his case.

As discussed in Section V.B below, the District Court erred in determining that Judge White’s June 18, 2019, dismissal [D.E. 38] extinguished (*i.e.*, forfeited) Fyk’s ability to advance a *non-forfeitable* Rule 5.1 constitutional challenge [D.E. 66], 2-ER-28-37. In June 2019, the merits of this case had not been developed, and a Rule 5.1 constitutional challenge is not supposed to transpire until such development has occurred. *See* n. 12, *supra*. Had Fyk advanced his Rule 5.1 constitutional challenge any sooner than he did, it would have been denied without prejudice as premature. Fyk brought his Rule 5.1 constitutional challenge (again, which is a *non-forfeitable* right . . . the constitution cannot be forfeited, ever) precisely when he should have. As discussed in Section V.B below, the District Court should not have terminated Fyk’s non-forfeitable Rule 5.1 constitutional challenge, especially without any meaningful analysis of the challenge.

As discussed in Section V.C below, the District Court erred in denying Fyk’s request for Rule 60(b)(6) relief in deciding “extraordinary circumstances” were not present. The District Court did not engage in any analysis of the “extraordinary circumstances” guideline/considerations outlined by this Court in *Phelps*, but instead syllogistically asserted that no “extraordinary circumstances” existed because Fyk’s unhappiness with losing (thus far) is “ordinary.” As discussed in Section V.C below, applying the *Phelps* factors to this case, Fyk was/is plainly entitled to Rule 60(b)(6) relief just like Phelps was.

## V. Argument

### A. The “Good Samaritan” General Provision Of Section 230(c) Is, In Fact, Generally Applicable To Section 230(c)(1) AND Section 230(c)(2) – Facebook Should Have Never Been Afforded CDA Immunity Vis-à-Vis Its Backdoor Misclassification Of This Case As A 230(c)(1) Case, Warranting R. 60(b)(5) Relief

As *Jarkesy* (and other cases from across the nation for decades, *see, e.g.*, n. 14, *supra*) makes clear, Congress must supply an intelligible principle/general provision when it delegates administrative restraint authority (notably, when Facebook invoked § 230’s protections, it affirmatively acknowledged that it voluntarily chose to act as the *enforcer/instrument* of Congress; *i.e.*, to block and screen offensive materials). As *Jarkesy* concludes, if Congress does not supply an intelligible principle/general provision under such a delegation setting, then the law is unconstitutional. All § 230(c) must be governed by the overarching “Good Samaritan” intelligible principle/general provision as Fyk’s prior briefing consistently posits, and as Congress wrote the law, or the law is unconstitutional and Fyk’s dismissal cannot stand.

Because a court should not turn to constitutional assessments unless absolutely necessary (per the Constitutional Avoidance Doctrine), we start with the proper application of § 230(c)’s “Good Samaritan” general provision/intelligible principle – that is, the “Good Samaritan” general provision applies generally across § 230(c)(1) and § 230(c)(2), not to just § 230(c)(2) as the District Court did in this action [D.E. 51, 74]. Fyk’s



Rule 60(b) motion [D.E. 61] and Rule 5.1 constitutional challenge [D.E. 66] relate to the “Good Samaritan” intelligible principle/general provision applying to all of Title 47, United States Code, Section 230(c) (“CDA”), not just § 230(c)(2).

Fyk’s anti-competition/unfair competition claim (Count II of the Verified Complaint, [D.E. 1] at ¶¶ 58-66, 4-ER-616-618) is the antithesis of Good Samaritanism, and should have the same result as the *Dangaard* decision (involving Facebook/Meta) that unfair competition lawsuits are not subject to CDA immunity under § 230(c)(1) and that this Court’s *Enigma* decision applies equally to Fyk:

While *Zango* and *Enigma* applied only to Section 230(c)(2), and the parties in *Enigma* were direct competitors, the same policy concerns arise here: Meta defendants’ ‘filtering practices [are] aimed at suppressing competition’ in the online adult entertainment business. In fact, Meta defendants could have employed Section 230(c)(2) to attempt to defend themselves – they claim to be removing obscene material from their platforms in good faith, which is what Section 230(c)(2) immunizes. But they instead chose Section 230(c)(1) to shield themselves. *To approve Meta defendants’ CDA defense would make Section 230(c)(1) a backdoor to CDA immunity — ‘contrary to the CDA’s history and purpose.’* Thus, congressional policy weighs heavily against Meta defendants’ CDA defense.

*Dangaard*, 2022 WL 17342198, at \*6 (emphasis added).

*Dangaard* is precisely our case, as discussed above in Section III. Facebook’s “filtering practices [were] aimed at suppressing [Fyk as] competition in the online . . . [comedy] entertainment [/advertisement] business.” *Id.* “In fact, [Facebook] could have employed § 230(c)(2) to attempt to defend [itself] – [pre-suit, Facebook] claim[ed] to be [quashing Fyk’s businesses/pages due to purported] obscenity [supposedly found within same].” *Id.* “But [in about-face fashion at the start of litigation in August 2018, Facebook] instead chose § 230(c)(1) to shield [itself]. To approve [Facebook’s] CDA defense would make § 230(c)(1) a backdoor to CDA immunity – contrary to the CDA’s history and purpose. Thus, congressional policy weighs heavily against [Facebook’s] CDA defense.” *Id.*

No difference exists between the theories of liability advanced in the *Dangaard* and *Fyk* cases,<sup>21</sup>

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<sup>21</sup> Judge Alsup finally drew the content development/provision *hardline*, consistent with what Fyk has argued for years:

Here, similarly, Meta defendants are not entitled to CDA immunity for operation of their filtering system. Like the defendant in *Roommate[s]*, which was alleged to have purposefully *designed its website to filter listings in a discriminatory manner*, *Meta defendants are alleged to have purposefully designed their platforms to filter posts and accounts in an anti-competitive manner* [such was the allegation here]. Although Meta defendants are not alleged to have augmented the posts [*i.e.*, changed its physical format] or accounts themselves, [their] connection to the [anti-competitive] filtering process is direct and palpable: [They] designed [their] [platforms] to limit the listings available to subscribers based on” ties to competitors of OnlyFans [*e.g.*, based on Facebook’s ties to Fyk’s competitor – Red Blue Media]. While providing “neutral tools to carry out what may be unlaw-

yet, Dangaard received justice while Fyk was deprived of his constitutional rights. That should not be, justice is not supposed to be administered in disparate fashion . . . justice is supposed to be administered consistently and level-handedly. Fyk simply asks that his claims be treated exactly as other litigants in this jurisdiction are treated.

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ful or illicit [conduct] does not amount to ‘development,’ Meta defendants are not alleged to have filtered pornographic content in a neutral manner. Plaintiffs allege that *Meta defendants’ filtration tools are designed to facilitate anti-competitive conduct*. Thus, Section 230(c)(1) is inapplicable here. *Id.* at 1169 (emphasis in original); see *Barnes*, 570 F.3d at 1101 n. 3.

*Dangaard*, 2022 WL 17342198, at \*4 (emphasis added). Just like in *Dangaard*, Fyk alleged (a) “Meta defendants’ filtration tools are designed to facilitate anticompetitive conduct.” (b) “Meta defendants are not alleged to have augmented [Fyk’s] posts or accounts themselves [*i.e.*, the format], [their] connection to the [anticompetitive] *filtering process* is direct and palpable: [They] designed [their] [platform] to limit [Fyk’s materials] based on” ties to competitors of [Red Blue Media-Facebook’s advertising business partners].” (c) “Meta defendants are not alleged to have filtered [Fyk’s] content in a neutral manner.” (d) Just as in *Dangaard*, the content’s impropriety is irrelevant because the allegations are about Facebook’s anti-competitive *conduct*/animus /filtration practices, not about the impropriety of any *content*, at all. (e) Facebook “could have employed Section 230(c)(2) to attempt to defend themselves,” but instead “chose Section 230(c)(1) to shield themselves.” (f) And this Court’s approval of “Meta defendants’ CDA defense [makes] Section 230(c)(1) a backdoor to CDA immunity — ‘contrary to the CDA’s history and purpose.’ Thus, congressional policy weighs heavily against Meta defendants’ CDA defense.” Fyk’s case is not just “similar” to *Dangaard*, it is essentially identical to *Dangaard*. And, just like in *Dangaard*, “Section 230(c)(1) is inapplicable here.”

The District Court's Order [D.E. 74], 1-ER-2-5, strangely ignored the same Judge's (Judge Gilliam, Jr.'s) own case (*Rumble*) along with the Northern District's *DZ Reserve* case, and chose not to apply this Court's *Lemmon* case, cited in Fyk's Second Motion for Reconsideration [D.E. 61] which constituted changes of law (along with *Henderson* and *Dangaard* and *Jarkesy*) since the time of the initial dismissal in June 2019 nearly five years ago.

*Rumble* supports granting Fyk's Second Motion for Reconsideration [D.E. 61], 2-ER-57-240 and 3-ER-242-420, reversing dismissal, and remanding. The *Rumble* decision addresses whether a complaint involving unfair competition/antitrust allegations (Sherman Act in the *Rumble* case, California Business & Professions Code §§ 17200-17210 (Unfair Competition) in Fyk's case) is subject to dismissal. The district court in *Rumble* held, in pertinent part, as follows:

- (a) "the Supreme Court's direction [is] that Sherman Act plaintiffs 'should be given the full benefit of their proof without compartmentalizing the various factual components and wiping the slate clean after scrutiny of each,'" *id.* at 6 (internal citations omitted);
- (b) "This is especially true given the Ninth Circuit's holding that 'even though [a] restraint effected may be reasonable under section 1, it may constitute an attempt to monopolize forbidden by section 2 if a specific intent to monopolize may be shown,'" *id.* (internal citations omitted). These holdings are much like that of *Enigma* and *Fyk*. That is, actions underlain by anti-competitive

animus (as specifically alleged by Fyk against Facebook, and as alleged by Rumble against Google) are not subject to dismissal at the CDA “Good Samaritan” immunity threshold. Just as Rumble was permitted to engage in discovery (*i.e.*, was “given the full benefit of their proof”) vis-à-vis the District Court’s denial of Google’s motion to dismiss in a Sherman Act context (*i.e.*, federal anti-competition context), Fyk should have been given the benefit of engaging in discovery (*i.e.*, “given the full benefit of [his] proof”) vis-à-vis this Court’s denial of Facebook’s motion to dismiss in the California Business & Professions Code §§ 17200-17210 context (*i.e.*, state anti-competition context).

Next, *Lemmon* (9th Circuit) supports granting Fyk’s Second Motion for Reconsideration [D.E. 61], reversing dismissal, and remanding, but the District Court declined to do so [D.E. 74]:

Critically, the *Lemmon* court found that the cause of action at issue there did ‘not seek to hold Snap liable for its conduct as [the] publisher or speaker,’ because plaintiffs’ ‘negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat’s reward system and the Speed Filter).’”

[D.E. 74] at 3, 1-ER-4 (citing *Lemmon*, 995 F.3d at 1092). That is the whole point – that is why *Lemmon* is relevant to this case, and the District Court’s January 12, 2024, Order [D.E. 74] simply missed the point. The “negligent design” in *Lemmon* is the anti-compet-

itive animus design at the heart of this case and at the heart of the *Dangaard* case:

While providing ‘neutral tools to carry out what may be unlawful or illicit [conduct] does not amount to ‘development,’ Meta defendants are not alleged to have filtered [] content in a neutral manner. Plaintiffs allege that Meta defendants’ filtration tools are *designed to facilitate anti-competitive conduct*. Thus, Section 230(c)(1) is inapplicable here.

*Dangaard*, 2022 WL 17342198, at \*4 (emphasis added). Precisely – just as in *Lemmon* where “the cause of action at issue there did ‘not seek to hold Snap liable for its conduct as [the] publisher or speaker,’” [D.E. 74] at 3, 1-ER-4, and just as in *Dangaard* where “Meta defendants are not alleged to have filtered *content* in a neutral manner[, but, rather] allege[d] [to have] filtration tools [] designed to facilitate anti-competitive conduct,” so too is the case with the Verified Complaint.

Fyk’s Verified Complaint does *not* include causes of action seeking to hold Facebook liable for publishing/speaking; rather, the Verified Complaint’s focus is on Facebook’s facilitation of anti-competitive conduct. As with *Lemmon* and as with *Dangaard*, therefore, “Section 230(c)(1) is inapplicable here.” This case (which, again, is nearly six years old) deserves to finally surpass the dismissal stage (just like the *Lemmon* and *Dangaard* cases, for examples) and move forward with the merits.

For approximately six years, Fyk has been saying precisely what *Dangaard* and *Lemmon* and *Enigma* and *Rumble* and *Henderson* and *Jarkesy* and

*et cetera* have said as of relatively recently. Fyk has never once tried to somehow hold Facebook accountable for Fyk’s publishing; rather, at all times Fyk has sought to hold Facebook accountable for its own illegal conduct/strategy/product design having nothing to do with Fyk’s content.

The California courts distorted the facts of this case as actually alleged by Fyk in taking (the District Court, in particularly) Facebook’s “factual” re-write hook, line, and sinker – again, never has Fyk sought to hold Facebook liable for its conduct as “the publisher or speaker” of his content, just as Lemmon never sought with Snap. Fyk is “the publisher or speaker” of his own content, in accordance with a proper read of § 230(c)(1). At all times, Fyk has sought to hold Facebook liable for unfair competition, tortious interference with economic advantage, fraud, and civil extortion as was alleged in Fyk’s Verified Complaint. Fyk deserves the same Due Process afforded to Lemmon (and afforded to Enigma and afforded to Dangaard, and afforded to Henderson, and *et cetera*). That is why *Lemmon* was/is relevant in the reconsideration proceedings here, and the District Court completely missed the point as to same.

A law, such as § 230(c) of the CDA, that delegates administrative restraint authority *is unconstitutional* if such law is not governed and guided by a general provision/intelligible principle and Fyk’s constitutional rights (*e.g.*, Due Process) are *non-forfeitable*. Therefore, the “Good Samaritan” general provision/intelligible principle *must* apply to § 230(c)(1) as well as to § 230(c)(2) (*i.e.*, the “Good Samaritan” general provision *must* apply to Fyk’s case), otherwise § 230(c)(1) is unconstitutional.

**B. The Rule 5.1 Constitutional Challenge Was Not Forfeitable And Could Not Have Been Advanced Sooner Than It Was, Warranting R. 60(b)(5) Relief**

The District Court adopted Facebook’s conclusory characterization that Facebook’s acts here, which Fyk alleged were for Facebook’s *commercial* purposes (*i.e.*, anti-competitive restraint of Fyk’s businesses), are merely affirmative CDA enforcement acts immunized by § 230(c)(1). The District Court erroneously asserted that *Enigma’s* “Good Samaritan” general provision/intelligible principle is only applicable to § 230(c)(2); *i.e.*, the District Court looked no further and performed no analysis of whether Facebook qualified as a “Good Samaritan” as required by the CDA in the first instance, and concluded, without any analysis or authority, that the intelligible principle did not apply to (does not “exist” with respect to) § 230(c)(1). The District Court’s failure to engage in *any* analysis of the qualified entitlement to CDA protections resulted in a constitutionally repugnant application of a federal statute against Fyk, because it concretely and particularly deprived him of his Due Process rights by summarily concluding, on the pleading alone, that § 230(c)(1) provides an entity (Facebook) with unilateral/unfettered prior restraint authority, contrary to the intelligible principle and “contrary to the CDA’s history and purpose.”

In *Jarkesy*, for example,<sup>22</sup> the legislature permitting a certain kind of activity (and then

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<sup>22</sup> See n. 14, *supra* (*Jarkesy* is not unique to the Fifth Circuit, the tenets espoused therein have been prescribed by SCOTUS for approximately one-hundred years).



immunizing the actor from all civil liability associated with such activity) without a legislative guiding force in the form of an intelligible principle, renders the federal statute unconstitutional because the authority being exercised by the entity would be “unfettered.” In *Jarkesy*, the Fifth Circuit found “[g]overnment actions are ‘legislative’ if they have the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.” *Jarkesy*, 34 F.4th 446, 461. Here, the “rights, duties, and relations” between folks engaged with Facebook (here, Fyk) and Facebook were/are *prima facie* fundamentally altered vis-à-vis the CDA’s grant of civil liability protection, to Facebook, for the prior restraint of Fyk’s individual civil liberties.

The granting of statutory protection/immunity is a “legislative” power (both as to the immunity itself and as to the granting of same), and Congress can only grant legislative powers to another if such is accompanied by a guiding intelligible principle. *See id.* If a “legislative” power (such as statutory immunity/protection) is bestowed by Congress and not accompanied by an intelligible principle/general provision, then such power is deemed unconstitutional (*i.e.*, *forbidden*). *See id.* at 462 (“If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution”). Accordingly, it is the judiciary that is charged with *critically* reviewing whether the delegated agent/government instrumentality is operating within the bounds of both the law and the Constitution.

Hence, the District Court’s dismissal affirmation and refusal to consider Fyk’s constitutional challenge

offend the Non-Delegation Doctrine, which provides that:

Congress cannot delegate its legislative powers to other entities [*e.g.*, Section 230's 'voluntary' option to engage in a government mandate]. This prohibition typically involves Congress delegating its powers to administrative agencies or to private organizations [*e.g.*, interactive computer service providers/users].

In *J.W. Hampton v. United States*, 276 U.S. 394 (1928), the Supreme Court clarified that when Congress does give an agency [or instrumentality] the ability to regulate [*i.e.*, restrain third-parties], Congress must give the agencies an 'intelligible principle' on which to base their regulations.

In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court held that 'Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.'

[https://www.law.cornell.edu/wex/nondelegation\\_doctrine](https://www.law.cornell.edu/wex/nondelegation_doctrine) (emphasis added).

The Supreme Court has recognized that Congress could not delegate powers that were 'strictly and exclusively legislative.' Chief Justice John Marshall laid the groundwork for the 'intelligible principle' standard that governs non-delegation cases today. Marshall stated that if Congress delegates quasi-legislative powers to another

body, it must provide a ‘general provision’ by which ‘those who act’ can ‘fill up the details.’ Therefore, Congress cannot give an outside agency free reign to make law, but it can authorize the agency to flesh out the details of a law Congress has already put in place. This became known as providing an ‘intelligible principle’ to which the agency is instructed to conform. The ‘intelligible principle’ could be anything in the ‘public interest, convenience, or necessity’ or considered ‘just and reasonable.’ Being put in such subjective terms gives agencies vast discretion when enacting new rules.

<https://definitions.uslegal.com/i/intelligible-principle/> (emphasis added).

