No. ________

In the Supreme Court of the United States

JASON FYK,

Petitioner,

v.

FACEBOOK, INC.,

Respondent.

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

APPENDIX VOLUME 2
App.417a – App.920a

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SECOND MOTION FOR RELIEF PURSUANT TO FED. R. CIV. P. 60(B) TO VACATE AND SET ASIDE ENTRY OF JUDGMENT [DE 61] (JUNE 16, 2023)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:18-cv-05159-JSW

LOCATION: OAKLAND, CT. 5, FL. 2

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

SECOND MOTION FOR RELIEF PURSUANT TO FED.R.CIV.P. 60(B) TO VACATE AND SET ASIDE ENTRY OF JUDGMENT

Plaintiff, Jason Fyk ("Fyk"), moves this Court to reconsider and reverse its June 2019 dismissal of the Verified Complaint [D.E. 1] following Fyk's appeal to the Ninth Circuit (twice) and Supreme Court of the United States ("SCOTUS") (twice).

I. Preliminary Statement

Fyk returns to this Court on his second motion for reconsideration shortly after SCOTUS denied his petition for writ of certiorari in mid-April 2023 and immediately after SCOTUS rendered its decision declining to address CDA § 230[1] in the *Gonzalez v. Google, LLC*, S. Ct. No. 21-1333.

II. Relevant Procedural History and Factual Background

On June 18, 2019, this Court dismissed on written motion, *see* [D.E. 38], the August 22, 2018, Verified Complaint sans hearing and entered judgment of equal date. *See* [D.E. 39]. One day later, Fyk commenced an appeal with the Ninth Circuit. On June 12, 2020, the Ninth Circuit affirmed dismissal. *See* [D.E. 42]. Fyk promptly moved for rehearing *en banc*, which was denied on July 21, 2020. On November 2, 2020, Fyk petitioned SCOTUS for a writ of certiorari, divesting the California courts of jurisdiction during the pendency of the SCOTUS petition. On January 11, 2021, SCOTUS denied writ. On March 22, 2021, Fyk timely filed his first 60(b) motion with this Court. *See* [D.E. 46].

On November 1, 2021, this Court denied Fyk's reconsideration motion. *See* [D.E. 51]. Fyk accordingly timely filed another appeal with the Ninth Circuit, with an opening brief filing date of March 3, 2022. By October 19, 2022 memorandum [D.E. 54], the Ninth Circuit stated that Fyk's 60(b) motion filed with this Court was tardy. On November 2, 2022, Fyk timely moved the Ninth Circuit for reconsideration/rehearing,

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[1] *Gonzalez* oral argument was on February 21, 2023, but SCOTUS' recent *Gonalez* decision did not address § 230 immunity.

see [D.E. 37], and the Ninth Circuit denied same, culminating with a November 17, 2022, mandate. *See* [D.E. 40]. On February 7, 2023, therefore, Fyk petitioned SCOTUS (again) for a writ of certiorari. On April 17, 2023, SCOTUS denied Fyk's petition again, sans explanation. This second motion for reconsideration follows, and factual background is now discussed.

Fyk is "the publisher" of Where's The Fun ("WTF") Magazine. Fyk used Facebook's purportedly "free" "platform for all ideas" (Mark Zuckerberg) to publish humorous content. Fyk's business pages, at one time, had more than 25,000,000 documented followers. Fyk's large online presence resulted in his pages becoming income generating advertising and marketing business tools, generating hundreds of thousands of dollars a month (*i.e.,* Fyk's real intellectual or physical property).

Facebook began selling the same reach and distribution "Newsfeed" space to Fyk's straight-line advertising competitors, space previously offered for free. In so doing, Facebook itself became a direct advertising competitor (*i.e.,* a dominant party partnered with Fyk's straight-line competitors; *i.e.,* in a group boycott) of all interactive computer service ("ICS") users, like Fyk. This business model, "create[d] a misalignment of interests between [Facebook] and people who use [Facebook's] services." This pecuniary "misalignment" incentivizes(d) Facebook to tortiously restrict lower valued ICS users, in favor of developing Facebook's higher valued advertising "partners" who benefit Facebook.

In October 2016, after reducing Fyk's competitive reach to almost nothing (for Facebook's own financial interests), Facebook deactivated several of Fyk's pages

/businesses, totaling over 14,000,000 fans cumulatively, under the *fraudulent* aegis of "otherwise objectionable"–purportedly improper content restriction (factually applicable to § 230(c)(2)(A) protection, if any, certainly not § 230(c)(1)).

In February/March 2017, Fyk contacted a prior business colleague (and now a straight-line competitor) who was more favored by Facebook, having paid Facebook over $22,000,000.00 in advertised content development. Fyk's competitor was offered exclusive service(s) and community standards (*i.e.,* "rules") exemptions unavailable to Fyk. Fyk asked his competitor to see if their Facebook representative would restore Fyk's deleted pages for Fyk. Fyk's competitor approached Facebook with Fyk's request, and Facebook declined the request unless Fyk's competitor would take over ownership (*i.e.,* Facebook solicited a new owner) of Fyk's information/property.