The Court has contrasted the delegation of authority to a public agency, which typically is required to follow established procedures in building a public record to explain its decisions and to enable a reviewing court to determine whether the agency has stayed within its ambit and complied with the legislative mandate, with delegations to private entities, which typically are not required to adhere to such procedural safeguards.

[https://constitution.congress.gov/browse/essay/artI-S1-1%202/ALDE\\_00000010/%5b'declaration',%20of,%20'independence'%5d](https://constitution.congress.gov/browse/essay/artI-S1-1%202/ALDE_00000010/%5b'declaration',%20of,%20'independence'%5d)

Here, the “Good Samaritan” intelligible principle overarching all of § 230(c) is undeniably present (indeed, Congress’ draftsmanship could not have been

clearer, the general provision is articulated in quotation marks for added emphasis) and was/is a constitutional absolute (under the Non-Delegation Doctrine, for example) given the administrative authority delegated to private corporations (here, Facebook) under the CDA by Congress. Judge White's/Judge Gilliam, Jr.'s misinterpretation of *Enigma*/misapplication of the "Good Samaritan" general provision (*i.e.*, Judge White's/Judge Gilliam, Jr.'s stripping the "Good Samaritan" intelligible principle from half of § 230(c)) is wrong as a matter of law and it violates Fyk's and other similarly-situated parties' constitutional rights.

Further, the Major Questions Doctrine closely related to the Non-Delegation Doctrine, was recently addressed by SCOTUS in *National Federation of Independent Business, et al. v. Department of Labor, Occupational Safety and Health Administration, et al.*, No. 21A244 and *Ohio, et al. v. Department of Labor, Occupational Safety and Health Administration, et al.*, No. 21A247, 595 U.S. \_\_\_\_ (Jan. 13, 2022). In these cases, it was appropriate for SCOTUS to rein in administrative actions, like OSHA's attempt to mandate COVID-19 vaccination in certain settings. Similarly, here, private social media commercial enterprises function as quasi-governmental agencies (like OSHA) who must be controlled/reined in; *i.e.*, not afforded unfettered § 230 immunization/civil liability protection, as was wrongly afforded to Facebook by Fyk's Courts.

The aforementioned recent SCOTUS cases included a pertinent discussion of the Major Questions Doctrine tied to the aforementioned Non-Delegation Doctrine. The Major Questions Doctrine is conceptually as follows: "We expect Congress to speak clearly if it

wishes to assign to an executive agency decisions of vast economic and political significance.” *Id.* at 2 (internal citation omitted). Justice Gorsuch’s discussion of the Major Questions Doctrine specifically relates same to the Non-Delegation Doctrine:

In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. . . . Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

*Id.* at 4 (internal citation omitted).

The new “laws” (*e.g.*, Community Standards) created by large technology companies “govern[] the lives of [millions of] Americans [and must be] subject to the robust democratic processes the Constitution demands,” like Due Process. Anybody with functioning dendrites and firing synapses recognizes that the “laws” created by large tech companies do anything but ensure constitutional freedoms. Applied here, and put more simply, CDA immunity implicates major questions concerning Due Process, freedom of speech, *et cetera* – any law (*e.g.*, § 230) that results in the deprivation of life, liberty, and/or property sans Due Process (*e.g.*, the deprivation experienced concretely and particularly by Fyk) is legally untenable. Justice Gorsuch aptly continued:

The major questions doctrine serves a similar function [to the non-delegation doctrine] by

guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes [like Section 230] seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. . . . Later, *the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment*. The major questions doctrine guards against this possibility by recognizing that Congress does not usually 'hide elephants in mouseholes.'

*Id.* at 5 (internal citations omitted) (emphasis added).

First, as the District Court found in *Dangaard*, private actors (like Facebook in *Dangaard* and here) indeed have tried to *exploit* (and have succeeded in so exploiting thus far; *e.g.*, this case) gaps and/or ambiguities in the CDA. More specifically, as correctly determined by Judge Alsup in *Dangaard*, Facebook seeks to *exploit* maneuvering between § 230(c)(1) and § 230(c)(2) in “backdoor” fashion, which such “backdoor” maneuvering was properly determined by Judge Alsup to be “contrary to the CDA’s history and purpose.” *Dangaard*, 2022 WL 17342198, at \*6. Here, then, just as in *Dangaard*, “congressional policy weighs heavily against Meta defendants’ CDA defense.” *Id.*

Second, exploitation by large technology companies (like Facebook here and in *Dangaard*) have taken the CDA “far beyond” what Congress originally could have plausibly intended. In *Dangaard*, the District Court did not permit large technology companies like

Facebook to exploit the CDA beyond the law's "history and purpose."

Third, the well-being of the worldwide web and protecting (*i.e.*, immunizing) those who legitimately engage in trying to preserve a healthy Internet (as a "Good Samaritan" in "good faith") is "important policy." It is not only important to interactive computer service users (like Fyk) that this Court correctly applies the "Good Samaritan" general provision of § 230(c) here, but it is also important to interactive computer service providers (like Facebook) and critical for the future of this country because (a) preservation of a healthy Internet in which users and providers co-exist is "important policy" in today's day and age, and (b) preservation of the Constitution (and related constitutional doctrines and canons) is "important policy" in today's day and age (all the way back to Day 1 of the United States of America, for that matter, as the Constitution is what makes America *free* and constitutional rights are accordingly *non-forfeitable*), again there being only one constitutionally sound way to go here – applying the general provision generally across all § 230(c) as written by Congress, as intended by Congress, and as required by the law (*e.g.*, *J.W. Hampton, Jr. & Co., Inc. v. United States*, *et cetera*).

The SCOTUS concurring opinion in the aforementioned COVID-19 vaccination decision(s) continued:

Whichever the doctrine, the point is the same. Both serve to prevent 'government by bureaucracy supplanting government by the people.' . . . And both hold their lessons for today's case. On the one hand, OSHA claims the power to issue a nationwide mandate on

a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really did endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority. Under OSHA's reading, the law would afford it almost unlimited discretion – and certainly impose no 'specific restrictions' that 'meaningfully constrain[n]' the agency. . . . OSHA would become little more than a 'roving commission to inquire into evils and upon discovery correct them.' *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring). Either way, the point is the same one Chief Justice Marshall made in 1825: There are some 'important subjects, which must be entirely regulated by the legislature itself,' and others 'of less interest, *in which a general provision may be made, and power given to [others] to fill up the details.*' *Wayman v. Southard*, 10 Wheat. 1, 43 (1825). And on no one's account does this mandate qualify as some 'detail.' The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA. In saying this much, we do not impugn the intentions behind the agency's mandate. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the



lives of 84 million Americans. Respecting those demands may be trying in times of stress. But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little.

*Id.* at 6-7 (some internal citations omitted) (emphasis added). Spot on, we could simply swap out "OSHA" with "interactive computer service" (Facebook, Twitter, or Google, for examples) and come to an identical SCOTUS holding regarding the CDA.

The Internet is an indispensable aspect of life for most people and is much more than just some "detail." This appeal asks this Court to strictly enforce § 230(c)'s general provision/intelligible principle (as it *must* constitutionally) as it is the only branch of government entrusted with the role of gatekeeper to prevent commercial actors from perverting § 230(c)(1) and turning it into an exploitable "backdoor" "super-immunity."

The design of the CDA is Internet regulation by way of "blocking and screening of offensive material." The CDA contemplates protecting the "Good Samaritan" (whether that be the user or the online provider) who engages in the regulation/restraint of third-party's individual liberties that is "blocking and screening of offensive materials." Despite the CDA's "Good Samaritan" requirement, however, Fyk's courts erroneously deferred to Facebook without requiring a threshold showing of the private actor's entitlement to "Good Samaritan" status even where the allegations against the private actor (Facebook) here have con-

sistently and clearly been that of anti-competitive motive.

Under the Major Questions Doctrine highlighted by SCOTUS as discussed above, one must be a congressionally appointed agency tasked with overseeing a regulatory act/law before a federal court even begins to consider yielding to one's interpretation of that statute or regulation. Facebook is not an explicitly congressionally appointed "agency" in relation to the CDA.

In enacting the CDA, Congress did not appoint *any* overseeing agency (such as, *e.g.*, the Federal Communications Commission, "FCC," is to the Communications Act of 1934, or OSHA is to the Occupational Safety and Health Act), and Congress has not maintained oversight or regulation of the CDA on its own. But in function/in reality/in practice, somehow commercial industry giants, like Facebook, have absolutely morphed into Congress' CDA outsourced and industry self-regulating instrument.

In the absence of congressional oversight as to the application of the CDA, the judiciary is charged with the task of being the gatekeeper of whether the defendant actor is entitled to the CDA's specific civil liability protection narrowly conferred upon Good Samaritan actors who *neutrally* regulate content, in particularly because the burden shifts to a defendant raising § 230(c) protection as an affirmative defense. Because Fyk alleged in his Verified Complaint that Facebook discriminately used its "policing" power against Fyk but not against another Facebook user who took ownership of the *same exact content* (distinguishable from Fyk only in that the other user *paid* Facebook more for commercial services), Fyk's courts

wrongly gave deference to the private party (Facebook) to “enforce” the CDA by restraining Fyk.

The “Good Samaritan” blocking and screening decision-making, which is all of § 230(c) (*i.e.*, § 230(c)(1), § 230(c)(2)(A), and § 230(c)(2)(B)), cannot rightly be classified as anything less than decision-making of “vast economic and political significance.” Under the Major Questions Doctrine, Congress had to “speak clearly if it wishe[d] to assign [] executive agency decision[-making] of vast economic and political significance” to Facebook. Congress did not; Big Tech “cannot trace its [unfettered] authority . . . to any clear congressional mandate.” The Major Questions Doctrine and the Non-Delegation Doctrine require this Court to interpret and apply the “Good Samaritan” general provision/intelligible principle across all of § 230(c) *as actually written by Congress* to ensure preservation of constitutionally protected individual civil liberties, such is the Court’s duty.

There is only one construction of § 230(c)(1) that is constitutionally sound – *Congress’ articulated construction*. Courts need only apply the statute as written (*e.g.*, strictly as “the publisher or speaker,” not sloppily as “a publisher”) and as intended (*e.g.*, apply the statute’s general provision “generally”); but, Court orders in Fyk’s case have not applied the statute as written, or as intended, or in a constitutionally acceptable fashion, or in a legally required manner.

The Constitutional Avoidance Doctrine provides that “[w]hen the validity of an act . . . is drawn in question, and even if a serious doubt of constitutionality is raised [which Fyk has raised repeatedly] . . . [the Court] will first ascertain whether a construction of the statute is fairly possible by which the question

may be avoided.” <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/the-constitutional-doubt-canon> (citing, *inter alia*, *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Consequently, per the associated Constitutional-Doubt Canon, “if a statute is susceptible to two plausible interpretations, one of which violates the Constitution, the Constitutional-Doubt Canon instructs courts to choose the interpretation consistent with the Constitution.” *Id.* (myriad SCOTUS citations omitted).

There are two interpretations/applications of § 230(c)(1) at play in this case: (a) Fyk’s Courts’ *unconstitutional* misconstruction, applying the subsection in a grammatically incorrect fashion (*e.g.*, as “a publisher,” rather than as “the publisher” as actually written by Congress, with the one word making a critical difference as to the proper application) and based on the Courts’ “absurd” interpretation as it relates to the Absurdity Doctrine (*e.g.*, “unfettered” blanket “super-immunity”); (b) Fyk’s *constitutionally sound* construction, applying the subsection as it is written (*e.g.*, strictly as “the publisher or speaker”) and based generally on Congress’ articulated intent (*e.g.*, “Good Samaritan” general provision/intelligible principle).

*Fyk’s construction is not just “fairly possible,” it is the only possible construction that avoids a constitutional question and/or avoids contravening the constitutional doctrines or canons of statutory construction discussed above.* The Constitutional-Doubt Canon accordingly instructs this Court to choose Fyk’s interpretation/application consistent with the Constitution (which, as discussed above, is also the interpretation/application of Judge Alsup in

*Dangaard*, Judge Gilliam, Jr. in *Rumble*, the Fourth Circuit in *Henderson*, and this Court in *Lemmon* and *Enigma*, for examples). So, as Section V.A concluded, so too does this Section – Fyk’s Rule 5.1 constitutional challenge [D.E. 66] was/is not some “freestanding” thing (as the District Court’s January 12, 2024, Order [D.E. 74], 1-ER-2-5, wrongly called it), Fyk’s Rule 5.1 constitutional challenge was/is inextricably intertwined, based on the circumstances at hand, with Fyk’s Second Motion for Reconsideration [D.E. 61] and was advanced at the appropriate time (after all possible legal briefing, [D.E. 61], had unfolded; *i.e.*, after this case had been fully developed).

The CDA’s “Good Samaritan” general provision and Fyk’s Rule 5.1 constitutional challenge to the District Court’s unconstitutional construction/application of § 230 requires dismissal reversal and remand:

Put simply, [Fyk’s constitutional question] is a Catch-22: either the District Court was wrong about the application of Section 230(c)(1) (that is, wrong that Section 230(c)(1) is somehow not subject to the Section 230(c) “Good Samaritan” intelligible principle) or the federal statute is unconstitutional. Either way, the dismissal of Fyk’s case was/is untenable and must be immediately overturned.

[D.E. 66], 2-ER-37.

There are no other choices, unless this Court is bound and determined to continue the miscarriage of justice and the deprivation of rights that Fyk has had to endure at immense cost, time, and hardship thus far. This Court should remand to require the District

Court to perform its solemn duty<sup>23</sup> to distribute justice equally as to the litigants before it and afford Fyk an opportunity to be heard on the merits.

**C. Deprivation Of Constitutional Rights And Miscarriage Of Justice Are “Extraordinary Circumstances” Warranting Rule R. 60(b)(6) Relief**

The District Court Order [D.E. 74] at issue on this appeal engaged in no analysis of the “extraordinary circumstances” (Rule 60(b)(6)), instead declaring in substance and effect: “it’s ordinary for the losing party to be displeased, not extraordinary.” Without any analysis of Fyk’s constitutional challenge, the District Court outright denied Fyk’s Due Process rights. The District Court’s order took on its own “extraordinary” action and threatened to strip Fyk’s counsel of *pro hac vice* privileges for *defending* Fyk’s constitutional rights if Fyk did not go away, which such threat was inappropriate. An appropriate analysis, like the *Phelps* “extraordinary circumstances” analysis, entails the Rule 60(b)(6) component of Fyk’s Second Motion for Reconsideration. The factors involved in a proper *Phelps*-

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<sup>23</sup> When a Defendant invokes an affirmative defense, for a prior restraint, the United States has an *affirmative duty* to strictly protect Plaintiff’s individual civil liberties (to counterbalance the State’s affirmative defense authority), because of the special relationship it triggers between the State and its instrumentality, here Facebook. However, here, the District Court chose to protect Facebook regardless of its anticompetitive animus (*i.e.*, the District Court granted Facebook 230(c)(1) “super-immunity” without there being any showing of “good faith” and/or “Good Samaritan[ism]”), under the wrong statutory subsection, in contravention to applicable law and Fyk’s constitutional rights.

oriented “extraordinary circumstances” analysis are set forth and discussed below.

Even if this Court were to deny the Rule 60(b)(5) aspect of Fyk’s Second Motion for Reconsideration, it should still vacate the judgment under Rule 60(b)(6) to avoid a “manifest injustice” (*e.g.*, deprivation of constitutional rights). Rule 60 offers equitable relief to a party seeking to vacate a judgment to avoid “manifest injustice.” *Latshaw v. Trainer Wortham Comp. Inc.*, 452 F.3d 1097, 1103 (9th Cir. 2006); *U.S. v. Washington*, 394 F.3d 1152, 1157 (9th Cir. 2005), overruled on other grounds in *U.S. v. Washington*, 593 F.3d 790 (9th Cir. 2010), *U.S. v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)).

Rule 60(b)(6) has been called “a grand reservoir of equitable power,” and it affords courts the discretion and power “to vacate judgments whenever such action is appropriate to accomplish justice.” *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 542 (2005), quoting *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 864 (1988)). Under this standard, Rule 60 relief is not governed by any per se rule, but is to be granted on a case-by-case basis when the facts of a given case warrant such relief.

In *Phelps*, the Ninth Circuit set forth certain factors “designed to guide courts in determining whether . . . extraordinary circumstances [as required for Rule 60 relief] have been demonstrated by an individual seeking relief under the rule.” *Phelps*, 569 F.3d 1120. Courts should consider whether:

- (1) a litigant has diligently pursued relief that respects the strong public interest in

timeliness and finality, (2) whether granting relief would ‘undo the past, executed effects of the judgment, thereby disturbing the parties’ reliance interest in the finality of the case, as evidence, for example, by detrimental reliance or a change in position and if (3) given, in the court’s opinion, that a central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner’s constitutional claims from ever being heard[;] [i]n such cases, this factor will cut in favor of granting Rule 60(b)(6) relief.

*Phelps*, 569 F.3d at 1137-1140.

These factors all support Fyk’s request for relief. First, Fyk has been diligent – he has not stopped his pursuit of justice for approximately six years (three stints in the District Court, two prior appeals before this Court, and two petitions for review before SCOTUS – a Herculean task).

Second, no party has detrimentally relied on the judgment where it would cause harm for the case to be litigated. Facebook’s conduct has not changed in reliance on the Court’s Order because the Order merely maintained the status quo prior to this action.

Third, this Court must correct the judgment to prevent a manifest injustice from continuing. Issues surrounding overly broad<sup>24</sup> CDA immunity are of

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<sup>24</sup> Even the DOJ, in its *Gonzalez v. Google* amicus, has recognized that § 230(c)(1) has been “applied beyond its proper bounds.” And Senator Cruz, in his *Gonzalez* amicus, called § 230(c)(1) “super-immunity.” And Attorney General Paxton, in his *Gonzalez* amicus, called it “government-like” immunity. Fyk called it



national significance (garnering the attention of Congress) and courts in the Ninth Circuit have inconsistently applied § 230 protections for almost three decades, which has resulted in entrenched ongoing anti-competitive and discriminatory misconduct by interactive computer service providers like Facebook.

This Court should rein in commercial actors' exploitation of § 230(c)(1) as unconstitutional. *See, e.g., Jarkesy* (relatively recent), *National Federation of Independent Business, et al. v. Department of Labor, Occupational Safety and Health Administration, et al.*, No. 21A244 and *Ohio, et al. v. Department of Labor, Occupational Safety and Health Administration, et al.*, No. 21A247, 595 U.S. \_\_\_\_ (Jan. 13, 2022) (relatively recent), and *J.W. Hampton*. (approximately one-hundred years old).

## VI. Conclusion

This matter must be remanded to proceed on the merits, and the Rule 5.1 constitutional challenge must be certified as required by the rule. Subjecting a litigant to the sufferings of manifest miscarriages of justice for over half-a-decade is “extraordinary.”

Deprivation of constitutionally guaranteed Due Process rights is “extraordinary.” It is especially “extraordinary” when others in nearly identical (if not identical) circumstances have been afforded justice (*e.g., Lemmon, Enigma, Henderson, Dangaard*).

While Fyk deserves justice (having patiently awaited same for nearly six years) under the Rule

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“sovereign-like” immunity, and now Judge Alsup calls it what it really is: a “backdoor to CDA immunity.”

60(b)(5) component of [D.E. 61] and/or per the Rule 5.1 grounds of [D.E. 66], this Court, if needed to effectuate such justice, should tap into the “grand reservoir of equitable power” that is Rule 60(b)(6). In the end, no matter the method (Rule 60(b)(5), Rule 60(b)(6), Rule 5.1, and/or anything else just, equitable, or proper), this Court is due to finally reverse the District Court’s dismissal and remand this matter to the District Court to proceed on the merits; *i.e.*, this Court should finally “vacate judgment [] . . . to accomplish justice.”

#### STATEMENT OF RELATED CASES

Fyk is unaware of another case pending before this Court involving *the acute issues at play here*, though Fyk is indirectly, vaguely aware of perhaps a couple cases (not yet utilizable authority) pending in this Court implicating § 230 to some extent.

March 8, 2024

Respectfully Submitted,

/s/ Constance J. Yu  
Constance J. Yu, Esq.  
Attorneys for Plaintiff-Appellant, Fyk

/s/ Jeffrey L. Greyber  
Jeffrey L. Greyber, Esq.  
Attorneys for Plaintiff-Appellant, Fyk

**FYK SUPPLEMENTAL AUTHORITY:  
DANGAARD v. INSTAGRAM LLC  
(DECEMBER 15, 2023)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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Case No. 4:18-cv-05159-HSG

LOCATION: OAKLAND, CT. 2, FL. 4

Before: Haywood S. GILLIAM, JR., U.S. District Judge.

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**PLAINTIFF'S NOTICE OF FILING  
SUPPLEMENTAL AUTHORITY IN FURTHER  
SUPPORT OF [D.E. 61] AND [D.E. 66]**

Plaintiff, Jason Fyk, through undersigned counsel and pursuant to N.D. Cal. L.R. 7-3(d), files this Notice of Filing Supplemental Authority in Further Support of (a) Plaintiff's June 16, 2023, Second Motion for Relief Pursuant to F.R.C.P. 60(b) to Vacate and Set Aside Entry of Judgment [D.E. 61], and (b) Plaintiff's September 19, 2023, F.R.C.P. 5.1 Motion Re: the

(Un)constitutionality of 47 U.S.C. § 230(c)(1) [D.E. 66]. Plaintiff respectfully submits the following as supplemental authority in further support of his pending Rule 60(b) motion and Rule 5.1 constitutional challenge: *Dangaard, et al. v. Instagram, LLC, et al.*, No. C 22-01101-WHA (N.D. Cal. Nov. 30, 2022), attached for ease of reference.<sup>1</sup>

Plaintiff's pending Rule 60(b) motion and Rule 5.1 constitutional challenge relate to the Good Samaritan intelligible principle/general provision applying to all of 47 U.S.C. § 230(c) ("CDA"), not just Section 230(c)(2) (as Judge White decided here in ratifying dismissal, *see* [D.E. 51]). With anticompetition/unfair competition (Count II of Plaintiff's Verified Complaint, [D.E. 1]) being the antithesis of Good Samaritanism, the *Dangaard* decision (involving Facebook/Meta) attached hereto holds that unfair competition lawsuits are not subject to CDA immunity under Section 230(c)(1) as well:

While *Zango* and *Enigma* applied only to Section 230(c)(2), and the parties in *Enigma* were direct competitors, the same policy concerns arise here: Meta defendants' 'filtering practices [are] aimed at suppressing competition' in the online adult entertainment business. In fact, Meta defendants could have employed Section 230(c)(2) to attempt to defend themselves—they claim to be removing obscene material from their platforms in

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<sup>1</sup> *Dangaard* has not been published (*i.e.*, there is no reporter citation), in that the only Westlaw version is a slip copy. We accordingly attach the actual Court order from the *Dangaard* docket found on PACER.

good faith, which is what Section 230(c)(2) immunizes. But they instead chose Section 230(c)(1) to shield themselves. To approve Meta defendants' CDA defense would make Section 230(c)(1) a backdoor to CDA immunity—'contrary to the CDA's history and purpose.' Thus, congressional policy weighs heavily against Meta defendants' CDA defense.

*Dangaard*, No. 3:22-cv-01101-WHA, [D.E. 101] at 9.  
Per L.R. 7-3(d), we now refrain from argument.

Respectfully Submitted,

/s/ Jeffrey Greyber  
Jeffrey L. Greyber, Esq.  
GREYBER LAW, PLLC  
*Counsel for Plaintiff*

Dated: December 15, 2023.

**ORDER ON MOTIONS TO DISMISS,  
U.S. DISTRICT COURT NORTHERN  
DISTRICT OF CALIFORNIA IN  
*DANGAARD V. INSTAGRAM LLC*  
(NOVEMBER 30, 2022)**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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DAWN DANGAARD, KELLY GILBERT,  
and JENNIFER ALLBAUGH,

*Plaintiffs,*

v.

INSTAGRAM, LLC, FACEBOOK OPERATIONS,  
LLC, FENIX INTERNET, LLC, FENIX  
INTERNATIONAL, LTD., META PLATFORMS,  
INC., LEONID RADVINSKY, and  
JOHN DOES 1–10,

*Defendants.*

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No. C 22-01101 WHA

Before: WILLIAM ALSUP, U.S. District Judge.

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**ORDER RE MOTIONS TO DISMISS**

**Introduction**

In this diversity and putative class action, plaintiffs claim that defendants remain engaged in unfair competition and tortious interference with contracts

and business relationships. Defendants have filed two separate motions to dismiss. For the reasons that follow, the motions are DENIED.

### STATEMENT

Plaintiffs Dawn Dangaard, Kelly Gilbert, and Jennifer Allbaugh are adult entertainment performers who use social media to promote themselves. Plaintiffs place (or “post”) links on social media to adult entertainment websites. Those websites allow users to watch plaintiffs’ content for a price. Plaintiffs split the revenue with the website owners. Of importance here, plaintiffs contract with *competitors* of the adult entertainment website “OnlyFans.”

Defendant Meta Platforms, Inc., owns and operates defendants Instagram, LLC, and Facebook, LLC (collectively, “Meta defendants”), who operate Instagram and Facebook. John Does One through Ten were employees of Meta defendants when the claims arose. Defendants Fenix International, Ltd., Fenix Internet, LLC, and Leonid Radvinsky (collectively, “Fenix defendants”) are associated with OnlyFans. Defendant Radvinsky owns defendant Fenix International, which operates OnlyFans. Defendant Fenix International owns defendant Fenix Internet — which receives payments from users of OnlyFans and distributes those payments to OnlyFans content creators.

Plaintiffs make the following allegations. Fenix defendants paid Doe defendants to demote or delete plaintiffs’ accounts and posts on Instagram and Facebook. That conduct reduced internet traffic to adult entertainment websites with which plaintiffs contract — websites that compete with OnlyFans.

Defendants' actions, thereby, reduced plaintiffs' viewership on adult entertainment platforms and plaintiffs' revenue from adult content. Defendants' actions increased internet traffic to OnlyFans and swelled its revenues.

Plaintiffs, moreover, allege that Doe defendants demoted or deleted plaintiffs' accounts and posts in a particular way. They allege Doe defendants caused such demotion or removal by manipulating Facebook and Instagram databases to include plaintiffs in lists of "dangerous individuals or organizations." Such lists identify terrorists, and Facebook and Instagram's algorithms use those lists to demote or remove terrorist content. Plaintiffs refer to this conduct as "blacklisting."

Additionally, plaintiffs allege Meta defendants share their lists of terrorists with other social media platforms via the "Global Internet Forum to Counter Terrorism Shared Hash Database." For that reason, plaintiffs allege their content was also demoted or removed from other social media platforms.

Plaintiffs contend Doe defendants' actions constitute unfair competition and tortious interference with plaintiffs' contracts and business relationships (with competitors of OnlyFans). Plaintiffs seek to hold Meta defendants vicariously liable for the actions of Doe defendants. And, plaintiffs contend Fenix defendants are liable under a theory of civil conspiracy.

Previously, Meta defendants moved to dismiss all claims under FRCP 12(b)(6) and California's anti-SLAPP statute. Fenix defendants moved to dismiss all claims under



FRCP 12(b)(2), FRCP 9(b), and on other grounds. At the hearing on the motions on September 8, 2022, plaintiffs revealed that they had the benefit of information outside the pleadings that may support their claims. For that reason, the district court ordered plaintiffs to file a second amended complaint, pleading as much cure as possible. The district court ordered defendants to re-brief their motions based on the new complaint. Fenix defendants' FRCP 12(b)(2) motion, however, was held in abeyance pending jurisdictional discovery.

Now, all defendants move to dismiss the second amended complaint under FRCP 12(b)(6). Meta defendants again move to strike the claims under California's anti-SLAPP statute. Fenix defendants have not revived their FRCP 9(b) motion. This order follows full briefing and oral argument.

## ANALYSIS

### 1. Plaintiffs' Claims are Plausible.

To survive a motion to dismiss:

a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with"

a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57, 570 (2007)).

Here, plaintiffs' allegations are sufficient to state plausible claims for relief. *First*, plaintiffs provide an email that purports to show several wire transfers from Fenix defendants to Meta defendants (Second Amd. Compl., Exh. D). Specifically, the email lists five bank accounts, account numbers, and physical addresses. It describes a wire transfer from a Fenix International account (in the United Kingdom, where Fenix is headquartered and incorporated) to an intermediary Fenix bank account (in Hong Kong, where Fenix is also incorporated), "Smart Team International." Underneath that information, it lists the names of several adult entertainment websites that compete with OnlyFans. Plaintiffs allege that the list is a "memo" line, indicating the purpose of the wire transfer. Thereafter, the email details several wire transfers from the Smart Team intermediary account to the trust accounts of three employees of Meta defendants (in the Philippines).

Taking the above facts as true, it is reasonable to infer that the money sent from the Fenix International account to the Smart Team intermediary account in October 2018 bore a relationship to the adult entertainment websites listed in the memo line — websites that compete with OnlyFans. Moreover, a wire transfer from the Smart Team intermediary account to one of Meta defendants' employees occurred on the same day as the initial transfer to the

intermediary account, so it is reasonable to infer that some of the money related to the adult entertainment websites benefited that employee. This supports plaintiffs' allegation that Meta defendants' employees accepted bribes from Fenix defendants in late 2018 to blacklist competitors of OnlyFans.

*Second*, plaintiffs allege that, starting in late 2018, competitors of OnlyFans experienced significant drops in web traffic while OnlyFans experienced a significant increase in traffic. The complaint contains graphs depicting such changes in traffic for OnlyFans and numerous competitors of OnlyFans (Second Amd. Compl. ¶¶ 94–96 and Exh. B at 31–32). And, a news article incorporated into the complaint states that over 100 Instagram accounts that drove traffic to a competitor of OnlyFans experienced content take downs in late 2018 (*id.*, Exh. A). Coupled with the email above, these facts are strong support for plaintiffs' allegations.

*Third*, plaintiffs' second amended complaint refers to a Facebook whistleblower report that corroborates the claims. Plaintiffs did not append the report to the complaint because they did not receive it until after they opposed defendants' motions. Plaintiffs submitted the report (and a related news article) and filed an administrative motion to supplement the complaint on the due date for defendants' reply briefs.

Nevertheless, this order treats plaintiffs' motion as a motion for leave to amend under FRCP 15(a)(2), which provides that "[t]he [district] court should freely give leave when justice so requires." "District courts generally consider four factors in determining whether to deny a motion to amend: 'bad faith, undue delay, prejudice to the opposing party, and the futility of

amendment.” *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 701 (9th Cir. 2011) (citation omitted).

Here, amendment would not be futile because the whistleblower report supports plaintiffs’ claims. Specifically, an anonymous Facebook employee posted the report on a Facebook-owned website (albeit a public website) specifically designated to receive whistleblower reports. The report states that “[c]ertain employees are taking bribes to protect OnlyFans on [Facebook].” “They have taken down every OnlyFans competitor. . . .” “[T]he early stages used the GIFCT database. . . .” The scheme “beg[an] in [the] summer of 2018,” and the employee “observed it” in the United Kingdom (Dkt. No. 89, Exh. L).

All of these statements corroborate plaintiffs’ allegations. Furthermore, at least Meta defendants have had access to the report since its posting, so it is hard to believe Meta defendants are surprised by the information. Thus, the whistleblower report (and the related news article) shall be added to the complaint.

*Fourth*, plaintiffs have sufficiently pled damage. All of plaintiffs state that they have experienced decreases in revenue since the alleged conduct began. And, one of plaintiffs alleges that her annual revenue decreased by \$13,000 from 2020 to 2021.

*Fifth*, plaintiffs have pled actionable harm to competition. Specifically, rather than plead “[i]njury to an individual plaintiff,” plaintiffs have pled that defendants’ actions have had “some anticompetitive effect in the larger, interbrand [adult entertainment] market.” *Marsh v. Anesthesia Servs. Med. Grp., Inc.*, 200 Cal. App. 4th 480, 495 (2011) (citation omitted).

*Sixth*, plaintiffs' claims against defendant Radvinsky are plausible. Plaintiffs allege that defendant Radvinsky is the sole owner of Fenix International, Fenix Internet, and OnlyFans. Moreover, plaintiffs allege that competitors of OnlyFans experienced significant drops in traffic beginning around the same time that defendant Radvinsky acquired OnlyFans. Taking these facts together with the facts considered above, it is plausible that defendant Radvinsky personally participated in the alleged misconduct.

Thus, plaintiffs' claims are plausible. To the extent defendants argue that plaintiffs' factual allegations are unreliable, that will be tested in discovery. On a motion to dismiss, all well-pled facts are accepted as true.

## **2. The Communications Decency Act Does Not Bar Plaintiffs' Claims Against Meta Defendants.**

Meta defendants argue Section 230(c)(1) of the Communications Decency Act bars the claims against them. This order disagrees.

Section 230(c)(1) states: "No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). In other words, "subsection (c)(1) only protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat . . . as a publisher or speaker (3) of information provided by another information content provider." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009). A provider of an interactive computer service cannot meet the third element when

it is “also an ‘information content provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the creation or development of’ the offending content.” *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (quoting 47 U.S.C. § 203(f)(3)).

#### **A. Meta Defendants Are Information Content Providers.**

Here, Meta defendants certainly provide interactive computer services because they “provide[] or enable[] computer access by multiple users to a computer serv[er]” via the Facebook and Instagram social media platforms. *Sikhs for Just. “SFJ”, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1093 (N.D. Cal. 2015) (Judge Lucy Koh) (quoting 47 U.S.C. § 230(f)(2)). And, “the [claims] inherently require[] the court to treat [Meta defendants] as the ‘publisher or speaker’ of content provided by another” because “removing content is something publishers do.” *Barnes*, 570 F.3d at 1102–03.

But Meta defendants are alleged to have done *more* than merely demote or remove information provided by third parties (*i.e.*, plaintiffs’ accounts and posts). Meta defendants are information content providers “who [are] ‘responsible . . . in part, for the creation or development of’ the offending content.” Thus, Section 230(c)(1) does not immunize them. *Roommate*, 521 F.3d at 1162 (citation omitted).

In *Roommate*, the defendant operated a website designed to match people renting out spare rooms with people looking for places to live. The defendant required subscribers to state their sex, sexual orientation, and number of children in their household

before using the website, which is a discriminatory practice prohibited by 42 U.S.C. Section 3604(c). “[The defendant was] not entitled to CDA immunity for the operation of its search system, which filter[ed] listings, or of its email notification system, which direct[ed] emails to subscribers according to discriminatory criteria.” Specifically, “[it] designed its system to use allegedly unlawful criteria so as to limit the results of each search, and to force users to participate in its discriminatory process.” “By contrast, ordinary [websites] do not use unlawful criteria to limit the scope of searches conducted on them, nor are they designed to achieve illegal ends.” In that way, *Roommate* “interpret[ed] the term ‘development’ as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.” Because the defendant “help[ed] to develop unlawful content,” it was an information content provider “and thus f[ell] within the exception to Section 230.” *Id.* at 1164–68.

Here, similarly, Meta defendants are not entitled to CDA immunity for operation of their filtering system. Like the defendant in *Roommate*, which was alleged to have purposefully designed its website to filter listings in a discriminatory manner, Meta defendants are alleged to have purposefully designed their platforms to filter posts and accounts in an anticompetitive manner. Although Meta defendants are not alleged to have augmented the posts or accounts themselves, “[their] connection to the [anticompetitive] filtering process is direct and palpable: [They] designed [their] [platforms] to limit the listings available to subscribers based on” ties to competitors of OnlyFans. While providing “*neutral* tools to carry out what may

be unlawful or illicit [conduct] does not amount to ‘development,’” Meta defendants are not alleged to have filtered pornographic content in a neutral manner. Plaintiffs allege that Meta defendants’ filtration tools are *designed to facilitate* anticompetitive conduct. Thus, Section 230(c)(1) is inapplicable here. *Id.* at 1169 (emphasis in original); see *Barnes*, 570 F.3d at 1101 n. 3.

Furthermore, contrary to Meta defendants’ suggestion, allowing plaintiffs to pursue their claims would not open the door to others “to recover for the removal of posts *whenever* automated content-moderation tools [are] used” (Reply Br. 11) (emphasis added). Rather, this order finds only that, when automated content-moderation tools are allegedly *designed to facilitate* unlawful conduct, the claims survive CDA defenses.

#### **B. Policy Weighs Against Application of the CDA.**

The policy outlined in the CDA itself weighs heavily against application of the Act here.

*First*, the CDA states that “[i]t is the policy of the United States . . . *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.” 47 U.S.C. § 230(b)(1) (emphasis added). Because “[n]othing in [the CDA] shall be construed to prevent any State from enforcing any State law that is consistent with [the CDA],” this order cannot construe the CDA to bar plaintiffs’ claims of unfair competition on the Internet. 47 U.S.C. § 230(e)(3).