Facing no equitable solution, Fyk fire sold/transferred his (previously published) property to his competitor at an extremely reduced amount. Thereafter, Facebook "re-published" Fyk's information (*i.e.,* Facebook substantively contributed to the conscious alteration/development of Fyk's information) for Fyk's competitor and not for Fyk.[2]

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[2] To put substantive contribution in the context of information development (at issue in *Gonzalez v. Google*), we use the extreme example of *Henderson v. Public Data* to analogize Fyk's situation:

> An extreme example helps illustrate this point. Take a writer of a ransom note, for example, who cuts letters out of a magazine [developing] to list his demands [intent]. That writer might be said to be 'altering' content [knowingly/consciously selecting

Fyk is undeniably "the publisher" and speaker of his information, and Facebook undeniably contributed substantively to the harms caused to Fyk. "But for" Facebook's conduct, the illegalities espoused in the Verified Complaint would not have occurred. Here, Facebook's anti-competitive actions to de-publish and republish the exact same content (*i.e.,* a change in function, not form) is *prima facie* evidence there was never any improper content legitimately at issue.[3] Fyk's case was never about treating Facebook as the original author or speaker of Fyk's purportedly improper content, it has always been about Facebook's own unlawful conduct.

III. Introduction–In Reality Rather Than Judicial Misconception

Now realized by at least the Fourth Circuit, § 230(c)(1) of the CDA is not a license to do whatever

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> letters]. Yet, the note's writer [Facebook] is hardly acting as an 'editor' of [Fyk's] magazine [information]. Instead, [Facebook] has *substantively changed* [Fyk's] magazine's content and transformed it from benign [less valued/unpublished] information into [higher value/republished] information [for a different purpose] . . .

Henderson, et al. v. Source for Public Data, L.P. Data at footnote 25

[3] A claim treats the defendant "'as the publisher or speaker of any information' when it (1) makes the defendant liable for publishing certain information to third-parties [not for third-parties], and (2) seeks to impose liability based on that information's *improper content*." *Henderson* at 120-121; *see also id.* at 122-124 (*The Source for Public Data, L.P., et al.*, 53 F.4th 110, n.5 (4th Cir. 2022) (emphasis added) regarding "but for" causation).

one wants online, because it does not provide any immunity, for any conduct, at all. Page one of Fyk's Verified Complaint makes clear: "This case asks whether Facebook can, without consequence, engage in brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent practices" (*i.e., conscious conduct*). [D.E. 1] at ¶ 1.

"Intent generally refers to the mental objective behind an action. The concept of intent is often the focal point of Criminal Law and is generally shown by circumstantial evidence such as the acts or *knowledge* of the defendant."[4] Facebook had both knowledge and intent behind what it was doing to Fyk. Intent and knowledge play key roles in understanding the correct application of § 230 protection.

The gravamen of Fyk's § 230(c)(1) dismissal rested on this Court's erroneous determination "if the duty that the plaintiff alleges was violated by defendant derives from the defendant's status or *conduct* as *a 'published or speaker,'* . . . § 230(c)(1) precludes liability."[5] *Fyk v. Facebook, Inc.* No. 18-cv-05159-JSW, 2019 WL 11288576 at *2 (N.D. Cal. June 18, 2019) (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009), a decision entirely undermined by *Henderson*, as *Barnes* rests on the Fourth Circuit's approximate 26-year-old *Zeran v. American Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) decision that *Henderson* unwound) (emphasis added)). The Ninth Circuit erroneously advanced the same sloppy draftsmanship (*i.e.,* using

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4 https://www.law.cornell.edu/wex/intent

5 An example of sloppy drafting. The statute accurately reads "<u>the</u> publisher or speaker."

"a publisher" instead of "the publisher"): "In any event, it is clear that Fyk seeks to hold Facebook liable as *a publisher* for its decisions (*i.e.,* a conscious alteration /material contribution) to de-publish and re-publish the pages." [D.E. 42] (emphasis added).

Both California *Fyk* Courts fell prey to the same sloppy draftsmanship. Courts have mistakenly converted *"the" specific publisher or speaker* (*i.e.,* "another") into "a" *unspecified publisher or speaker*; *i.e.,* in the *indefinite general* sense; *i.e.,* including themselves. § 230(c)(1) went from not being treated as another publisher (*i.e.,* someone else) to not being treated as themselves. Under such "reasoning," this Court absurdly concluded that § 230(c)(1) precludes Fyk from "treating" Facebook as Facebook its own illegal conduct. Naturally, § 230(c)(1) only applies when a plaintiff seeks to treat the defendant as someone else, whereas the plaintiff seeks to hold the defendant responsible for the conduct and content of another. Here, Fyk did not allege that there was any improper content spoken by Facebook. Here, Fyk did not attempt to treat Facebook as anyone else other than Facebook.

While this Court has previously rendered decisions as to the purported "§ 230(c)(1) immunity" of Facebook's anti-competitive misconduct (*e.g.,* the June 18, 2019, dismissal order [D.E. 38] and the November 1, 2021, first motion for reconsideration order [D.E. 51] revolving largely, if not entirely, around *Enigma*), these decisions cannot possibly be reconciled with new case law that has come about since those decisions. For examples, and as discussed in greater detail below: (a) *Henderson*, (b) *Rumble, Inc. v. Google, LLC*, No. 21-cv-00229-HSG (N.D. Cal. July 29, 2022), (c) *Jarkesy v. SEC,* No. 20-61007 (5th Cir. May 18, 2022), (d) *Doe v. Facebook,* *Inc.*, 595 U.S. ___, 2022 WL 660628 (Mar. 7, 2022), and (d) *DZ Reserve v. Meta Platforms, Inc.* No. 3-18:cv-04978 (N.D. Cal.) (which is an unfair competition case, just like this case, that has properly withstood dismissal unlike this case.)[6],[7] Not only has the law substantively changed since this Court made its premature, unfounded dispositive determinations here, but equitable considerations also militate towards vacating the judgment. If the Court does not vacate its judgment, it will continue to allow social media platforms to illegally prevent any sort of competition, like Fyk, predicated on their own "anti-competitive animus," rather than "blocking and screening of offensive materials," in good faith, as a "Good Samaritan."