*Second*, “[t]he [CDA] was not meant to create a lawless no-man’s-land on the Internet.” “[The Internet’s] vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.” It follows that Meta defendants cannot help OnlyFans violate laws of general applicability and hide behind the CDA to avoid liability itself. *Roommate*, 521 F.3d at 1164.

True, our court of appeals has affirmed the dismissal of an unfair competition claim on the basis of Section 230(c)(1). *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1108 (9th Cir. 2007). But, more recently, in *Zango, Inc. v. Kaspersky Lab, Inc.*, our court of appeals acknowledged the danger that internet service providers may “abuse [their] immunity [under Section 230(c)(2)] to block content for anticompetitive purposes or merely at [their] malicious whim.” *Zango* warned of “a web browser configured by its provider to filter third-party search engine results so they would never yield websites critical of the browser company or favorable to its competitors.” That is essentially what Meta defendants are alleged to have done here: configure Facebook and Instagram to filter posts and accounts (and accept bribes from OnlyFans to do so) so that neither platform yields posts favorable to OnlyFans’ competitors. 568 F.3d 1169, 1178–79 (9th Cir. 2009) (Fisher, J., concurring).

In *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, our court of appeals took a step further and held Section 230(c)(2) did not immunize the anticompetitive conduct alleged therein. Specific-

ally, *Enigma* considered “whether [Section] 230(c)(2) immunizes blocking and filtering decisions that are driven by anticompetitive animus” when the parties are “direct competitors.” The parties in *Enigma* both sold computer security software, and the plaintiff alleged that the defendant had programmed its software to prevent users from downloading the plaintiff’s software. The claims for deceptive business practices and tortious interference (with contracts and business relationships) survived the motion to dismiss because “[i]mmunity for filtering practices aimed at suppressing competition, rather than protecting internet users, would lessen user control over what information they receive, contrary to Congress’s stated policy.” 946 F.3d 1040, 1048–51 (9th Cir. 2019).

While *Zango* and *Enigma* applied only to Section 230(c)(2), and the parties in *Enigma* were direct competitors, the same policy concerns arise here: Meta defendants’ “filtering practices [are] aimed at suppressing competition” in the online adult entertainment business. *Id.* at 1051. In fact, Meta defendants could have employed Section 230(c)(2) to attempt to defend themselves — they claim to be removing obscene material from their platforms in good faith, which is what Section 230(c)(2) immunizes. But they instead chose Section 230(c)(1) to shield themselves. To approve Meta defendants’ CDA defense would make Section 230(c)(1) a backdoor to CDA immunity — “contrary to the CDA’s history and purpose.” *Id.* at 1050. Thus, congressional policy weighs heavily against Meta defendants’ CDA defense.

### **3. The First Amendment Does Not Bar Plaintiffs' Claims Against Meta Defendants.**

Meta defendants also argue that the First Amendment protects their decisions to remove plaintiffs' content from their platforms. But the Supreme Court has held that the First Amendment does not immunize anticompetitive conduct:

The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.

*Associated Press v. U.S.*, 326 U.S. 1, 20 (1945).

Here, the First Amendment does not shield Meta defendants from liability for anticompetitive suppression of speech. As discussed above, Meta defendants are allegedly removing posts and accounts linked to *all* adult entertainment websites *except for* OnlyFans. If that is true, then Meta defendants are helping OnlyFans to achieve an unlawful monopoly in the online adult entertainment business.

“It is true that the . . . course of conduct here [was,] as in most instances[,] brought about through speaking or writing.” As Meta defendants argue, removal of certain posts and accounts constitutes speech. “But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Thus, plaintiffs’ claims withstand Meta defendants’ First Amendment defense.

#### **4. Meta Defendants Are Vicariously Liable for the Acts of Their Employees.**

Meta defendants argue they are not liable for the acts of their employees who allegedly participated in the anticompetitive conduct. This order disagrees. It is premature to conclude that those accepting bribes were involved in a frolic of their own so as to immunize Meta itself.

*First*, Meta defendants assert that the second amended complaint does not allege the three individuals named therein took any action to blacklist plaintiffs. But that argument is unavailing. Plaintiffs allege that two of the individuals are high-ranking officers and one is an employee of Meta defendants. Plaintiffs also allege that each individual has means to blacklist plaintiffs via the GIFCT database (Second Amd. Compl. ¶¶ 79–83). Moreover, Exhibit D to the complaint refers to wire transfers that benefited each individual at the expense of OnlyFans’ competitors. And, the whistleblower report states that the bribery “goes all the way to the top” such that “the top executives involved in this [conduct] get a revenue share of [OnlyFans] growth” (*id.*, Exh. L). Thus, it is reasonable to infer that the two high-ranking officers and the employee took actions to blacklist plaintiffs.

*Second*, Meta defendants assert that they are not vicariously liable for the acts of the Doe defendants (*i.e.*, Meta defendants’ unnamed employees). But that argument is also unavailing. “[A]n employer is vicariously liable for the torts of its employees committed within the scope of the employment.” “The employment, in other words, must be such as predictably to create the risk [that] employees will commit intentional torts of the type for which liability is sought.” “[T]hat [the] tortious act ‘was not committed in order to further the interests of the principal’ does not preclude vicarious liability.” *M. v. Henry Mayo Newhall Mem’l Hosp.*, 12 Cal. 4th 291, 296 (1995) (citation omitted).

The employment of individuals within Meta defendants’ content-moderation and security teams predictably and plausibly creates the risk that employ-

ees will intentionally and tortiously remove certain content from Meta defendants' platforms. Such employees have a duty to filter content. In the performance of that duty, it is plausibly foreseeable that an employee would abuse his power for his own benefit. See *Khraibut v. Chahal*, No. 15-CV-04463-CRB, 2021 WL 1164940, at \*13 (N.D. Cal. Mar. 26, 2021) (Judge Charles Breyer) (citing *Meester v. Davies*, 11 Cal. App. 3d 342, 346 (1970)). And, even if no benefit flows to Meta defendants, that alone would not preclude liability.

*Third*, Meta defendants argue that vicarious liability does not apply to unfair competition claims. But they misstate the law. "[A company] can, of course, be held liable for violations of Section[] 17200 . . . by its employees, [but] [the company owner's] individual liability must be predicated on his personal participation in the unlawful practices." Thus, only individual owners of Meta defendants — not Meta defendants themselves — must have personally participated in the unlawful practices to be held liable. *People v. Toomey*, 157 Cal. App. 3d 1, 14 (1984); see *People v. Regan*, 157 Cal. Rptr. 62, 64 (App. Dep't Super Ct. 1979).

## **5. The Anti-SLAPP Statute Does Not Bar Plaintiffs' Claims Against Meta Defendants.**

Meta defendants move to strike plaintiffs' claims under California's anti-SLAPP statute. To prevail on their anti-SLAPP motion, Meta defendants must make a prima facie showing that the claims arise from an act specified in California Code of Civil Procedure Section 425.16(e). Thereafter, the burden shifts to plaintiffs to establish a reasonable probability of prevailing

on the claims to survive dismissal. *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1155 (9th Cir. 2021). “At the second step, if, as here, the ‘anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the [FRCP] 12(b)(6) standard and consider whether a claim is properly stated.” *CoreCivic, Inc. v. Candide Grp., LLC*, No. 20-17285, 2022 WL 3724307, at \*3 (9th Cir. Aug. 30, 2022) (citations omitted).

Regardless of whether Meta defendants can show that the claims arise from protected conduct, the anti-SLAPP motion fails. This order has already found plaintiffs’ claims plausible, and they withstand our defendants’ other defenses. Thus, plaintiffs have established a reasonable probability of prevailing on their claims, so the claims withstand the anti-SLAPP statute.

## **6. Administrative Motions to Seal.**

The parties move to seal and redact certain portions of the second amended complaint and the briefing. “Unless a particular court record is one traditionally kept secret, a strong presumption in favor of access is the starting point. A party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by . . . articulat[ing] compelling reasons supported by specific factual findings[] that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process.” *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178–79 (9th Cir. 2006).

*First*, plaintiffs seek to redact the identities of certain individuals whom they allege handled business

of OnlyFans in the Philippines (Second Amd. Compl. ¶¶ 74–75). However, plaintiffs’ allegations regarding those individuals derive from public webpages. Thus, redacting the individuals’ identities would serve no purpose. Plaintiffs’ motion is denied as to paragraphs 74 and 75 of the second amended complaint.

*Second*, plaintiffs request to seal Exhibit D and redact other portions of the complaint. As discussed above, Exhibit D contains bank account information, details of wire transfers from Fenix International to Meta employees, and the names of Meta employees. The remaining paragraphs in the complaint that plaintiffs wish to redact describe the wire transfers and provide background information on the Meta employees referenced in Exhibit D. Plaintiffs also wish to redact the whistleblower report, Exhibit L. Defendants seek to redact similar information in their briefs.

As to Exhibit D, redaction is appropriate. Plaintiffs make only “general claims of [reputational] harm and privacy without any ‘particularized showing’ that ‘specific prejudice or harm will result’ with the disclosure of [the] referenced information.” District courts have found such claims insufficient to seal bank information and nonparties’ identities. *Martin v. Wells Fargo Bank, N.A.*, No. CV 12-06030 SI, 2013 WL 5441973, at \*3 (N.D. Cal. Sept. 30, 2013) (Judge Susan Illston); *see Pat. Tech., LLC v. Woodman*, No. 15-CV-00578-DMR, 2015 WL 4537779, at \*7 (N.D. Cal. July 27, 2015) (Judge Donna Ryu); *Bunsow De Mory LLP v. N. Forty Consulting LLC*, No. 20-CV-04997-JSC, 2020 WL 7872199, at \*2 (N.D. Cal. Sept. 21, 2020) (Judge Jacqueline Corley).

Yet FRCP 5.2(a)(3) and (a)(4) state that, when a filing “contains . . . the name of an individual known



to be a minor[] or a financial-account number, a party or nonparty making the filing may include only: . . . (3) the minor's initials; and (4) the last four digits of the financial account-number." Thus, as to Exhibit D, all but the last four digits of each account number shall be redacted, and the name of the minor referenced therein shall be redacted. All other information shall be made available to the public. The same shall apply to (i) the remaining exhibits and paragraphs in the second amended complaint and (ii) the information in defendants' briefs.

### CONCLUSION

For the foregoing reasons, the motions to dismiss and strike are DENIED. Plaintiffs' motion for leave to amend the complaint to include the whistleblower report (and the related news article), Exhibits L and M, is GRANTED. The parties' motions to seal are GRANTED IN PART AND DENIED IN PART.

IT IS SO ORDERED.

/s/ William Alsup  
U.S. District Judge

Dated: November 30, 2022.

**F.R.C.P. 5.1 MOTION  
RE: THE (UN)CONSTITUTIONALITY  
OF 47 U.S.C. § 230(C)(1)–  
PLAINTIFF’S BRIEF RESPONSE TO [D.E. 71]  
(OCTOBER 10, 2023)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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Case No. 4:18-cv-05159-HSG

LOCATION: OAKLAND, CT. 2, FL. 4

Before: Haywood S. GILLIAM, JR., U.S. District Judge.

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**F.R.C.P. 5.1 MOTION RE:  
THE (UN)CONSTITUTIONALITY OF  
47 U.S.C. § 230(C)(1) – PLAINTIFF’S BRIEF  
RESPONSE TO [D.E. 69]**

On September 19, 2023, Plaintiff, Jason Fyk (“Fyk”), pursuant to Federal Rule of Civil Procedure 5.1(a)(1)(A) and Title 28, United States Code, Section 2403(a), respectfully moved this Court for a determination that Title 47, United States Code, Section

230(c)(1) is unconstitutional as applied by District Court Judge White in this case. *See* [D.E. 66] (the constitutional challenge, “CC”). Fyk also proceeded with service of the United States (“USA”) pursuant to Rule 5.1(a)(2). The USA/US DOJ emerged *via* Notice of Appearance dated September 29, 2023. *See* [D.E. 67]. Then, on October 2, 2023, the USA filed an Acknowledgement of Notice of Constitutional Challenge. *See* [D.E. 68]. On October 3, 2023, Fyk replied to the USA’s Acknowledgement of Notice of Constitutional Challenge. *See* [D.E. 70]. While Fyk was replying to the USA on October 3, 2023, Defendant, Facebook, Inc. (“Facebook”), was responding to the CC. *See* [D.E. 69]. We now briefly address [D.E. 69].

Throughout this five-plus-year matter, Facebook has displayed an expertise in obfuscation (factually and legally) time after time after time. On myriad occasions throughout the pendency of this action, Facebook has routinely and unabashedly put forth false “facts” that District Court Judge White has fully endorsed in contravention of the hornbook Rule 12(b) standard of accepting the facts alleged by the plaintiff, not the defendant. Similarly, on myriad occasions throughout the pendency of this action, Facebook has routinely and unabashedly put forth wayward legal arguments that District Court Judge White has fully endorsed. For example, within the confines of the instant CC, there was/is Facebook’s wayward legal argument that Section 230(c)’s “Good Samaritan” general provision does not apply generally to all of Section 230(c) but instead applies selectively to only Section 230(c)(2). *See* [D.E. 47], identified in footnote 2 of [D.E. 66] as required by Rule 5.1. With District Court Judge White endorsing (through essentially a cut-

and-paste) Facebook’s constitutionally repugnant views as to the application of an intelligible principle. *See* [D.E. 51], identified in footnote 2 of [D.E. 66] as required by Rule 5.1. For reasons now discussed, Facebook’s most recent filing [D.E. 69] does not represent an exception as to Facebook’s *modus operandi* for factual and legal obfuscation.

**The CC Is Not At All Like The *Divino* Constitutional Challenge That [D.E. 69] Relies Upon**

Facebook’s October 3, 2023, filing [D.E. 69] starts off (“substantively” speaking) with this: “Courts have already rejected the very constitutional argument raised in Mr. Fyk’s motion.” *Id.* at 1 and n. 7. This Facebook “point” misconstrues (not coincidentally or accidentally, we submit) the nature of the CC [D.E. 66].

As purported support for the aforementioned Facebook “point,” Facebook cites *Divino Grp. LLC v. Google LLC*, 2022 WL 4625076, \*20 (N.D. Cal. Sept. 30, 2022) for this proposition: “Plaintiffs have not established that the application of Section 230(c) as a defense is unconstitutional.” [D.E. 69] at n. 7. In *Divino*, the constitutional challenge of Section 230(c) revolved around plaintiffs’ argument “that CDA Section 230(c) is unconstitutional because it violates their free speech rights under the First Amendment.” *Divino* at \*18. More specifically, the *Divino* plaintiffs’ constitutional challenge of Section 230(c) argued that “the statute’s application results in an unconstitutional permissive speech law that violates the First Amendment.” *Id.* To wit, the *Divino* defendants argued that “there is no valid basis for plaintiffs’ constitutional attack on Section 230(c) because defendants are not

state actors subject to the constraints of the First Amendment.” *Id.* In deciding that the *Divino* “Plaintiffs [did] not establish[] that the application of Section 230(c) as a defense is unconstitutional,” *id.* at \* 20, the *Divino* court had concluded as follows:

To the extent the [complaint] suggests that defendants’ invocation of CDA Section 230(c) as a defense violates plaintiffs’ First Amendment right to ‘petition[] the courts for relief,’ . . . plaintiffs have not been precluded from presenting their legal disputes to the courts, ‘express[ing] their ideas, hopes, and concerns to their government,’ or from ‘request[ing] action by the government to address those concerns.’

*Id.* at \*19.

*The CC, however, has absolutely nothing to do with whether or not the Section 230(c) immunity affirmative defense is (un)constitutional straightaway (at the threshold) from a deprivation of First Amendment rights perspective or otherwise.* Fyk’s constitutional challenge of Section 230 in the DDC Court (noted in [D.E. 69] as if the DDC matter somehow had something to do with the subject CC) involved, in part, the threshold/facial unconstitutionality of Section 230; whereas, the CC at issue in this case has nothing to do with that. Rather, the CC at issue here revolves entirely around District Court Judge White’s unconstitutional application (vis-à-vis [D.E. 51]) of Section 230(c)’s “Good Samaritan” general provision. It was not until [D.E. 51] that District Court Judge White applied the “Good Samaritan” general provision in a constitutionally repugnant manner in this case. So, among other things (and as discussed further below),

Facebook’s “woe is me, this case is old . . . so, Judge, there is nothing to see here .. pretty please, Judge, just go with the flow and continue to snuff out Fyk’s day in court because we say so” chatter and Facebook’s “gee whiz, when filing his complaint in 2018, Fyk should have somehow anticipated District Court Judge White’s unconstitutional application of the ‘Good Samaritan’ general provision in the November 1, 2021, Order [D.E. 51] and challenged such unconstitutional application over three years before such unconstitutional application occurred in crystal ball fashion” chatter is exactly what Facebook’s chatter has been for the past five-plus-years . . . poppycock.

After District Court Judge White’s Order [D.E. 51] applied the “Good Samaritan” general provision in an unconstitutional manner, Fyk promptly appealed to the Ninth Circuit. The Ninth Circuit’s subsequent decision said nothing as to the merits (*i.e.*, said nothing about the District Court’s unconstitutional application of the “Good Samaritan” general provision and/or otherwise); rather, the Ninth Circuit dismissed that appeal based on a *sua sponte* untimeliness determination. So, Fyk promptly proceeded to SCOTUS. SCOTUS simply denied Fyk’s petition without saying more. During the appellate and SCOTUS proceedings, the District Court was divested of jurisdiction. Once SCOTUS denied the petition, Fyk promptly returned to the District Court under Rule 60(b). *See* [D.E. 61]. It is [D.E. 61] that is now pending, and the case is open as it concerns (at the very least) the disposition of [D.E. 61].

As discussed more thoroughly below, Fyk is genuinely confused as to the [D.E. 69] water muddying concerning the CC somehow being a disguised “third”

60(b) motion, and how there is no “mistake” at play that could give rise to a “third” 60(b), and how a “third” 60(b) would be too late anyway, and blah blah blah. Huh? No—the CC is a Rule 5.1 CC that is allowed to run contemporaneously/concurrently with the pending [D.E. 61] 60(b) proceedings. Per Rule 5.1(d), that which is placed at issue in the CC cannot be “forfeited.” And per Rule 5.1(b), the Court “must” certify the CC to the appropriate attorney general. *Constitutional rights cannot be forfeited.* And, as discussed more thoroughly below, Fyk could not have brought the CC any sooner than he did; again, it was [D.E. 51] in November 2021 that applied the “Good Samaritan” general provision in this case in an unconstitutional fashion and it was not until Fyk exhausted appellate rights (through the Ninth Circuit and SCOTUS) concerning [D.E. 51] that the subject CC was pursuable/ripe. Had Fyk brought the CC any sooner than he did, he would have doubtless encountered the District Court’s dismissal (without prejudice) of the CC based on prematurity. *See, e.g.*, [D.E. 66] at n. 3 (citing *Anderson v. Municipality of Anchorage*, No. 3:21-cv-00139-JMK, 2023 WL 2932962, \*1 (D. Alaska Apr. 13, 2023)).

**The CC Is Not A “Third” 60(b) Attempt As Argued In [D.E 69]**

With past being prologue (the past being Facebook’s propensity to try to factually and legally confuse the Court into untenable rulings), [D.E. 69] says a bunch about the CC [D.E. 66] somehow being a “third” 60(b) motion that is unwarranted because there was no “mistake” and it is too late. Again, there is already pending reconsideration motion practice (fully briefed) concerning [D.E. 51], that being [D.E.

61]. [D.E. 66] is a constitutional challenge implicating [D.E. 51], which such CC is allowed to run alongside [D.E. 61].

Per *Anderson* (as just one example), Fyk was required to fully develop the record surrounding the subject matter of the CC (or otherwise) before he could advance the CC. Fyk fully developed the [D.E. 51]-oriented record by way of the above-mentioned Ninth Circuit appellate proceedings, by way of the above-mentioned SCOTUS proceedings, and now amidst the above-mentioned 60(b) proceedings ([D.E. 61]) concerning [D.E. 51]. There is simply no other place for Fyk to go concerning [D.E. 51] in order to fully develop the record concerning [D.E. 51] before advancing a CC concerning [D.E. 51]—Fyk went to the next highest court (the Ninth Circuit court), the next highest court (SCOTUS), and back to this Court ([D.E. 61]). Having fully developed the [D.E. 51]-oriented record, Fyk was/is perfectly entitled to advance a contemporaneous CC concerning [D.E. 51]’s unconstitutional application of Section 230(c)’s “Good Samaritan” general provision.

And, yet, Facebook’s [D.E. 69] weakly argues that the CC is inappropriate (and worthy of sanctions . . . really?) because Facebook says the CC is somehow a disguised “third” 60(b) motion that points out no 60(b)-related “mistake” and is too late anyway? Begging the question—are we in the Twilight Zone? Facebook’s perception that the CC is of a *Divino* ilk could not be further from the truth—either Facebook did not read *Divino*, did not read the CC, and/or is trying to dupe the Court again. Facebook’s *naked* (“because we say so”) argument that the CC is a disguised “third” 60(b) motion could not be further from the



truth, and Facebook's related [D.E. 69] "analysis" as to when 60(b) relief is available could not be further off the mark—either Facebook did not read the CC and/or is trying to dupe the Court again.

Once more, the truth (something [D.E. 69] lacks entirely, just as with all prior Facebook filings) is as follows: (1) The CC flows from Rule 5.1 and relates to [D.E. 51]'s unconstitutional application of the "Good Samaritan" general provision; the CC does not in any way, shape, or form flow from Rule 60(b). Again, 60(b) proceedings concerning [D.E. 51] are already pending and such 60(b) proceedings (revolving around changes in law and/or circumstances, sounding in 60(b)(5) and/or 60(b)(6)) concern more than [D.E. 51]'s unconstitutional application of the "Good Samaritan" general provision. For example, [D.E. 61] involves the change in law that is the Fourth Circuit Court's *Henderson* decision, with such change of law warranting the Court's overturning dismissal. (2) Fyk filed the CC when such was ripe, as he was required to do. *See, e.g., Anderson*. The CC concerning [D.E. 51] was certainly not ripe before [D.E. 51], as [D.E. 69] ridiculously contends ("Mr. Fyk could have raised the constitutionality of Section 230(c)(1) in his [2018] complaint," *id.* at 2). And the CC concerning [D.E. 51] was not ripe before the case record concerning same was fully developed; *i.e.*, before Fyk fully exhausted appellate and/or reconsideration rights through the Ninth Circuit, through SCOTUS, and through [D.E. 61] in this Court. (3) Per the law (Rule 5.1), Fyk's right to challenge the unconstitutionality of [D.E. 51] (*i.e.*, challenge the District Court's unconstitutional determination that the "Good Samaritan" general provision is not generally applicable to both Section 230(c)(1) and

Section 230(c)(2)) cannot be “forfeited” and “must” be certified (unless, of course, a prematurity situation was at play like in *Anderson*, which is not the case here, in which case the Court could dismiss the CC *without prejudice* as unripe).

### Conclusion

The Court “must” certify the ripe, fully developed 5.1 CC pursuant to Rule 5.1(b), as Fyk’s CC rights cannot be “forfeited” per Rule 5.1(d). The Rule 5.1 CC is allowed to run concurrently with pending, open Rule 60(b) proceedings. Theoretically, as mentioned in [D.E. 70], the CC would not necessarily have to unfold if the Court were to just realize that we are correct and overturn the dismissal based on [D.E. 61] and finally allow this matter to move forward on the merits; *i.e.*, in the ordinary civil course in relation to the glaring illegalities that Facebook inflicted upon Fyk in destroying his livelihood. But, should [D.E. 61] not result in the overturning of the dismissal that has been unwarranted for over half a decade (which such overturning would moot the CC . . . at least for now, conceptually), the CC [D.E. 66] should absolutely transpire in relation to [D.E. 51]’s unconstitutional application of the “Good Samaritan” general provision.<sup>1</sup> Put differently and in sum, the dismissal is

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<sup>1</sup> Simply put, [D.E. 51] concluded that the Ninth Circuit’s *Enigma* decision (which such decision made clear that Section 230(c) immunity is not available in an anti-competitive animus setting because anti-competition is the antithesis of “Good Samaritan”) did not apply here because District Court Judge White was somehow of the view that the *Enigma* holding relating to the “Good Samaritan” general provision was only applicable in Section 230(c)(2) settings; *i.e.*, was somehow of the view that the “Good Samaritan” general provision overarching all of Section

destined to go away as legally untenable by way of [D.E. 61] and/or as constitutionally untenable by way of [D.E. 66]—there is no other viable route, the dismissal must go away either way.

Respectfully Submitted,

/s/ Jeffrey Greyber

Jeffrey L. Greyber, Esq.  
GREYBER LAW, PLLC  
*Counsel for Plaintiff*

Dated: October 10, 2023.

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230(c) was not to be generally applied to both Section 230(c)(1) and Section 230(c)(2). Here, the CC will result in a determination that District Court Judge White’s *selective* application of the *general* provision (vis-à-vis [D.E. 51]) was constitutionally unsound; *i.e.*, will result in a determination that the only constitutionally sound way to apply the “Good Samaritan” general provision is to apply such generally to both Section 230(c)(1) and Section 230(c)(2). And with that proper application of the “Good Samaritan” general provision in place, it will necessarily be determined that Facebook cannot enjoy its professed Section 230(c)(1) immunity in a case revolving around anti-competitive animus.

**F.R.C.P. 5.1 MOTION  
RE: THE (UN)CONSTITUTIONALITY  
OF 47 U.S.C. § 230(C)(1)–PLAINTIFF’S  
BRIEF RESPONSE TO [D.E. 70]  
(OCTOBER 3, 2023)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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Case No. 4:18-cv-05159-HSG

LOCATION: OAKLAND, CT. 2, FL. 4

Before: Haywood S. GILLIAM, JR., U.S. District Judge.

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**F.R.C.P. 5.1 MOTION RE:  
THE (UN)CONSTITUTIONALITY OF  
47 U.S.C. § 230(C)(1) – PLAINTIFF’S BRIEF  
RESPONSE TO [D.E. 68]**

On September 19, 2023, Plaintiff, Jason Fyk (“Fyk”), pursuant to Federal Rule of Civil Procedure 5.1(a)(1)(A) and Title 28, United States Code, Section 2403(a), respectfully moved this Court for a determination that Title 47, United States Code, Section

230(c)(1) is unconstitutional as applied by the District Court. *See* [D.E. 66] (the constitutional challenge, “CC”). Fyk also proceeded with service of the United States (“USA”) pursuant to Rule 5.1(a)(2). The USA/US DOJ emerged *via* Notice of Appearance dated September 29, 2023. *See* [D.E. 67]. Then, on October 2, 2023, the USA filed an Acknowledgement of Notice of Constitutional Challenge. *See* [D.E. 68]. The October 2, 2023, USA filing misapprehends a few things; thus, this brief “response” to set the record straight as to the non-forfeitable CC, *see* Fed. R. Civ. P. 5.1(d), that “must” be certified by this Court to the USA. *See* Fed. R. Civ. P. 5.1(b).

First, the USA’s October 2, 2023, filing says that Fyk “did not attach” any paperwork identifying what about this case places the constitutionality of the subject law at issue. Correct, nothing was attached to [D.E. 66] because nothing had to be. Rather, Fyk complied with the letter of the law (Rule 5.1 as actually written) by “identifying” in his September 19, 2023, filing the exact portions of this case’s record that give rise to the Rule 5.1 CC. *See, e.g.*, [D.E. 66] at n. 2. Rule 5.1(a)(1) says “identifying the paper that raises it,” not “attaching the paper that raises it.”

Second, the USA’s October 2, 2023, filing misconstrues the procedural posture of this case. [D.E. 68] suggests that the Rule 5.1 CC arises within the pending reconsideration motion practice, which such pending motion practice represents the third time this case is back in this Court. Wrong. In reality, the papers identified as setting off the unconstitutional trajectory of this case related to the second time this case was back in this Court under the first round of reconsideration motion practice. Again, *see* [D.E. 66] at n. 2, identifying

[D.E. 47] and [D.E. 51], *inter alia*, not the docket entries identified in the USA's October 2, 2023, filing that are, indeed, pending with this Court but by no means somehow make the 5.1 CC premature as the USA seems to be suggesting. Since the time the District Court botched a constitutionally sound application of the "Good Samaritan" general provision /intelligible principle overarching all of Section 230(c) (that being [D.E. 51] identified in [D.E. 66] at n. 2), Fyk was forced to go through the massive-resource-burning-ringer yet again—to the Ninth Circuit for a second time (who *sua sponte* ignored him on the merits) and to SCOTUS for a second time (who simply did not accept the petition).

In sum, Fyk has identified the papers within this case that *prima facie* show either (a) an unconstitutional application of Section 230(c)'s general provision/intelligible principle unfolded in this case (*via* the absurd [D.E. 51] conclusion that the "Good Samaritan" general provision overarching all of Section 230(c) is somehow not general, but rather picky-choosy in somehow only applying to Section 230(c)(2)), rendering dismissal completely unviable because there would be no "immunity" rug for Facebook to sweep its illegalities under (one cannot have unconstitutional immunity, let alone "unfettered" unconstitutional immunity), or (b) Section 230(c)'s general provision is exactly what Fyk has said it is for years (and what many other Courts and attorneys and legal scholars and Congressmen and the DOJ are saying)—that is, the "Good Samaritan" general provision is *generally* applied across both subparts of Section 230(c) and that Facebook's purported Section 230(c)(1) "immunity" that has derailed justice (even some semblance of justice)

unfolding in Fyk's case for about six years was not some sort of automatic "super-immunity" warranting automatic dismissal; rather, Facebook's purported Section 230(c)(1) immunity was/is, at the bare minimum, subject to a "Good Samaritan" analysis (*i.e.*, worthy of discovery, absolutely not automatic dismissal).

The USA can show up in this case and try to somehow say that the "Good Samaritan" general provision is somehow not general . . . that would be interesting, a point blank admission from the USA that its law is unconstitutional. Or, the USA could do the right thing and show up and profess that Fyk's position on the general application of a general provision as a law (Section 230) is actually written is correct. Or the USA does not have to show up at all. Either way, the USA has 60-days (per Rule 5.1(c)) to make a choice. But the bogus reasons set forth in [D.E. 68] for the USA's current inclination to sit on its hands as to a matter of great national importance (make no mistake, Section 230 is a matter of great national importance) . . . those "reasons" being that Fyk did not attach paperwork to [D.E. 66] when that is not what Rule 5.1 requires, and that Fyk has pending reconsideration motion practice when, in actuality, the reconsideration motion practice that created the entire 5.1 problem was a round of motion practice ago . . . are exactly that—bogus. Alas, this filing to set the record straight, especially in recognition that Judge H.S. Gilliam, Jr. is relatively new to this approximate six-year-old file.

The Court "must" certify the ripe 5.1 CC to the USA pursuant to Rule 5.1(b). Or the Court could just realize that we are correct, not burden the USA with coming in to confirm we are correct, overturn the

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dismissal that has been unwarranted for over half a decade, and finally allow this matter to move forward on the merits; *i.e.*, in the ordinary civil course in relation to the glaring illegalities that Facebook inflicted upon Fyk in destroying his livelihood.

Respectfully Submitted,

/s/ Jeffrey Greyber  
Jeffrey L. Greyber, Esq.  
GREYBER LAW, PLLC  
*Counsel for Plaintiff*

Dated: October 3, 2023.



**META PLATFORMS, INC.’S  
(F/K/A FACEBOOK, INC.) RESPONSE  
TO PLAINTIFF JASON FYK’S MOTION  
CONCERNING THE CONSTITUTIONALITY  
OF 47 U.S.C. § 230(C)(1) [DE 69]  
(OCTOBER 3, 2023)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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Case No. 4:18-cv-05159-HSG

LOCATION: OAKLAND, CT. 2, FL. 4

Before: Haywood S. GILLIAM, JR., U.S. District Judge.

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**META PLATFORMS, INC.’S (F/K/A FACEBOOK,  
INC.) RESPONSE TO PLAINTIFF JASON  
FYK’S MOTION CONCERNING THE  
CONSTITUTIONALITY OF 47 U.S.C. § 230(C)(1)**

Plaintiff Jason Fyk’s “Motion Re: the (Un)constitutionality of 47 U.S.C. § 230(c)(1)” (“Motion”) is the latest in a long line of baseless filings stemming from an alleged decision by Facebook, Inc. (now known as Meta

Platforms, Inc.) in 2016 to remove some of Mr. Fyk's Facebook pages.<sup>1</sup> As it has done with all of his prior motions, this Court should once again deny Mr. Fyk's frivolous request for relief.

This Court dismissed Mr. Fyk's complaint, and issued a final judgment terminating this action, in June 2019—*more than four years ago*.<sup>2</sup> The Ninth Circuit affirmed this Court's order of dismissal in June 2020.<sup>3</sup> Since then, this Court, the United States District Court for the District of Columbia, the Ninth Circuit Court of Appeals, and the United States Supreme Court have all heard—and *denied*—Mr. Fyk's numerous additional requests for relief.

In March 2021, for instance, Mr. Fyk filed a motion pursuant to Rule 60(b) to vacate this Court's 2019 Order. This Court denied that motion in November 2021,<sup>4</sup> the Ninth Circuit affirmed that order in 2022, and the Supreme Court subsequently denied *certiorari*.<sup>5</sup> Undeterred, in June of this year, Mr. Fyk filed a

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<sup>1</sup> For a detailed discussion of these filings, *see* Dkt. No. 62 (procedural history).

<sup>2</sup> *See* Dkts. 38, 46-2 (reported at *Fyk v. Facebook, Inc.*, 2019 WL 11288576, at \*3 (N.D. Cal. June 18, 2019)).

<sup>3</sup> Dkt. 46-3 (reported at *Fyk v. Facebook, Inc.*, 808 F. App'x 597 (9th Cir. 2020)).

<sup>4</sup> *Fyk v. Facebook, Inc.*, 2021 WL 5764249, at \*1 (N.D. Cal. Nov. 1, 2021) (denying motion to vacate).

<sup>5</sup> *Fyk v. Facebook, Inc.*, 2022 WL 10964766 (9th Cir. Oct. 19, 2022), *cert. denied*, 2023 WL 2959399 (U.S. Apr. 17, 2023).

*second* meritless motion to vacate under Rule 60(b), which the Court has not yet had occasion to address.<sup>6</sup>

Now before the Court is Mr. Fyk's latest gambit: a motion to declare 47 U.S.C. § 230(c)(1) unconstitutional. Courts have already rejected the very constitutional argument raised in Mr. Fyk's Motion.<sup>7</sup> Here, however, no basis exists for this Court even to consider the argument raised in Mr. Fyk's Motion because this case has been closed for years. "It is only under a very limited set of circumstances," not present here, "that motions or additional documents should be filed in a dismissed, closed case." *Soladigm, Inc. v. Min Ming Tarng*, WL 1949627, at \*3 (N.D. Cal. May 9, 2013); *see also, e.g., Drevaleva v. U.S. Dep't of Veterans Affs.*, 2021 WL 1433063, at \*1 (N.D. Cal. Mar. 29, 2021) (denying all pending motions in closed case and ordering that no further filings shall be accepted), *appeal dismissed sub nom. Drevaleva v. Dep't of Veterans Affs.*, 2021 WL 4785893 (9th Cir. Aug. 16, 2021).

Notably, Mr. Fyk does not seek Rule 60(b) relief in his Motion, much less does he attempt to demonstrate any of the legal requirements for reopening this long-closed case. Nor can he. "Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circum-

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<sup>6</sup> See Dkt. No. 61 (Fyk's second motion to vacate under Rule 60(b)); Dkt. No. 62 (Meta's response).

<sup>7</sup> *Divino Grp. LLC v. Google LLC*, 2022 WL 4625076, at \*20 (N.D. Cal. Sept. 30, 2022) ("Plaintiffs have not established that the application of Section 230(c) as a defense is unconstitutional."), *reconsideration denied*, No. 19-CV-04749-VKD, 2023 WL 218966 (N.D. Cal. Jan. 17, 2023).

stances including fraud, mistake, and newly discovered evidence.” See *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). None of those “limited circumstances” are even allegedly present here.

Moreover, even if the Court were to construe the instant motion as a *third* request for relief under Rule 60(b), that request would be untimely. Fed. R. Civ. P. 60(c)(1) (“A motion under Rule 60(b) must be made within a reasonable time-and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.”). Mr. Fyk could have raised the constitutionality of Section 230(c)(1) in his complaint, filed in 2018. Instead, he raised the issue for the first time more than *four years after* the case was dismissed and closed.