On November 3, 2022, *Henderson*, a case deciding two of the very issues at the heart of this matter (the scope of § 230(c)(1) protections, and the interplay of "publisher" and "content provider"), successfully overcame a 12(b)(6) motion to dismiss. *Henderson* shed new light on the unanswered question that has plagued courts, (*i.e.,* because the answer is arbitrary, capricious); where do the courts draw the line between "traditional

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[6] The then new case *Enigma* was the subject matter of the first motion for reconsideration [D.E. 51]. The *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021) case during the first motion for reconsideration proceedings, *see* [D.E. 49] was not addressed in this Court's reconsideration order [D.E. 51], and this Court should now pay attention to it.

[7] *Henderson*, *Rumble*, *Jarkesy*, and *Doe* were supplemented into the most recent Ninth Circuit appeal record, but the Ninth Circuit did not address the cases on the merits of Fyk's appeal. These cases, along with *DZ Reserve* and *Lemmon* and Professor Adam Candeub's § 230 treatise, any of which warrants this Court's overturning its dismissal/judgment are attached hereto as Exhibit 1 and incorporated fully herein by reference.

editorial function" and "information content provision?" In *Gonzalez,* SCOTUS raised that same question, but ultimately declined to answer it, in its final opinion.

> Justice Kagan: . . . I can imagine a world where you're right that none of this stuff [*i.e.,* content provision] gets protection. And, you know, every other industry has to internalize the costs of its conduct. Why is it that the tech industry gets a pass? A little bit unclear.
>
> On the other hand, I mean, we're a court. We really don't know about these things. You know, these are not like the nine greatest experts on the Internet.
>
> . . . I don't have to accept all Ms. Blatt's 'the sky is falling' stuff to accept [that], there is a lot of uncertainty about going the way you would have us go, in part, just because of the difficulty of *drawing lines* in this area and just because of the fact that, once we go with you, all of a sudden, we're finding that Google isn't protected.
>
> Mr. Schnapper (attorney for Gonzalez): Well, [] I think [] the *line-drawing* problems are real. No one minimizes that. *I think that the task for this Court is to apply the statute the way it was written* . . . .

Gonzalez Feb. 21, 2023, SCOTUS Oral Argument, Ex. 3 at 45:11–46:12 (emphasis added).[8]

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[8] For ease of reference, the *Gonzalez* transcript is attached hereto as Exhibit 3 and incorporated fully herein by reference.

We agree, this Court should apply the statute *"the way it was written."* And, just because the content provision "line" is difficult to draw, it does not mean "the tech industry gets a pass" for all its conduct. But, the "line" can also not be arbitrary, whereby Facebook's conscious alterations, here, fell short of the *material contribution* line (*i.e.,* this Court arbitrarily disagreed with Fyk), and Public Data's conscious conduct in *Henderson* surpassed the line (*i.e.,* the Fourth Circuit agreed with Plaintiff(s), contrary to this Court's decision). Different protections within different jurisdictions, applying the same statute, resulting in different outcomes, is juridically intolerable. Compared to Fyk's decision, *Rumble*, *Jarkesy*, *Doe*, *Enigma, Lemmon*, and now *Henderson* and *DZ Reserve, see* Ex. 1, comport with evenhanded statutory construction and reflect the opinions of over a dozen Congressmen, Attorneys General, the DOJ, and SCOTUS Justices (at least the wise Justice Thomas), *see* Ex. 2.

> Section 230(c)(1) of the Communications Decency Act protects some parties operating online from specific claims that would lead to liability for conduct done offline. *But it is not a license to do whatever one wants online.* Protection under § 230(c)(1) extends only to bar *certain claims* imposing liability for *specific information* that another party provided.

Henderson, 53 F.4th at 117 (emphasis added).

To understand Congress' original intent, we must look to the legislature and statutory text for guidance. Senator Cruz and sixteen other members of Congress posit: *"§ 230(c)(1) does not immunize any conduct at all"* (Facebook's conduct being at the heart of Fyk's case). Cruz, Senator Ted, et al., No. 21-1333, 2022 WL

17669645 at *13 (Dec. 7, 2022) (emphasis added), Ex. 2 (*see* n. 12, *infra*).

> [§]230(c)(1) does not provide any immunity. Rather, it states a definition: no [ICS provider] 'shall be treated as the publisher or speaker of any information provided by another information content provider ["ICP"].' 47 U.S.C § 230(c)(1). Although this requirement can *indirectly* affect liability, it (1) does not directly confer immunity, and (2) applies only in limited circumstances where the elements of a claim turn on treating an Internet platform as the speaker or publisher of others' words. Outside of this limited realm, § 230(c)(1) plays no role whatsoever, and the lower courts–including the Ninth Circuit []–have erred by turning § 230(c)(1) into a super-immunity provision.

Id. at *7 (original emphasis in italics, added emphasis in bold).

Here too, this Court erred by "turning § 230(c)(1) into a super immunity provision." More specifically, if courts are somehow correct (they are not) that "[s]ubsection (c)(1), by itself, shields from liability all publication decisions [*i.e.,* all conduct],"[9] and also cor-

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[9] *See* [D.E 17] at 14-15, Facebook's November 18, 2019, Ninth Circuit Answering Brief (citing, inter alia, *Barnes*, 570 F.3d at 1105 and *Zeran*, 129 F.3d 327). Of note, the bulk (if not all) of the anti-Fyk points made by Facebook, this Court, and the Ninth Circuit throughout the history of this case have the Fourth Circuit's *Zeran* decision at their root/foundation. And, again, the Fourth Circuit's *Henderson* decision completely undermined *Zeran* and its progeny (*e.g.*, *Barnes* and *Fyk*).

rect that "nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service,"[10] then § 230(c)(1) is, "by itself," absolute, unlimited "super-immunity," which such "super-immunity" eviscerates § 230(c)'s "Good Samaritan" general provision, § 230 (c)(2)'s (limited conduct) civil liability protections, § 230(f)(3)'s definition of an ICP, and even § 502 (codified at 47 U.S.C. § 223(d)) of the very same act (whereby § 502 makes it a crime to "*knowingly* . . . display" obscene material to children (*i.e.,* conscious intent), even if a third-party created that content).

The overbroad, unconstitutional application of § 230(c)(1) "super-immunity" derives from erroneous judicial construction, not from age, vagueness, or from the legislation. The text of the statute simply does not support § 230(c)(1)'s absurd "super-immunity" (*i.e.,* § 230(c)(1) "does not insulate [Facebook] from liability for all conduct that happens to be transmitted through the internet").

For the reasons set forth more fully herein, the previous judgment dismissing this case should be vacated by this Court, thereby correcting the injustice Fyk has suffered and finally live up to (in this case at least, five years into the Twilight Zone that has been this case) the "honor" in "Your Honor."

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10 *See* [D.E. 42] at 4, the Ninth Circuit's June 12, 2020, Memorandum.

IV. Memorandum of Law

A. Legal Standard

Rule 60(b) motions allow the Court the opportunity to revisit cases and correct injustice. Rule 60(b) motions are addressed to the sound discretion of this Court. *See, e.g., Martella v. Marine Cooks & Stewards Union,* 448 F.2d 729, 730 (9th Cir. 1971). When faced with a Rule 60(b) motion, a court should balance the competing principles of finality and relief from unjust judgments giving a "liberal construction to (60b)." *Id.* quoting 7 Moore's Federal Practice P.60.18[8] P.60-138.

Rule 60(b)(5) specifically provides parties with relief from a judgment or order when "a prior judgment upon which it is based has been reversed or otherwise vacated [*e.g., Zeran*], or it is no longer equitable that the judgment should have prospective application." *See id.*[11] Relief under Rule 60(b) is appropriate where there has been a subsequent change in the law. *See, e.g., Milgard Tempering, Inc. v. Selas Corp. of America,* 902 F.2d 703, 715 (9th Cir. 1990) (A court "properly exercises its discretion to reconsider an issue previously decided" when "a change in the law has occurred"); *see also, e.g., Kirkbride v. Continental Cas. Co.,* 933 F.2d 729, 732 (9th Cir. 1991) ("[t]he district court was entitled to reconsider its position" in light of new law). Notably, the Ninth Circuit has expressly embraced the "flexible standard" for Rule 60(b)(5) adopted by the

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[11] Again, the root foundation of this Court's prior rulings was the Fourth Circuit's *Zeran* decision, and the Fourth Circuit nuked its 26-year-old *Zeran* decision (when the Internet was a mystery) with its few-months-old *Henderson* decision.

United States Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). *See, e.g., 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). Under this standard, a party seeking a modification of a court order need only establish that a "significant change in facts or law warrants a revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 393; *SEC v. Coldicutt*, 258 F.3d 939, 942 (9th Cir. 2002). A significant change in law has occurred that warrants a revision of the decree.

Moreover, SCOTUS has repeatedly confirmed that a district court always possesses the inherent authority to modify a judgment in-light-of significant changed circumstances, including changes in law or fact. *See, e.g., System Federation v. Wright,* 364 U.S. 642, 647 (1961). "[T]he court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned through chang[ed] circumstances into an instrument of wrong."' *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)). Rule 60(b)(6) compels reconsideration of this new case authority.

B. Rule 60(b)(5)–Law Change Warrants Reversal Of The Antiquated Dismissal Order

This Court should vacate/set aside dismissal, as the Fourth Circuit's *Henderson* decision unraveled its prior *Zeran* decision, which this Court relied on (substantially; more actually, foundationally) to dismiss Fyk's case, constituting a substantial change in law that warrants reconsideration and reversal of Fyk's decision. Whether directly (*e.g., Zeran*) or indirectly (*e.g., Barnes* (with conclusions flowing from gross misinterpretation of *Zeran*), this Court and the Ninth Circuit relied on superseded case law (changed by *Henderson)* to dismiss Fyk's case. The *Henderson* decision serves as new legal precedent that undermines this Court's previous findings and conclusions. Alternatively, Fyk should be granted leave to amend his Verified Complaint, since this case is certainly no longer "futile, in the instance."

After this Court granted Facebook's 12(b)(6) motion and after Fyk had filed his appeal in the Ninth Circuit, and after this Court denied Fyk's first 60(b) motion and after Fyk filed his second appeal in the Ninth Circuit, the Fourth Circuit issued its opinion in *Henderson,* "explaining that a defendant is an information content provider if they *"contribute[d] materially to the alleged illegality of the* <u>*conduct*</u>*"* (*i.e.,* an opinion that cannot be reconciled with Fyk's case) (citing *Fair. Hous. Council of San Fernando Valley v. Roommates.com, LLC,* 521 F.3d 1157, 1168 (9th Cir. 2008), emphasis added), solidifying new precedent that was unavailable to Fyk, which, had it been applied to Fyk's case (which such case could not more specifically allege Facebook's anti-competitive misconduct), would have resulted in the unraveling of this Court's dismissal of Fyk's Verified Complaint. This Court should re-examine the dismissal honorably under the Fourth Circuit's new seminal *Henderson* decision (which, once again, undermined *Zeran* and *Barnes*, which, once again, were decisions this Court relied upon heavily, if not entirely in kicking, Fyk to the curb in deprivation of "day in court"/Due Process), as well as under *Rumble* (from this Court), *Jarkesy* (from the Fifth Circuit), *Doe* (from J. Thomas), and even *DZ Reserve* (from this Court). This Court should also revisit *Lemmon* (from the Ninth Circuit) since it did not consider it in the first reconsideration motion. The conflicting decisions of *Henderson, Rumble*, *Jarkesy*, *Doe,* and *etc.*, *see* Ex. 1., underscore the importance of addressing court conflicts as to the application of the CDA immunity in pure business tort cases, which such cases we now briefly discuss.