Accordingly, this Court should strike Mr. Fyk’s improper motion and instruct that “if Plaintiff persists in these filings, [he] may be subject to sanctions.” *Bridgewater v. Hayes Valley Ltd. P’ship*, 2012 WL 2571321, at \*2 (N.D. Cal. July 2, 2012); see also *Soladigm, Inc.*, WL 1949627, at \*3 (“further attempts by Defendant to unjustifiedly maintain this litigation will be met with orders summarily terminating or striking the motion, request or improper pleading”); *Webb v. Ducart*, 2019 WL 1118120, at \*1 (N.D. Cal. Mar. 11, 2019) (“No further filings will be accepted in this closed case.”).

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KEKER, VAN NEST & PETERS LLP

By: /s/ William Hicks  
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Matan Shacham  
William Hicks  
Attorneys for Defendant  
Meta Platforms, Inc.

Dated: October 3, 2023

**UNITED STATES OF AMERICA'S  
ACKNOWLEDGMENT OF NOTICE OF  
CONSTITUTIONAL CHALLENGE [DE 68]  
(OCTOBER 2, 2023)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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Case No. 4:18-cv-05159 (HSG)

FRCP 5.1 Notice Filed on ECF: September 19, 2023

Hearing Date: none set

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**UNITED STATES OF AMERICA'S  
ACKNOWLEDGMENT OF NOTICE OF  
CONSTITUTIONAL CHALLENGE**

Plaintiff filed on September 19, 2023 a document that, albeit styled as a “motion,” the United States construes as a notice of constitutional challenge regarding 47 U.S.C. § 230(c) (Dkt. 66 (“Rule 5.1 Notice”)). The Court has not certified the constitutional question. *See* Fed. R. Civ. P. 5.1(b); 28 U.S.C. § 2403.

The Rule 5.1 Notice did not attach any pending “pleading, written motion, or other paper . . . that raises” the constitutional challenge. *See* Fed. R. Civ. P. 5.1(a).

The Rule 5.1 Notice argues (at 8-9) that the District Court’s prior dismissal of the action should be “overturned.” Thus, the Rule 5.1 Notice apparently relates to Plaintiff’s second motion under Rule 60 for relief from the prior dismissal, Dkt. 61, briefing on which appears to have closed on July 7, 2023, when Plaintiff replied, Dkt. 63.

In light of the pendency of Plaintiff’s second motion under Rule 60, and the apparent absence of any pending “pleading, written motion, or other paper . . . that raises” the constitutional challenge, the United States does not expect to make a further filing concerning the Rule 5.1 Notice.

Additionally, the United States notes that the approval of the Solicitor General would be required for the United States to intervene in response to a Rule 5.1 notice. *See* 28 C.F.R. § 0.21. Ordinarily, the process of obtaining a decision from the Solicitor General regarding intervention takes at least several weeks, sometimes longer. As such, if the Court were to call for a decision by the United States whether to intervene in response to the Rule 5.1(a) Notice, the Department of Justice would be required to request an extension of time sufficient to obtain such a decision from the Solicitor General. That delay would be unnecessary if the Court were to decide Plaintiff’s second motion under Rule 60 based on the existing briefs, Dkt. 61-63.

The United States respectfully submits that, following disposition of Plaintiff's second motion under Rule 60, if further proceedings resume in this Court, and if Plaintiff then asserts a constitutional challenge, this Court should order Plaintiff to file and serve a Rule 5.1 notice attaching the paper raising any such challenge. Fed. R. Civ. P. 5.1(a)(2); *see also* Wright & Miller, 4B *Federal Practice and Procedure* § 1154 (4th ed. Apr. 2023 update).

Respectfully submitted,

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Dated: October 2, 2023



**F.R.C.P. 5.1 MOTION  
RE: THE (UN)CONSTITUTIONALITY  
OF 47 U.S.C. § 230(C)(1) [DE 66]  
(SEPTEMBER 20, 2023)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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Case No. 4:18-cv-05159-HSG

LOCATION: OAKLAND, CT. 2, FL. 4

Before: Haywood S. GILLIAM, JR., U.S. District Judge.

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**F.R.C.P. 5.1 MOTION RE: THE (UN)CONSTITUTIONALITY OF 47 U.S.C. § 230(C)(1)**

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**INTRODUCTION**

Plaintiff, Jason Fyk (“Fyk”), pursuant to Federal Rule of Civil Procedure 5.1(a)(1)(A) and Title 28, United States Code, Section 2403(a), respectfully moves this Court for a determination that Title 47, United States Code, Section 230(c)(1) is unconstitu-

tional as applied by the District Court.<sup>1</sup> From the onset of this litigation, Fyk has been faced with an opposition (Defendant, Facebook, Inc., “Facebook”) and California federal court system (namely, District Court Judge Jeffrey S. White, who recently recused himself as disqualified approximately six years into this lawsuit) who have prescribed to many aberrant notions concerning Section 230. Such aberrations came to a head with the most recent position taken by Facebook and embraced by the District Court—that the “Good Samaritan” intelligible principle/general provision overarching all of Section 230(c) is not a *general* provision; *i.e.* the “Good Samaritan” intelligible principle/general provision overarching all of Section 230 only applies to Section 230(c)(2) (not to Section 230(c)(1)).<sup>2</sup>

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<sup>1</sup> Subsection 230(c)(1) is part of a grander federal statute called the Communications Decency Act (“CDA”), Title 47, United States Codes, Section 230. Enacted in 1996, the CDA was, at its root, designed to guard America’s youth from offensive material on the Internet.

<sup>2</sup> See Apr. 5, 2021, Facebook Response to Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to Vacate and Set Aside Entry of Judgment [D.E. 47], at 3 (wherein Facebook argued that the Ninth Circuit’s *Enigma* holding as to the application of the “Good Samaritan” intelligible principle in relation to Section 230(c)(2) was limited to Section 230(c)(2); *i.e.*, that the “Good Samaritan” intelligible principle of Section 230(c) does not apply to Section 230(c)(1)); see also Nov. 1, 2021, Order [D.E. 51] at 2 (same). On appeal, the Ninth Circuit did not address this issue, which was the sole issue before the Ninth Circuit. Rather, on the most recent appeal, the Ninth Circuit punted— the Ninth Circuit *sua sponte* determined that the last round of Rule 60(b) proceedings carried out by Fyk was somehow untimely/time-barred (an argument/topic that neither Facebook nor the District Court had

The Ninth Circuit has reiterated the standard for when a statute is “drawn into question,” citing the Supreme Court’s language in *United States v. Lynch*:

The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry.

*Anderson v. Municipality of Anchorage*, No. 3:21-cv-00139-JMK, 2023 WL 2932962, \*1 (D. Alaska Apr. 13, 2023) (citing *Peruta v. Cnty. of San Diego*, 771 F.3d 570, 575 (9th Cir. 2014), quoting *U.S. v. Lynch*, 137 U.S. 280, 285 (1890)). This constitutional challenge (“CC”) does not question Facebook’s exercising of authority or related immunity under Section 230(c)(1); rather, this CC questions the validity of Section 230(c) itself. *Anderson* at \*1. In determining that the “Good Samaritan” intelligible principle/general provision overarching all of Section 230(c) is not “general” because such intelligible principle purportedly only applies to Section 230(c)(2)(A) (not Section 230(c)(1)), the District Court has “denied” the constitutionality and/or legality of Section 230(c) (namely, has denied the existence of Section 230(c)’s “Good Samaritan” intelligible principle/general provision in relation to Section

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brought up in underlying proceedings). See Oct. 19, 2022, Memorandum [D.E. 54], *Fyk v. Facebook, Inc.*, No. 21–16997 (9th Cir.).

230(c)(1)), thereby giving rise to a line of “direct inquiry” vis-à-vis this CC.

A federal statute (wielded by Facebook as a threshold immunity defense, and embraced by the District Court hook, line, and sinker) has frustrated Fyk’s civil rights; *i.e.*, Section 230(c)(1) “immunity” has stood in the way of Fyk’s pursuing civil liability in the ordinary course in relation to four run-of-the-mill civil causes of action (intentional interference with prospective economic advantage/relations; violation of California business & professions code sections 17200-17210 (unfair competition); civil extortion; fraud /intentional misrepresentations, *see* [D.E. 1]). The Verified Complaint [D.E. 1] does not directly challenge Section 230(c)(1); indeed, the Verified Complaint does not challenge any of the CDA. Rather, the Verified Complaint only twice mentions Section 230(c)(2), *see* [D.E. 1] at ¶¶ 6, 24, in discussing pre-suit instances where Facebook meddled with Fyk’s content (and associated businesses) under the guise of Section 230(c)(2); *i.e.*, where Facebook crippled Fyk’s businesses on the Facebook platform/News Feed market because the content displayed within such businesses /pages was somehow “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” 47 U.S.C. § 230(c)(2)(A). While the Verified Complaint alleges that Facebook’s pre-suit acts were under the color of Section 230(c)(2)(A) (not even Section 230(c)(1)), that is not the same as an allegation that the statute itself is unconstitutional. Rather, purported Section 230(c)(1) immunity was brought up for the first time (in out-of-the-blue fashion) by Facebook as a threshold defense, contending that Facebook was privileged/immunized (by way of Section 230(c)(1)) to

inflict upon Fyk the illegalities embodied by the four counts of the Verified Complaint.

Over five years into this lawsuit (which has involved two trips to the Ninth Circuit and two trips to SCOTUS), the parties' positions and theories have been laid bare. And as one can see from the various briefs submitted by the parties (and associated orders), *see, e.g., n. 2, supra*, and/or the trajectory of this case, a legitimate Rule 5.1/Section 2403 line of "direct inquiry" concerning Section 230(c) has arisen amidst the District Court's "denial" of the existence of the "Good Samaritan" intelligible principle/general provision in relation to Section 230(c)(1), which, in turn, "denied" the constitutionality and/or legality of Section 230(c). Per the admissions of Facebook and the District Court, *see n. 2* (citing [D.E. 47] and [D.E. 51]), we have a federal statute on our hands (Section 230(c)(1)) that provides an entity (Facebook) with immunization from content policing/restriction (exercised here against Fyk) not subject to an intelligible principle. And, yet, per case law discussed in greater detail below, a power or authority (Section 230(c) immunity) that the legislature provides to an entity (Facebook) without a guiding force in the form of an intelligible principle/general provision, renders the federal statute unconstitutional because the immunity being exercised by the entity would be absurdly "unfettered."

This is precisely the kind of situation that demands a "notice of constitutional question"/"notice of constitutional challenge" that Federal Rule of Civil

Procedure 5.1/Title 28 U.S.C. Section 2403 envisions.<sup>3</sup> Indeed, Fyk attempted to challenge the constitutionality of Section 230(c) in a declaratory action against the United States of America. *See Fyk v. U.S.A.*, No. 1:22-cv-01144-RC (D.D.C.). In deciding that Fyk did not have the standing to pursue such action against the United States (hung up on traceability and redressability), the District Court Judge Contreras held, in pertinent part, as follows: “Mr. Fyk had his opportunity to challenge the CDA when Facebook invoked it as a shield against his claims.” *Id.*, [D.E. 16] at 9. And, so, that is what this Rule 5.1/Section 2403 CC does—Fyk challenges the CDA in this action involving Facebook where “Facebook invoked [Section 230(c)(1)] as a shield against [Fyk’s] claims” and where the District Court has denied the existence of Section 230’s “Good Samaritan” intelligible principle/general provision in relation to Section 230(c)(1), rendering the federal statute unconstitutional or otherwise legally untenable.

## MEMORANDUM

### A. Legal Standard

Federal Rule of Civil Procedure 5.1 provides, in pertinent part, as follows:

- (a) NOTICE BY A PARTY. A party that files a pleading, written motion, or other paper

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<sup>3</sup> In *Anderson v. Municipality of Anchorage*, for example, Anderson had a situation on his hands worthy of a constitutional challenge/constitutional question, but pleadings and/or briefings spelling out the parties’ positions had not yet been developed in that case; so, the *Anderson* court determined that the constitutional challenge/constitutional question was premature.

drawing into question the constitutionality of a federal or state statute must promptly:

- (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:
    - (A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or . . .
  - (2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned . . . either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.
- (b) CERTIFICATION BY THE COURT. The court *must*, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned.
- (c) INTERVENTION; FINAL DECISION ON THE MERITS. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

- (d) NO FORFEITURE. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

*Id.* (emphasis added). And Title 28, United States Code, Section 2403(a) provides as follows:

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

*Id.*

**B. Without An Intelligible Principle, Section 230(c)(1) Is Unconstitutional**

In late-2019, the Ninth Circuit court determined that “[t]he Good Samaritan provision of the Communications Decency Act does not immunize blocking and filtering decisions that are driven by anticompet-



itive animus.” *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. (Cal.) 2019) (emphasis added), cert. denied *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13 (2020). Put differently, the Ninth Circuit court confirmed that the “Good Samaritan” intelligible principle/general provision overarching Section 230(c) most certainly applies to the Section 230 immunity analysis.

With that Ninth Circuit determination in hand (new case law at the time), Fyk asked the District Court to reconsider its dismissal, as Fyk’s Verified Complaint hinges on the anticompetitive animus displayed by Facebook,<sup>4</sup> and, per *Enigma*, Facebook could not enjoy the statutorily prescribed immunity under such circumstances. See [D.E. 46], [D.E. 47], [D.E. 48], and [D.E. 51]. Remarkably, as discussed in footnote 2 above, the District Court (in siding entirely with Facebook, so much so that [D.E. 51] was pretty much a cut-and-paste of [D.E. 47]) determined that the “Good Samaritan” general provision of Section 230(c) was not “general” in application; *i.e.*, that the “Good Samaritan” general provision/intelligible principle was isolated to Section 230(c)(2)(A) just because the underlying fact pattern of *Enigma* was that

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<sup>4</sup> Not only is Count II of Fyk’s Verified Complaint one of unfair competition (violation of California business & professions code sections 17200-17210 (unfair competition)), but the very first paragraph of Fyk’s Verified Complaint reads as follows: “This case asks whether Facebook can, without consequence, engage in brazen . . . unfair and anti-competitive . . . practices that caused the build-up (through years of hard work and entrepreneurship) and subsequent destruction of Fyk’s multi-million dollar business with over 25,000,000 followers . . .” [D.E. 1], ¶ 1.

of Section 230(c)(2)(A); *i.e.*, denied the existence of the “Good Samaritan” intelligible principle/general provision with respect to Section 230(c)(1). The District Court’s determination that the “Good Samaritan” intelligible principle/general provision overarching Section 230(c) did not exist in relation to Section 230(c)(1) (again, which echoed Facebook’s responsive briefing) was entirely made up, as there is no such thing as a general provision that is not applied “generally” and is instead whimsically and selectively applied to some parts of a statute but not others.

That absurdity (that the “Good Samaritan” intelligible principle, in cherry-pick fashion, applies to Section 230(c)(2)(A) and not Section 230(c)(1) per Facebook and the District Court) is presently the law of the case. In denying the existence of the “Good Samaritan” intelligible principle as it relates to Section 230(c)(1), the District Court rendered Section 230(c)(1) unconstitutional or otherwise legally untenable. And, so, a line of “direct inquiry” concerning the constitutionality of Section 230(c) has been established. This Court “must” engage in this “constitutional challenge”/“constitutional question” exercise necessitated by the District Court’s position that Section 230(c)’s “Good Samaritan” intelligible principle/general provision does not “exist” in relation to Section 230(c)(1). And, per Rule 5.1(b) and Section 2403, this Court “*must . . .* certify to the appropriate attorney general that a statute has been questioned.” Rule 5.1(b) (emphasis added).

At odds in the parties’ competing papers throughout this litigation has been the parties’ competing views as to the whole or partial application of Section 230(c)’s “Good Samaritan” intelligible

principle. *See* n. 2, *supra*. Facebook raised a Section 230(c)(1) defense, claiming that the federal statute afforded it privilege (immunity) to do what it did to Fyk; but, Facebook could only get away with doing what it did to Fyk under the protection/privilege of the immunizing federal statute if the enactors of the federal statute (the legislature) provided an “intelligible principle” so that Facebook’s immunized content policing under Section 230(c) was not “unfettered.” Per *Jarkesy v. Securities and Exchange Commission*, 34 F.4th 446 (5th Cir. 2022), for example,<sup>5</sup> if there is no intelligible principle overarching the actions (here, Facebook’s content policing/moderation/regulation conduct) immunized by federal law (Section 230), then the law that affords the protection/immunization is unconstitutional—one’s federally authorized immunity from civil action cannot be “unfettered,” and “unfettered” is precisely the result when there is no guiding force in the form of an intelligible principle.<sup>6</sup>

Facebook and the District Court have taken the position that Facebook’s acts here (Facebook’s content policing of Fyk) are best categorized under Section

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<sup>5</sup> Fyk provided the District Court with a copy of *Jarkesy* and requested the Court’s consideration and application of same. *See* [D.E. 26-1]. Instead, the District Court ignored *Jarkesy*.

<sup>6</sup> The holding of *Jarkesy* is not a Fifth Circuit thing, it has been a Supreme Court of the United States thing for a hundred years or so. *See, e.g., J.W. Hampton, Jr. & Co. v. U.S.*, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power”).

230(c)(1)<sup>7</sup> and eligible at the threshold for the CDA immunity authorized by the legislature. And Facebook and the District Court have taken the position that *Enigma's* “Good Samaritan” intelligible principle determination is only applicable to Section 230(c)(2); *i.e.*, both Facebook and the District Court were of the opinion that the “Good Samaritan” intelligible principle did not apply to (does not “exist” with respect to) Section 230(c)(1). So, in the end, per the admissions of Facebook and the District Court, we have a federal statute on our hands (Section 230(c)(1)) that provides an entity (Facebook) with content policing immunity (exercised here against Fyk, and creating the overall ability to restrict the property and liberties of all other unwilling participants in unfettered fashion) not subject to an intelligible principle.

Per *Jarkesy*, for example, the legislature permitting a certain kind of activity (and then immunizing the actor from any and all civil liability associated with such activity) without a guiding force in the form of an intelligible principle, renders the federal statute unconstitutional because the authority being exercised by the entity would be “unfettered.” Per *Jarkesy*, “[g]overnment actions are ‘legislative’ if they have the purpose and effect of altering the legal

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<sup>7</sup> Despite, as pointed out in prior briefs, everybody else across the United States (*i.e.*, everybody else not situated in California’s court system; *e.g.*, the Fourth Circuit Court of Appeals in *Henderson*, the amicus curiae briefs of various Congressmen, state attorney generals, and the DOJ in *Gonzalez, et cetera*) is of the appropriate view that Section 230(c)(1) does not protect any conduct at all, lest Section 230(c)(1) be absurdly viewed as some sort of “super-immunity,” which, as we have also pointed out in prior briefs, would render Section 230(c)(2)(A) mere surplusage.

rights, duties and relations of persons . . . outside the legislative branch.” *Jarkesy*, 34 F.4th 446, 461. Here, the “rights, duties, and relations” between folks engaged with Facebook (here, Fyk) and Facebook were/are *prima facie* fundamentally altered vis-à-vis the CDA’s grant of civil liability immunity to Facebook. The granting of statutory immunity is a “legislative” power (both as to the immunity itself and as to the granting of same), and Congress can only grant legislative powers to another if such is accompanied by a guiding intelligible principle. *See id.* If a “legislative” power (such as statutory immunity) is bestowed by Congress and not accompanied by an intelligible principle, then such is deemed unconstitutional. *See id.* at 462 (“If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution”).