The *Rumble* decision (this Court's 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 *Rumble* Court 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).

The *Jarkesy* (Fifth Circuit) case deals with the mandate that Congress supply an "intelligible principle"/general provision, where (as here) delegating administrative enforcement authority of a law. As *Jarkesy* concludes, if Congress does not supply an "intelligible principle" under such a delegation setting, then the law is unconstitutional. So, either all of § 230(c) is governed by the overarching "Good Samaritan" "intelligible principle" (as Fyk's briefings have consistently argued) or § 230(c) is unconstitutional authority. Either way, Facebook cannot enjoy *carte blanche* § 230(c)(1) super-immunity sans a "Good Samaritan" threshold requirement (*i.e.*, the anti-competitive animus espoused in *Enigma*, *Rumble, Henderson*, and in *Fyk).* Furthermore, the facts of Fyk's case more aptly fit the § 230(c)(2) paradigm (if any part of § 230), certainly not § 230(c)(1). If this Court's view that the "Good Samaritan" *general* provision is not applied *generally* (*i.e.*, somehow applies to only § 230(c)(2)), then, per *Jarkesy* and per an elementary understanding of what a general provision/"intelligible principle" is, § 230 is unconstitutional. Again, ither way, Facebook cannot enjoy § 230(c)(1) *carte blanche* super-immunity in this unfair competition/anti-competitive animus case.

In *Doe*, Justice Thomas put forth another spot-on Statement in the denial of certiorari mirroring the spot-on Statement that Justice Thomas put forth in *Enigma*, "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,'" *id.* at *1 (emphasis in original), with the subject *Fyk* case being one that seeks to hold Facebook accountable for Facebook's "own" actions, namely actions of an anti-competitive animus.

In *Henderson*, whether relying directly on the Fourth Circuit's *Zeran* decision or *Zeran's* progeny (*i.e., Barnes)*, courts (*e.g.*, this Court and the Ninth Circuit) who relied on *Zeran* to build their questionable foundation were undermined by the Fourth Circuit's *Henderson* decision. The Fourth Circuit's reformation of its 1997 *Zeran* decision undermined the precedent this Court and the Ninth Circuit relied on when deciding Facebook's § 230(c)(1) "immunity." *Henderson*'s rearticulation of *Zeran,* and the changes it caused to *Barnes* (stemming from *Zeran*) represents a substantial change of "the law" that this Court specifically relied on in its dismissal order, which clearly warrants this Court's reconsideration and immediate reversal of its antiquated dismissal order. Notably, the *Henderson* decision relied heavily on a treatise written by Professor Adam Candeub, who (not-so-coincidentally) read all

Fyk's prior briefs before memorializing same in: *READING SECTION 230 AS WRITTEN.*[12]

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 practices . . . ." [D.E. 1] at 1. *Fyk's allegations were based entirely on Facebook's illegal anti-competitive conduct* (*i.e.,* a UCL claim), *not based on the impropriety of any content or treating Facebook as "the publisher or speaker" of said content.*

> We have interpreted 'publisher' in § 230(c)(1) in line with th[e] common-law understanding. Thus for § 230(c)(1) protection to apply, we require that liability attach to the defendant on account of some *improper content* within their publication. *See Erie Ins. Co*., 925 F.3d at 139–40 ('There is no claim made based on the content of speech published by [Defendant]–such as a claim that [Defendant] had liability as the publisher of a misrepresentation of the product or of defamatory content.').

Henderson, 53 F.4th at 122 (emphasis added). "This improper-content requirement helps dispel [Defendant's] notion that a claim holds a defendant liable as

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[12] Again *Henderson*, *Rumble*, *Jarkesy*, *Doe, DZ Reserve, Lemmon*, and Mr. Candeub's treatise are attached as Ex. 1. And, mentioned elsewhere in this brief, courtesy copies of the amicus curiae briefs submitted in *Gonzalez* (all of which such amicus curiae briefs may as well have been cut and pasted from Fyk's briefing in this case) by Senator Cruz and myriad other congressmen, Texas Attorney General Paxton and others, and the DOJ are attached hereto as composite Exhibit 2 and incorporated fully herein by reference.

a publisher anytime there is a 'but-for' causal relationship between the act of publication and liability." *Id.*[13]

> Section 230(c)(1) provides protection to interactive computer services. *Zeran*, 129 F.3d at 331. But it does not insulate a company from liability for all conduct that happens to be transmitted through the internet. Instead, protection under § 230(c)(1) extends only to bar certain claims, in specific circumstances, against particular types of parties. Here, the district court erred by finding that § 230(c)(1) barred all counts asserted against Public Data. To the contrary, on the facts as alleged, it does not apply to any of them.

Id. at 129.

Here too, this Court "erred by finding that § 230(c)(1) barred all [Fyk's] counts." "There [wa]s no claim made [by Fyk] based on the content of speech published by [Fyk or Facebook]." For § 230(c)(1) to apply here, Fyk's "claims (must) demand the information's content be *improper* before imposing liability." Fyk's allegations were undeniably about Facebook's conduct, not about the substance of any "improper content" alleged to have been authored or spoken by Facebook. The only reason to identify content at all (*i.e.,* in the general sense), was to show the impropriety

[13] At a peak (prior to Facebook's interference), Fyk earned – $300,000.00 in one month in advertising and/or web trafficking monies, for example. There was no realistic end in sight to Fyk's economic gain before Facebook's interference; rather, all signs pointed towards Fyk earning even more advertising money "but for" Facebook's interference. [D.E. 1] at ¶ 55.

of Facebook's conduct (*i.e.,* disparate treatment; *e.g.,* disproportionate "rules"), in "treating Fyk's page content differently for Fyk than for the competitor to whom Fyk's content was redistributed." [D.E. 1] at n. 2.

While certain editorial conduct may be immune in certain circumstances (*e.g.,* § 230(c)(2)(A)), § 230(c)(1) does not protect "all conduct that happens to be transmitted through the internet." It certainly does not immunize "all publication decisions," including disparate/anti-competitive treatment. In reality," *§ 230(c)(1) does not immunize any conduct at all."* Cruz, Senator Ted, et al., 2022 WL 17669645 at *13 (emphasis added), Ex. 2. This Court also concluded that "granting leave to amend would be futile in this instance as Plaintiff's claims are barred as a matter of law." [D.E. 38] at 4. In finding that Fyk's claims could not be amended for purportedly being "futile in this instance," this Court falls into the minority of the current evaluation of § 230 case authority addressing the limitations of CDA immunity. *See, e.g.,* Exs. 1-2. The Fourth Circuit definitively ruled in *Henderson,* that § 230(c)(1) immunity is not absolute (*i.e.*, not "futile in this instance"); *i.e.,* § 230(c)(1) "does not insulate a company from liability for all conduct that happens to be transmitted through the internet," *Henderson*, 53 F.4th at 129, a determination directly at odds with this Court's prior decision(s) finding that § 230(c)(1) "shields from liability all publication decisions," absent intent (*i.e.,* unconstitutional "super-immunity"). This Court cannot disregard significant changes in law or facts if it is "satisfied that what it has been doing has been turned through chang[ed] circumstances into an instrument of wrong." *Swift & Co.,* 286 U.S. at 114-115.

Fyk's erroneous § 230(c)(1) dismissal hinged on the application of both the second and third requirements of the so-called[14] § 230(c)(1) immunity test. The Ninth Circuit held in pertinent part:

> The first and second requirements for § 230(c)(1) immunity are not in dispute. Fyk focuses on the third requirement. He contends that Facebook is not entitled to § 230(c)(1) immunity because it acted as a content developer by allegedly de-publishing pages that he created and then re-publishing them for another third party after he sold them to a competitor. *We disagree.*

[D.E. 42] at 2-3 (emphasis added).

Here, the Ninth Circuit erred in two respects. First, the "second requirement" of the test was, *in fact,* disputed to the extent that the courts used an inaccurate three-part test to determine immunity (*i.e., the test itself was wrong)* (further discussed in § B.1 below). And, second, while this Court, and the Ninth Circuit may not necessarily have agreed at the time, the "third requirement" of the test was, in retrospect, met because Facebook's actions to de-publish and re-publish Fyk's content are content provision decisions (*i.e.,* development conduct) (further discussed in § B.2 below). The Court's nonsense about their needing to be a *substantial contribution* to be considered content development (*i.e.,* the arbitrary responsibility line) is entirely made up, because the necessity of the

[14] "So-called" because § 230(c)(1) does not technically provide any civil liability immunity for any conduct, at all.

contribution being "substantial" is directly contradicted by § 230(f)(3)'s actual text: "in part."

While *Henderson* agreed that Plaintiff's allegations (like Fyk's here), met the material contribution line, this Court and the Ninth Circuit disagreed (in antiquated fashion), whereby *Fyk's* allegations fell short of this Court's arbitrary (*i.e.,* different) material contribution line.

> Public Data sought § 230(c)(1) protection against four claims brought against it for violating the Fair Credit Reporting Act ('FCRA'). The district court agreed that the claims were precluded by § 230(c)(1). Plaintiffs appealed, arguing that § 230(c)(1) does not apply. *We agree.*[15] Plaintiffs have alleged facts that, if true, render § 230(c)(1) inapplicable to their four claims. So we reverse the district court and remand for further proceedings.

Henderson, 53 F.4th at 117 (emphasis added). The Court's "material contribution" "line" cannot be arbitrary or capricious. Different protections, within different jurisdictions for a federal statute relating to internet communications, is untenable.

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[15] Facebook sought § 230(c)(1) protections against Fyk's four claims for unfair competition, tortious interference, fraud, and extortion. This Court determined § 230(c)(1) precluded Fyk's illegal conduct related claims. Fyk appealed, arguing that § 230(c)(1) does not apply. The Ninth Circuit *disagreed* (*i.e.,* although Fyk alleged similar facts as *Henderson*, the Ninth Circuit drew a different "material contribution" line than that of the Fourth Circuit in *Henderson*).