### C. Conclusion

Congress bestowed a “legislative” power on Facebook—immunity for actions taken by Facebook (Internet content policing; *i.e.*, blocking and screening offensive materials) under Section 230(c). But, unlike in *Jarkesy* where legislative power was granted by Congress to the SEC without any sort of guidance (any sort of intelligible principle), Congress saddled all of Section 230(c) with the “Good Samaritan” intelligible principle. If Section 230(c)(1) and the associated legislative power of immunity was not subject to an intelligible principle, Section 230(c)(1) would be unconstitutional per *Jarkesy*. Similarly, if Section 230(c)(2)(A) and the associated legislative power of immunity was not subject to an intelligible principle, Section 230(c)(2)(A) would be unconstitutional. Plainly, Congress’ placing the “Good Samaritan” intelligible

principle at the very start of Section 230(c) meant that the intelligible principle applies to both Section 230(c) subparts, Section 230(c)(1) and Section 230(c)(2)(A). Indeed, again, if that were not the case, the subparts would be unconstitutional.

As it stands, the District Court's dismissal predicated on Section 230(c)(1) immunity disclaims the existence of the "Good Samaritan" intelligible principle in relation to Section 230(c)(1), opining that the intelligible principle somehow only applies to Section 230(c)(2)(A). That being the current law of this case, the law of this case renders Section 230(c)(1) unconstitutional. This cannot be—the supposed nonexistence of the "Good Samaritan" intelligible principle in relation to Section 230(c)(1) gives rise to a line of "direct inquiry" that "must" be addressed in this CC. And the outcome of this CC must necessarily be one of two things: (1) the District Court's ruling (and related dismissal) that Section 230(c)(1) is not subject to the "Good Samaritan" intelligible principle of Section 230(c) is sound, and Section 230(c)(1) is accordingly unconstitutional because the immunity associated therewith constitutes legislative power sans guidance (intelligible principle), or (2) Section 230(c)(1) is constitutional because Section 230(c)(1) is subject to the "Good Samaritan" intelligible principle (just as Section 230(c)(2)(A) is), and the District Court's dismissal is unsound.

Either way, dismissal must be overturned. If Section 230(c)(1) (the section upon which Facebook has based its entire defense) is unconstitutional, the District Court's dismissal predicated on Section 230(c)(1) immunity is unviable straightaway. If Section 230(c)(1) is constitutional, the District Court's dismissal

remains unviable because Facebook's actions would have to go through a "Good

Samaritan" analysis and the Ninth Circuit (*via Enigma*) has already determined that actions underlain by anticompetitive animus (as alleged by Fyk's Verified Complaint) are not the actions of a "Good Samaritan" and accordingly not eligible for CDA immunity. Put simply, it is a Catch-22: either the District Court was wrong about the application of Section 230(c)(1) (that is, wrong that Section 230(c)(1) is somehow not subject to the Section 230(c) "Good Samaritan" intelligible principle) or the federal statute is unconstitutional. Either way, the dismissal of Fyk's case was/is untenable and must be immediately overturned.

WHEREFORE, Plaintiff, Jason Fyk, respectfully requests entry of an order (1) determining that Title 47, United States Code, Section 230(c)(1) is unconstitutional as applied in this case, and/or (2) affording Fyk any other relief the Court deems equitable, just, or proper.

Respectfully Submitted,

/s/ Jeffrey Greyber

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*Counsel for Plaintiff*

Dated: September 20, 2023

**PLAINTIFF JASON FYK'S REPLY IN  
SUPPORT OF HIS SECOND MOTION FOR  
RELIEF PURSUANT TO FED. R. CIV. P. 60(B)  
TO VACATE AND SET ASIDE  
ENTRY OF JUDGMENT [DE 63]  
(JULY 7, 2023)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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Case No. 4:18-cv-05159-JSW

Before: Hon. Jeffrey S. WHITE, Presiding Judge.

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**PLAINTIFF JASON FYK'S REPLY  
IN SUPPORT OF HIS SECOND MOTION  
FOR RELIEF PURSUANT TO FED. R.  
CIV. P. 60(B) TO VACATE AND  
SET ASIDE ENTRY OF JUDGMENT**

**I. Summary of Reply**

Fyk's Verified Complaint alleged that Facebook's removal of his commercially-successful pages was



motivated by anti-competitive animus. At the time of Fyk’s initial filing, and at the time that the District Court rendered its dismissal on the papers alone, *Enigma* had not yet been decided.<sup>1</sup> Months later, *Enigma* became the Ninth Circuit’s controlling authority, and relevant to this action, that immunity under Section 230 of the Communications Decency Act (CDA) would be unavailable to ICSPs who were alleged to have acted to block content, not as a “Good Samaritan” but instead for anti-competitive reasons. To date, not a single court has ever articulated why *Enigma* superseding the District Court’s decision does not apply to Fyk’s case. Fyk’s Rule 60(b) Motion is straightforward: it asks the Court to consider new law.

Reduced to its simplest elements, Facebook (now Meta) attempts to Vaseline lens the facts and procedural history. It (mis)directs the Court’s focus to “facts” that are immaterial. It claims that *Enigma* involved a section other than Section 230(c)(1), but that is a misdirection of Facebook’s making. Fyk’s allegations in his verified Complaint allege that Facebook’s conduct was not done in good faith, which required this Court to review the allegations through the lens of Section 230(c)(2), *viz*, whether Facebook acted as a “Good Samaritan,” which if determined at

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<sup>1</sup> *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1051 (9th Cir. 2019), cert. denied, 141 S. Ct. 13 (2020). For context, the Ninth Circuit overturned the district court’s dismissal of *Enigma*’s complaint September 12, 2019, months after this Court’s dismissal of Fyk’s complaint.

*Enigma*, *supra*, 946 F.3d at 1051.

trial to be the case—after discovery—would have entitled Facebook to immunity.

Facebook’s admitted business strategy is to tortiously interfere with users’ ability to make money. For example, Tess Lyons-Laing, Facebook’s Product Manager said, “. . . so going after actors who repeatedly share content [like Fyk’s], and reducing their distribution, removing their ability to monetize, removing their ability to advertise is part of our strategy.”<sup>2</sup> She continued: “There is pressure on content from public pages . . . it’s not as if people expanded time they’re spending on Facebook, so more content, *displaces* some of the content from publishers as well as from other pages.” Facebook’s paid advertising content must “displace” somebody else’s content in the News-Feed, like Fyk’s.<sup>3</sup>

To restrict its own competition, Facebook deliberately interferes with user’s ability to make money, and created ambiguous terms (*e.g.*, spam, misinformation, problematic content) to justify restricting anyone, for any reason, to displace their content, while hiding behind Section 230’s protections:

Since 2016, we [*i.e.*, Facebook] have used a strategy called “remove, reduce, and inform” to manage *problematic content* on Facebook. This involves removing content that violates our Community Standards, reducing the spread of problematic content *that does not violate our standards*, and informing people [*i.e.*, displacing content] with additional

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<sup>2</sup> <https://www.youtube.com/watch?v=X3LxpEej7gQ>

<sup>3</sup> <https://www.youtube.com/watch?v=DEVZeNESiqw>

information [e.g., paid advertising content] so they can choose what to click, read or share.<sup>4</sup>

Facebook's whole business model is anticompetitive, it is to remove, reduce, and replace "problematic" content (e.g., competitive content like Fyk's) and interfere with its users' ability to make money if the users do not opt in to Facebook's commercial (advertising) program. Fyk was specifically reduced, removed, and then replaced by Facebook's advertising content (i.e., content development). In other context without the cloak of Section 230 immunity, this would be a classic tortious interference claim. Instead, here, Facebook tortiously interfered with Fyk's ability to make money, using fraudulent-bad faith terms to "justify" displacing its own competitor's content (like Fyk's) with Facebook's content (i.e., developed advertising content). Facebook is a direct competitor to Fyk who is a dominant party controlling both sides of the field. This case is not about failing to remove content, it is about Facebook's conscious actions and business decisions to enrich itself.

Facebook is not the victim here, Fyk is the victim here. This Court and the Ninth Circuit Court have, and still have, an affirmative duty to protect Fyk's civil liberties.<sup>5</sup>

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<sup>4</sup> <https://newsroom.fb.com/news/2019/04/people-publishers-the-community/>

<sup>5</sup> Section 230 creates a "special relationship" between private and state actors. That "special relationship" is an "exception to the general principle that government actors are not responsible for private acts [of harm]" Section 230 pre-authorizes the involuntary restraint of Fyk's liberties, and property (a regulatory

## II. Legal Analysis

### A. Legal Standard

In its opposition, Facebook ignores and never addresses a single authority cited by Fyk for the legal standard in the Ninth Circuit for Rule 60(b) motions. Specifically, Fyk cited Ninth Circuit cases<sup>6</sup> for the Ninth Circuit’s well-established “liberal construction to 60(b) [motions].” Fyk also cited U.S. Supreme Court cases that confirm that a district court always maintains inherent authority to modify judgments in

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taking). In *DeShaney v. Winnebago County*, the Supreme Court rejected a Substantive Due Process claim by a victim of severe child abuse that the State had *failed to protect him* from his father. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 203 (1989). The Court held that the Constitution did not create affirmative duties on the State to prevent harm. However, the Court articulated important *exceptions to that rule*, exceptions that were not applicable in that case but could be in others. Serkin, Note, *Passive Takings: The State’s Affirmative Duty to Protect Property* at 376 (discussing *DeShaney*). (<https://michiganlawreview.org/journal/passive-takings-the-states-affirmative-duty-to-protect-property/>). Specifically, the *DeShaney* Court held that *the government does have an affirmative obligation to protect when it has rendered someone especially susceptible to harm or has disabled self-help*. See *DeShaney*, 489 U.S. at 200. Section 230 rendered Fyk “especially susceptible to harm,” therefore, the government has an *affirmative obligation* to protect Fyk’s civil liberties.

<sup>6</sup> Motion, Dkt. 61, pp. 8 and 9 of 27, citing *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir. 1971); *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990); *Kirkbride v. Continental Cas. Co.*, 933 F.2d 729, 732 (9th Cir. 1991); *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1255-56 (9th Cir. 1999); *Hook v. Arizona*, 120 F.3d 921, 924 (9th Cir. 1997).

light of changes in the law.<sup>7</sup> Facebook never addresses those cases either.

Instead, Facebook cites *Lowry Develop.*, a Fifth Circuit case, for the proposition that Rule 60(b)(5) does not authorize relief from a judgment on the ground that the law applied by the court was subsequently overruled or declared erroneous, and cites *Marzaiti*, an inapposite Ninth Circuit case, selectively quoting from an Eleventh Circuit case to assert that a judgment has “prospective application” “only if ‘it is executory or involves the supervision of changing conduct or conditions.’”

Put simply, Rule 60(b)(5) allows reconsideration of judgments, where applying it prospectively is “no longer equitable.” The relevant inquiry then, is whether the judgment of dismissal is equitable, which if permitted to stand, would allow Facebook to dismiss Fyk’s action on the pleadings alone, where, as here, Fyk has pled anti-competitive animus—and *Enigma* subsequently held that ICSPs are not afforded immunity where the ICSPs’ conduct is alleged to be inconsistent with Section 230(c)(2)’s requirement of acting as a Good Samaritan.

## B. The New Case Authorities

Facebook is a master of manipulating *context*. Facebook continues its sleight of hand tactics—again going outside of the pleadings, and trolling Fyk’s publications that are not on Facebook or before this

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<sup>7</sup> Motion, Dkt. 61, at p. 9, citing, *System Federation v. Wright*, 364 U.S. 642, 647 (1961). *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (citing *System Federation*, 364 U.S. at 647, quoting *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932).

Court. In its original Rule 12(b)(6) motion, Facebook suggested that Fyk’s pages were devoted to public urination—which was and is false—a fact that this Court accepted as truth in its dismissal—further harming Fyk. In this motion, Facebook falsely characterizes Fyk’s Twitter post regarding this instant motion as “gleeful.” In reality, Fyk is exhausted—he is only trying to get a day in court—the only reasonable interpretation of Fyk’s post (*i.e.*, in its full context), is that there is absolutely nothing “gleeful” about having to endure six years of litigation just to protect his civil liberties and loss of commercial property.<sup>8</sup>

Facebook asserts that *Henderson* is inapplicable because the Fourth Circuit noted that it was explicitly not addressing the applicability of Section 230(c)(1) in situations where, as is the case here, a plaintiff seeks to impose liability based on a defendant’s decision not to publish certain content. Opp. at 5: 14-17. However, Facebook’s assertion is misleading to the extent that it suggests that *Henderson* did not address 230(c)(1) as it relates to Fyk’s case. Fyk’s case is not, and was never, about “decision[s] not to publish certain content.” Fyk’s case was about Facebook’s illegal business activities. Fyk’s Verified Complaint (filed in August 2018) asked this Court “. . . whether Facebook can, without consequence, engage in brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent [business]

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<sup>8</sup> The full post is: “It’s not whether we are right or wrong anymore, it’s a matter of whether the courts will do the right thing or not. 230(c)(1) is not absurd, unlimited, unconstitutional “super immunity.” Round 3 begins!” <https://twitter.com/JasonFyk/status/1670392640020393984>

practices . . . .” [D.E. 1] at 1. *Henderson* was also about business practices, and *also* applied to 230(c)(1).

Rather than break out the white board and red string to understand how they fit together, we accept on appeal Plaintiffs’ allegation that all Defendants are alter egos jointly responsible for any FCRA *liability arising from the business activities conducted on PublicData.com*. So we refer to Defendants collectively as “Public Data.” *Henderson et al. v. The Source for Public Data L.P. et al.*, 53 F.4th 110, 117 (4th Cir. 2022).

Facebook’s assertion is contextually misleading. Neither Fyk’s case, nor Henderson’s case is about “decisions not to publish certain content.” Henderson’s case was about “liability arising from the business activities conducted on PublicData.com,” and Fyk’s case was about anticompetitive business practices conducted on Facebook.com. The cases are virtually identical, and both applied 230(c)(1), but resulted in diametrically opposite decisions, representing a substantial change in the application of 230(c)(1) that this Court cannot and should not ignore, especially because of its affirmative duty to protect Fyk’s civil liberties.

Facebook also posits:

“ . . . as another court in this District has already noted, “*the Fourth Circuit’s narrow construction of Section 230(c)(1) appears to be at odds with Ninth Circuit decisions* indicating that the scope of the statute’s protection is much broader.” *Divino Grp. LLC v. Google LLC*, 2023 WL 218966, at 17 *Id.* at 1093 n.4.18 \*2 (N.D. Cal. Jan. 17, 2023).

Facebook’s citation to a district court decision, which of course is not binding here, to assert that when two Circuit Courts are “at odds,” the law should somehow be interpreted even broader still. That conclusion is spurious and illogical. What it “indicat[es]” is that there is a disparate application of the law that needs to be reconciled. Since day one, Fyk has said 230(c)(1) is applied too broadly, the same conclusion reached by the *Henderson* court. The fact that the application of an immunity conferred upon private commercial actors under a federal statute (CDA) as applied to millions if not trillions of Internet and social media users, irrespective of where those users reside, is *different* based on the jurisdiction of where a litigant initiates his/her/its claim is problematic and untenable. “Different protections within different jurisdictions, applying the same statute, resulting in different outcomes, is juridically intolerable.” The application of Section 230(c)(1) cannot be “at odds” (*i.e.*, inconsistent) amongst jurisdictions.

This Court and the Ninth Circuit Court relied on policy and purpose to apply 230(c)(1) in an unprecedentedly broad way (*i.e.*, unconstitutionally as applied), whereas the Fourth Circuit relied on a *de novo* reading of the text of the statute to apply 230(c)(1) narrowly (*i.e.*, as written in the legislation). For example, this Court used the textually inaccurate *Barnes* 230(c)(1) immunity test, and the Fourth Circuit used a new 230(c)(1) test (creating new law) that is textually accurate. That represent a substantial change in the law that this Court cannot ignore. It is a simple question, should this Court apply the law as written? Section 230(c)(1)’s application cannot be inexplicably “at odds”—broad in some cases and narrow in others—



as applied to Internet users depending on where they access or post content. As stated in Fyk’s motion: “just because the content provision ‘line’ is difficult to draw, it does not mean ‘the tech industry gets a pass’ for all its conduct.”

Not only does 230(c)(1) does not protect “all publication decisions,” it does not protect any conscious publication decisions. That shift in law is extraordinary!

### **C. Facebook’s Timeliness Arguments Fail**

Facebook cites Fyk’s authorities evidencing the timeliness of the instant motion but does nothing to distinguish the factual circumstances here, and instead mealy-mouthed asserts without analysis, that while the *Enigma* case was decided by the Ninth Circuit and appealed to the U.S. Supreme Court, that “Mr. Fyk could have but failed to act sooner than he did.” Facebook offers no countervailing authorities and certainly no facts to refute that the nine months while Fyk filed various appeals and raised Good Samaritan arguments, as well as seeking to have *Enigma*’s Ninth Circuit decision applied to his case, is within the time frame—eight months to two years—that other cases have been reconsidered.

### **III. Conclusion**

It is extraordinary that dozens of representatives of the United States have taken the time to weigh in extensively on Section 230(c)(1)’s proper application because courts have been consistently, inconsistent. Senator Ted Cruz and over a dozen other Congressman said, “*230(c)(1) does not protect any conduct at all.*” Attorney General Paxton and over a dozen other Attorneys General said: “The statutory history of

Section 230 confirms the congressional intent to encourage Internet platforms to remove pornography and similar content, *not to grant platforms government-like immunity for their own conduct.*” And even the United States of America itself confirms, 230(c)(1) does not protect a website from “*allegations that the defendant acted with actual or constructive knowledge.*”<sup>9</sup> Here, Fyk alleges that Facebook acted with *actual knowledge* to eliminate Fyk as its competitor (evidenced by Fakebook’s actions to solicit a new owner of Fyk’s property), to enrich itself, by restricting and re-publishing Fyk’s materials predicated on the removal of Fyk. Facebook conspired with Fyk’s straight-line competitor to force Fyk out of business.