1. § 230(c)(1) Does Not Confer Any Immunity For Any Conduct At All

The second requirement of the *Barnes* three-part § 230(c)(1) immunity test, is *textually flawed* (*i.e.,* sloppy draftsmanship). In contrast, the Fourth Circuit's *Henderson* three-part immunity test is textually accurate (*i.e.,* it correctly cites § 230(c)(1)). The *Henderson* test and the *Barnes* test differ by one word, but that one word completely changes the results of the test. This Court was flat wrong in using the textually inaccurate *Barnes* test. This Court should have instead used the textually accurate *Henderson* test to determine Facebook's § 230(c)(1) protection–this Court now needs to remedy same.

Why have courts been using the textually inaccurate *Barnes* test to consider § 230(c)(1) protection? Defendants (*e.g.,* Facebook, Yelp!, *etc.*) cite "questionable precedent" (*e.g. Barnes, Zeran, Kimzey*) out-of-context to set up defendants' proof-text of isolated snippets from bad case law to advance their own presuppositions, agendas, or biases (*e.g.,* § 230(c)(1): "seeks to treat as *a publisher* or speaker," or "shields from liability *all publication decisions* . . . "), and to distort the statutory language and/or intent of § 230.

So as not to distort the statutory language and/or intent of § 230, we must look to the text itself, rather than rely on case precedent snippets. § 230(c)(1) does not describe what "a publisher" does (*i.e.,* what conduct is "immune"); rather, it specifically identifies *who* "the publisher" is (*i.e.,* "another" ICP). Changing "the" (of "the publisher") into "a" (of "a publisher") changes *who* "the (particular) publisher" is, that the ICS provider or ICS user cannot be treated as (*i.e.,* distorts the intent of § 230(c)(1)). This subtle word substitution significantly impacts the proper (*i.e.,* textual) application of § 230(c)(1).

§ 230(c)(1) *specifically* reads: "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." *Id.* (emphasis added). James Madison once argued that the most important word in "The Right To Free Speech" is the word "the" because it denotes "the right" *preexisted* any potential abridgement. In the English language, a definite article such as the word "the," in "the publisher," is used to "denote [a] particular, [or] specified persons or things."[16] "The publisher," in the context of § 230(c)(1), specifies "the (*particular* or *specified*) publisher" who created and/or developed the information entirely–*"another"* ICP (here Fyk). In other words, "the publisher" is not just *any unspecified publisher* (which includes the ICS provider or user), "the publisher" is specifically the *known publisher*. "The" *known* publisher is "another [ICP]" (*i.e.,* anyone other than the ICS provider or user). In the context of § 230(c)(1), Facebook cannot possibly be "the publisher" in Fyk's case, because Fyk is "the (known) publisher," and Fyk's publishing preexisted Facebook's involvement.

This subtle, yet critical drafting mistake–using "a" and "the" interchangeably in "the publisher or speaker" (as this Court has)–is the genesis of the misinterpretation of § 230(c)(1) and the origin of the confusion surrounding § 230's proper application. Once

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16 https://www.wordnik.com/words/the

"the publisher" is identified for the purposes of § 230 (c)(1), the rest of the statute's intended purpose is clear.

"Pursuant to § 230(c)(1) of the CDA, 47 U.S.C. § 230(c)(1), '[i]mmunity from liability exists for: . . . (1) a[n] [ICSP] or [ICSU] of an [ICS] (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 [ICP].'" *Fyk v. Facebook, Inc.*, 808 Fed. Appx. 597 (9th Cir. 2020) (citing *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009)).

§ 230(c)(1) explicitly reads: "the publisher," not "a publisher." The *Barnes* three-part "immunity" test (employing "*a publisher*") is inconsistent with the text of the statute (*i.e.,* an example of sloppy draftsmanship). Compare that to the three-part test used in *Henderson*, which accurately quotes and applies § 230(c)(1): "The defendant is a '[ICSP] or [ICSU] of an [ICS]'; (2) the plaintiff's claim holds the defendant 'responsible 'as *the publisher* or speaker of any information'; and (3) the relevant information was 'provided by another [ICP].'" *Henderson*, 53 F.4th at 119 (citing *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (quoting § 230 (c)(1)).

As a result of conflating "the" and "a," correct courts (*e.g.,* the Fourth Circuit in *Henderson via* "the") properly read § 230(c)(1) to not protect any publishing conduct, while other incorrect courts (*e.g.,* this Court in *Fyk via* "a") improperly read § 230(c)(1) to protect all publishing conduct in "super-immunity" fashion.[17] § 230(c)(1) is judicially righted by, for example, giving the word "the" proper effect, thereby restoring the meaningful difference between § 230(c)(1) and § 230 (c)(2), while simultaneously reconciling the inconsistency between § 502 and § 230 (*i.e.,* § 230 would no longer be absurd "super-immunity"). This Court simply needs to apply § 230(c)(1) *as written*.

"§ 230(c)(1) prevents suits that 'cast [the defendant] in the same position as the party who originally posted the offensive messages.'" *Henderson* at n. 26. " . . . § 230(c)(1) applies only when the claim depends on the content's impropriety." *Id.* at 125. "In other words, for protection to apply, the claim must turn on some 'information,' and must treat the defendant as the 'publisher or speaker' of that information." *Id.* at 120. Fyk posted his original messages and has never cast Facebook in the same position as himself. Fyk has made clear, on more than one occasion throughout the lifespan of this case, that "*this case is not about objectionable content*. . . . This case is about Facebook's fraud, extortion, unfair competition, and tortious interference with Fyk's business." *Fyk v. Facebook, Inc.*, No. 19-16232, 2020 WL 709442 at * (9th Cir.) No. 19-16232; *see also* Ver. Compl. [D.E. 1] at ¶ 1.