Fyk’s motion simply asks the Court to review its ruling against *Enigma* and the subsequent progeny of Section 230(c)(1) and (c)(2) cases (cited in Fyk’s motion).

Respectfully submitted,

POLI, MOON & ZANE, PLLC

By: /s/ Jeffrey L. Greyber

Attorneys for Plaintiff

JASON FYK

Dated: July 7, 2023

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<sup>9</sup> *Gonzales et al. v. Google LLC*, U.S. Supreme Court, Case No. 21-1333, Brief for the United States as Amicus Curiae at p. 18.

**META PLATFORMS, INC. (F/K/A FACEBOOK,  
INC.) RESPONSE TO PLAINTIFF JASON  
FYK'S MOTION FOR RELIEF PURSUANT TO  
FED. R. CIV. P. 60(B) TO VACATE AND  
SET ASIDE ENTRY OF JUDGMENT [DE 62]  
(JUNE 30, 2023)**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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JASON FYK,

*Plaintiff,*

v.

FACEBOOK, INC.,

*Defendant.*

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Case No. 4:18-cv-05159-JSW

Date Filed: August 22, 2018

Date Closed: June 18, 2019

Dept.: Courtroom 5

Before: Hon. Jeffrey S. WHITE, U.S. District Judge.

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**META PLATFORMS, INC. (F/K/A FACEBOOK,  
INC.) RESPONSE TO PLAINTIFF JASON  
FYK'S MOTION FOR RELIEF PURSUANT TO  
FED. R. CIV. P. 60(B) TO VACATE AND SET  
ASIDE ENTRY OF JUDGMENT**

## I. Introduction

For six years, Jason Fyk has burdened the Federal courts with frivolous lawsuits stemming from an alleged decision by Facebook, Inc. (now known as Meta Platforms, Inc.) in 2016 to remove some of Mr. Fyk’s Facebook pages. This Court, the United States District Court for the District of Columbia, the Ninth Circuit Court of Appeals, and the United States Supreme Court have all heard—and *denied*—Mr. Fyk’s numerous requests for relief. No matter, Mr. Fyk continues apace and indeed appears to revel in generating a stream of baseless legal filings.<sup>1</sup> Before this Court is Mr. Fyk’s latest—a *second* Rule 60(b) motion requesting the Court vacate and set aside its June 2019 dismissal order on the purported basis that there has been an intervening change in the controlling law.<sup>2</sup>

Mr. Fyk’s motion—like all his prior filings—is meritless. The law governing 47 U.S.C. § 230(c)(1) today remains the same as it did when the Court dismissed Mr. Fyk’s complaint in 2019 and when it denied his last Rule 60(b) motion in 2021. In fact, notwithstanding the fact the United States Supreme Court considered changing the governing interpretation of 47 U.S.C. § 230(c)(1) in *Gonzalez v. Google*, it elected *not* to do so and left the lower court jurisprudence undisturbed. 143 S. Ct. 1191, 1192 (2023) (“We therefore decline to address the application of § 230 to a

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<sup>1</sup> He gleefully exclaimed “Round 3 begins!” to his Twitter followers two days after filing his most recent motion. *See* <https://twitter.com/jasonfyk?lang=en> (post dated June 18, 2023).

<sup>2</sup> Dkt. 61.

complaint that appears to state little, if any, plausible claim for relief.”).

Defendant Meta respectfully requests this Court deny Mr. Fyk’s Rule 60(b) motion.

## II. Procedural History

Mr. Fyk filed his lawsuit against Meta (then known as Facebook, Inc.) in 2018. Meta filed a motion to dismiss, which this Court granted without leave to amend in June 2019.<sup>3</sup> The Court held that Mr. Fyk’s claims are barred by Section 230(c)(1) of the Communications Decency Act (“Section 230”). The Ninth Circuit affirmed that Order on June 12, 2020.<sup>4</sup> Undeterred, Mr. Fyk filed a petition for hearing *en banc*, which was denied.<sup>5</sup> In 2020, Mr. Fyk sought review at the Supreme Court. Mr. Fyk’s petition was denied.<sup>6</sup>

The following year, Mr. Fyk returned to this Court and in March 2021 filed a motion pursuant to Rule 60(b) to vacate the District Court’s 2019 Order. Mr. Fyk asserted that “new legal precedent” entitled him to relief, namely the Ninth Circuit’s decision in *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*,<sup>7</sup> and a statement by Justice Clarence Thomas in

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<sup>3</sup> See Dkts. 38, 46-2 (“the Order”) (reported at *Fyk v. Facebook, Inc.*, 2019 WL 11288576, at \*3 (N.D. Cal. June 18, 2019)).

<sup>4</sup> Dkt. 46-3 (reported at *Fyk v. Facebook, Inc.*, 808 F. App’x 597 (9th Cir. 2020))

<sup>5</sup> *Fyk v. Facebook, Inc.*, Case No. 19-16232, Dkt. 42 (9th Cir. July 21, 2020)

<sup>6</sup> *Fyk v. Facebook, Inc.*, 141 S. Ct. 1067 (2021) (*cert. denied*).

<sup>7</sup> 946 F.3d 1040 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 13 (2020)

the Supreme Court’s denial of *certiorari* in the *Enigma* matter. That motion was denied after this Court determined that *Enigma* involved a section of the Communications Decency Act other than § 230 (c)(1),<sup>8</sup> Justice Thomas’s statement was not binding authority, and Mr. Fyk failed to show any “extraordinary circumstances” that would entitle him to relief under Rule 60(b).<sup>9</sup> The Ninth Circuit affirmed that order last October, and the Supreme Court again denied *certiorari* in April of this year.<sup>10</sup>

Meanwhile, in May of 2022, Mr. Fyk launched yet another offensive. Unsuccessful in his prior suits against Meta, he filed suit against the United States asserting that Section 230 is unconstitutional.<sup>11</sup> The United States moved to dismiss for lack of standing. The United States District Court for the District of Columbia granted that motion on June 9, 2023.<sup>12</sup>

One week later, Mr. Fyk ran back to this Courthouse and now, for a second time, requests this Court vacate its original order dismissing his suit and cites six non-binding, inapplicable decisions. As explained below, none of these decisions marks a

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<sup>8</sup> 47 U.S.C. § 230(c)(2) and not 47 U.S.C. § 230(c)(1).

<sup>9</sup> *Fyk v. Facebook, Inc.*, 2021 WL 5764249, at \*1 (N.D. Cal. Nov. 1, 2021) (denying motion to vacate).

<sup>10</sup> *Fyk v. Facebook, Inc.*, 2022 WL 10964766 (9th Cir. Oct. 19, 2022), *cert. denied*, 2023 WL 2959399 (U.S. Apr. 17, 2023).

<sup>11</sup> *Fyk v. United States of America*, Case No. 1:22-cv-01144, Dkt. 2 (D. D.C. May 2, 2022)

<sup>12</sup> *Fyk. v. United States of America*, 2023 WL 3933719 (D. D.C. June 9, 2023).

change in the law that would justify vacating or setting aside this Court's judgement in favor of Meta.

### III. Legal Standard

Plaintiff moves for relief under Rules 60(b)(5) and 60(b)(6). They provide:

Rule 60(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party of its legal representative from a final judgment, order, or proceeding for the following reasons:

- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief. Fed. R. Civ. Proc. §§ 60(b)(5), 60(b)(6).

“Rule 60(b)(5) does not authorize relief from a judgment on the ground that the *law* applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding” *Lowry Develop., L.L.C. v. Groves & Assocs. Ins., Inc.*, 690 F.3d 382, 386 (5th Cir. 2012). A judgment has “prospective application” only if “it is executory or involves the supervision of changing conduct or conditions.” *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995) (internal quotes omitted). A court dismissal of claims is not executory, nor does it require ongoing supervision. “That plaintiff remains bound by the dismissal is not a ‘prospective effect’ within the meaning of [R]ule 60(b)(5) any more than

if plaintiff were continuing to feel the effects of a money judgment against him.” *Id.* (quoting *Gibbs v. Maxwell House*, 738 F.2d 1153, 1155–56 (11th Cir. 1984).

As for Rule 60(b)(6), its application is limited to “extraordinary circumstances” given the “strong public interest in [the] timeliness and finality of judgments.” *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009); *Anderson v. Arnold*, 2017 WL 977590, at \*2 (E.D. Cal. Mar. 14, 2017) (“The ‘extraordinary circumstances’ standard for assessing a Rule 60(b)(6) motion is intended to avoid a mere ‘second bite at the apple.’”).

#### IV. Argument

Plaintiff rests his Rule 60(b) motion on the supposed issuance of “[n]ew law that directly impacts the outcome of this case[.]”<sup>13</sup> More specifically, Plaintiff cites six cases: three appellate decisions, two district court decisions, and a Supreme Court *certiorari* denial. As noted above, even “new law[.]” by itself is not necessarily sufficient to merit relief under Rule 60(b). But as explained below, the Court can sidestep that question because none of the cases Mr. Fyk cites breaks new ground. None of these decisions altered the applicable legal framework for interpreting Section 230(c)(1) and consequently none provides any basis for disturbing the Court’s June 2019 order dismissing Mr. Fyk’s case. In any event, even if these decisions did create new law, Mr. Fyk’s motion should be denied because it is untimely under Rule 60(c).

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<sup>13</sup> Dkt. 61 at 25.



### **A. Court of Appeals Decisions**

Plaintiff cites three appeals court decisions, none of which is applicable to the present matter.

#### **1. *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021)**

Plaintiff cites the Ninth Circuit’s May 2021 decision in *Lemmon v. Snap* and urges this court to “pay attention to it”<sup>14</sup> without ever explaining the holding or its application to this matter. The *Lemmon* decision is inapplicable. In *Lemmon*, plaintiffs sued Snap, maker of the Snapchat mobile application, for claims arising from a feature that Snapchat designed called the “Speed Filter,” which enabled users to record their driving speed and post it on their Snapchat account. The Ninth Circuit held the filter and Snap’s alleged system of incentivizing users to use the filter worked together to encourage Snapchat users to drive at excessive speeds and then post photos or videos.<sup>15</sup> The Ninth Circuit made clear that the facts in *Lemmon* did not involve Snap’s role in “editing, monitoring, or removing of the content that its users generate through Snapchat.”<sup>16</sup> In *Lemmon*, the harm could occur even if the photo or video was not shared because the allegation was that individuals were incentivized by the filter to drive at unsafe speeds. *Id.* The Ninth Circuit held that if the claims had sought to hold Snap liable for publishing user content, those

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<sup>14</sup> *Id.* at 5 n. 6.

<sup>15</sup> *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091–92 (9th Cir. 2021).

<sup>16</sup> *Id.* at 1092.

claims would fall outside its decision and would be barred by Section 230(c)(1).<sup>17</sup>

By contrast, here the Court held in its June 2019 order that Mr. Fyk’s claims rested upon the precise sort of claim that the Ninth Circuit held it was *not* addressing and that would be barred by Section 230—decisions regarding what content to publish.<sup>18</sup>

**2. *Henderson v. The Source for Public Data LP*, 53 F. 4th 110 (4th Cir. 2022)**

Plaintiff cites the Fourth Circuit’s November 22, 2022 decision in *Henderson v. The Source for Public Data*. Notably, Plaintiff brought this decision to the Ninth Circuit’s attention last November, but the Ninth Circuit was unmoved to offer any relief.<sup>19</sup>

In *Henderson*, the Fourth Circuit held that companies that collected and sold public records could be liable under the Fair Credit Reporting Act and not avail themselves of protections under Section 230 because they were not mere forums for uploading information but were information content providers themselves. Mr. Fyk suggests that in *Henderson* the Fourth Circuit “vacated” its earlier decision in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). Not true—the Fourth Circuit panel in *Henderson* did not overrule *Zeran*. Regardless, *Henderson* is inapplicable

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<sup>17</sup> *Id.* at 1093 n.4.

<sup>18</sup> See Dkt. 38 at 4 (“Here, all three of Plaintiff’s claims arise from the allegations that Facebook removed or moderated his pages.”).

<sup>19</sup> *Fyk v. Facebook, Inc.*, Case No. 21-16997, Dkt. 38-1 (9th Cir. Nov. 7, 2022).

because the court noted that it was explicitly *not* addressing the applicability of Section 230(c)(1) in situations where, as is the case here, a plaintiff seeks to impose liability based on a defendant’s decision not to publish certain content.<sup>20</sup>

Moreover, the Fourth Circuit’s decision in *Henderson* is not binding precedent and, as another court in this District has already noted, “the Fourth Circuit’s narrow construction of Section 230(c)(1) appears to be at odds with Ninth Circuit decisions indicating that the scope of the statute’s protection is much broader.” *Divino Grp. LLC v. Google LLC*, 2023 WL 218966, at \*2 (N.D. Cal. Jan. 17, 2023).<sup>21</sup> Because Ninth Circuit decisions, including *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009)—which this Court cited in its June 2019 order—remain controlling precedent, nothing in *Henderson* constitutes a change in the law that binds this Court. Consequently, *Henderson* does not mark a change in the law that would entitle Mr. Fyk to seek Rule 60(b) relief.

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<sup>20</sup> *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 125 n. 18 (4th Cir. 2022).

<sup>21</sup> *See also Bride v. Snap Inc.*, 2023 WL 2016927, at \*7 n. 6 (C.D. Cal. Jan. 10, 2023) (“To the extent the Fourth Circuit’s decision in *Henderson v. The Source of Public Data*, 53 F.4th 110, 122 (4th Cir. 2022), in which the Fourth Circuit Court of Appeal reinterpreted its prior conception of “publication” under § 230(c)(1) in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997)), is implicated here, the court finds it unpersuasive in light of broader view adopted by the Ninth Circuit, *see, e.g., [Fair Hous. Council of San Fernando Valley v.] Roommates*, 521 F.3d [1157,] at 1170-71[(9th Cir. 2008)]; *see also Monsarrat v. Newman*, 28 F.4th 314, 320 (1st Cir. 2022).”).

**3. *Jarkesy v. Sec. & Exch. Comm’n*, 34 F.4th 446 (5th Cir. 2022)**

Plaintiff next cites the Fifth Circuit’s decision in *Jarkesy v. Sec. & Exch. Comm’n*. But that case is inapplicable. It concerns the constitutionality of the SEC’s adjudication of fraud claims via administrative proceedings. But no administrative agency is at issue in Mr. Fyk’s claim and, more importantly, the Fifth Circuit issued no ruling concerning Section 230.

**B. District Court Decisions**

Mr. Fyk cites two cases from the Northern District—*Rumble Inc. v. Google, LLC*, 2022 WL 3018062 (N.D. Cal. July 29, 2022) and *DZ Reserve v. Meta Platforms, Inc.*, 2022 WL 912890 (N.D. Cal. Mar. 29, 2022). The former is a Sherman Act antitrust matter. The latter is a class action alleging Meta committed various torts and UCL violations by allegedly providing its advertisers inaccurate metrics regarding the potential audience for their advertisements. Notably, neither case broke new ground interpreting Section 230. In fact, Mr. Fyk does not identify *any* orders from those cases that even address Section 230. Consequently, neither provides any basis for the Court to vacate its June 2019 order.

**C. Certiorari Denial**

Finally, Mr. Fyk cites the Supreme Court’s decision denying *certiorari* in *Doe v. Facebook, Inc.*, 142 S. Ct. 1087 (2022). There, Justice Thomas wrote that he concurred with the denial but suggested that “the proper scope of immunity under § 230” should be addressed in a later case. *Id.* at 1089. Justice Thomas made no new pronouncement about Section 230 nor

could he; a statement by a single Justice in a *certiorari* denial does not create new law, much less create binding precedent for this Court. *Maryland v. Wilson*, 519 U.S. 408, 412–13 (1997) (“We agree with respondent that the former statement was dictum, and the latter was contained in a concurrence, so that neither constitutes binding precedent.”). Notably, following the *certiorari* denial in *Doe*, the Supreme Court did invite briefing and oral argument on the scope of Section 230 in *Gonzalez v. Google*. But the Court ultimately elected not to disturb any lower court decisions interpreting Section 230. 143 S. Ct. at 1192. In short, *Doe* provides Mr. Fyk no relief.<sup>22</sup>

**D. Mr. Fyk’s Rule 60(b) motion is untimely.**

Although none of the cases Mr. Fyk cites created new law or provides any other basis for this Court to disturb its prior dismissal, even if they did, the motion should be denied for another reason: it is untimely. Under Rule 60(c), a motion for relief under Rule 60(b) “must be made within a reasonable time.” Notably, the Ninth Circuit last fall affirmed this Court’s first Rule 60(b) denial because Mr. Fyk acted too late in raising a challenge based on the *Enigma Software Group* case. *See Fyk*, 2022 WL 10964766, at \*2 (affirming this Court’s prior Rule 60(b) dismissal because Mr. Fyk untimely raised the *Enigma Software Group* case *nine months* after the decision was issued). The court decisions Mr. Fyk relies upon were decided

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<sup>22</sup> *Cf. Maryland v. Wilson*, 519 U.S. 408, 412–13 (1997) (holding that neither dictum statements nor statements in a concurrence constitute precedent).

eight months<sup>23</sup> to two years ago.<sup>24</sup> Mr. Fyk could have but failed to act sooner than he did.

## V. Conclusion

Mr. Fyk’s meritless Rule 60(b) motion—now his second—should suffer the same fate as his first: denial. Given Mr. Fyk’s litigation history, Defendant is understandably concerned that denial of his motion will inevitably result in an appeal to a Ninth Circuit panel, followed by a request for rehearing *en banc* by the Ninth Circuit, followed by a *certiorari* petition to the United States Supreme Court, followed by return to this Court for a third Rule 60(b) motion based upon any new cases addressing Section 230 that issue in the interim. Federal court can “regulate the activities of abusive litigants by imposing carefully tailored restrictions . . . under appropriate circumstances.” *De Long v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990). “Flagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants.” *Id.* at 1148. Should the Court not use its inherent powers to control its docket and Mr. Fyk’s ability to clog that docket with frivolous filings, Defendant respectfully requests the Court remind Mr. Fyk—who is represented by counsel—of the stringent requirements of Rule 11(b) and its requirement that no filing be “presented for an improper purpose.”

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<sup>23</sup> *Henderson v. The Source for Public Data, L.P.*, 53 F. 4th 110 (4th Cir. 2022).

<sup>24</sup> *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021).

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