This Court and Ninth Circuit, relying on *Zeran/ Barnes* (now eviscerated by *Henderson*), imaginary policy and purpose, and not the law itself, erroneously

[17] There is no real textual "correction" required here; rather, it is as simple as this Court giving the current text the correct effect (*i.e.,* apply the law as written). Subsequently, this Court should vacate or set aside its prior judgment because the *Barnes* test, used by this Court, is textually inaccurate. It should reconsider immunity under the new correct *Henderson* test.

dismissed all four of Fyk's anti-competitive *conduc*t claims under § 230(c)(1)'s purported "super-immunity," because Fyk was precluded from treating Facebook as "a publisher" in the general sense (*i.e.,* treating Facebook as Facebook for Facebook's own conduct), which runs afoul of the Absurdity Doctrine (as well as several other constitutional doctrines and canons of statutory construction). This Court's determination that § 230(c)(1) insulates all Facebook's conduct was proven wrong (though wrong at all times prior) by the Fourth Circuit *Henderson* decision. Not only does § 230(c)(1) not insulate Facebook from liability for all conduct that happens to be transmitted through the Internet, it does not protect any conduct, at all.

This Court should be "satisfied that what it has been doing [*e.g.,* falling prey to proof-texting, sloppy thinking and draftsmanship, and textual mistakes] has been turned through chang[ed] circumstances [*e.g., Henderson, etc.*, Exs. 1-2] into an instrument of wrong." *Agostini*, 521 U.S. at 215.

2. Any Editorial Conduct With Intent Or Knowledge Is Information Content Provision

In his prior briefs, Fyk argued § 230(c)(1) cannot protect "all publication decisions," because if "all publication decisions" are immune under § 230(c)(1), then that would include restricting materials (*i.e.,* the purpose of § 230(c)(2)(A)). Rejecting Fyk's argument, and again relying heavily on *Barnes* (eviscerated by *Henderson,* as *Barnes* stemmed from *Zeran*), the Ninth Circuit held in pertinent part:

> 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.' *Barnes,* 570 F.3d at 1105 '[T]he persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects,[18] 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).'*

[D.E. 42] at 4-5 (emphasis added).

Here, the Ninth Circuit misbelieves § 230(c)(1) and § 230(c)(2)(A) are *not redundant* because content development decisions are somehow not included in "all publication decisions." Wrong all six ways to Sunday–content development decisions are entirely publication decisions. The statute remained redundant. The Ninth Circuit (and this Court) resolved absolutely nothing here, much less reconciled the surplusage issue–*i.e.,* the redundancy between § 230(c)(1) and § 230(c)(2)(A).

Per § 230(f)(3), an ICP "means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* Courts, like this Court, have relied on "non-textual arguments" in interpreting § 230, narrowly interpreting "development" to preserve § 230(c)(1)'s absurd "super-immunity." Per Justice Thomas:

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[18] Which is "no provider or user;" *i.e.,* "any provider or user" of an ICS; *i.e.,* the same persons in § 230(c)(1) and § 230(c)(2).

Courts have [] departed from the most natural reading of the text by giving Internet companies immunity for their own content [*i.e.,* content development/content provision conduct]. Section 230(c)(1) protects a company from publisher liability only when content is 'provided by *another* information content provider.' (Emphasis added.) Nowhere does this provision protect a company that is itself the information content provider. *See Fair Housing Council of San Fernando Valley* v. *Roommates.Com, LLC*, 521 F. 3d 1157, 1165 (CA9 2008). And *an information content provider is not just the primary author or creator* [Fyk]; it is anyone 'responsible, in whole or in part, for the creation or development' of the content [Facebook]. § 230(f)(3) (emphasis added).

But from the beginning [*e.g., Zeran, Barnes*], courts have held that § 230(c)(1) protects the 'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or *alter content*.' *E.g., Zeran*, 129 F. 3d, at 330 (emphasis added); *cf. id.,* at 332 (stating also that § 230(c)(1) protects the decision to 'edit'). *Only later did courts wrestle with the language in § 230(f)(3*) suggesting providers are liable for content they help develop 'in part.' *To harmonize that text with the interpretation that § 230(c)(1) protects 'traditional editorial functions,'* [*i.e.,* to reconcile the actual text with the court's mistaken interpretation] *courts relied on policy arguments*

> [*i.e.,* not the text itself] *to narrowly construe § 230(f)(3) to cover only substantial or material edits and additions* [*i.e.,* made it up]. *E.g., Batzel v. Smith*, 333 F. 3d 1018, 1031, and n. 18 (CA9 2003) ('[A] central purpose of the Act was to protect from liability service providers and users who take some *affirmative steps*[19] to edit the material posted') [*i.e.*, "edit" in the restrictive sense, pursuant to § 230(c)(2)].
>
> Under this interpretation [*i.e.,* misinterpretation], a company can solicit[20] thousands of potentially defamatory statements, 'selec[t] and edi[t] . . . for publication' several of those statements, add commentary, and then feature the final product prominently over other submissions[21]—all while enjoying immunity [*i.e.,* act as a content provider]. *Jones v. Dirty World Entertainment Recordings LLC*, 755 F. 3d 398, 403, 410, 416 (CA6 2014) (*interpreting "development" narrowly to "preserv[e] the broad [i.e., make-believe] immunity th[at § 230] provides for website operators' exercise of traditional publisher functions"*). *To say that editing a statement and adding commentary in this context does not "creat[e] or develo[p]" the final product,*

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[19] The ICS provider only consciously ("considers") engages in editorial conduct under § 230(c)(2)(A).

[20] Here, Facebook solicited a new owner of Fyk's property (*i.e.,* conduct that is anti-competitive).

[21] "Featur[ing] the final product prominently over other submissions" is content prioritization/ development/provision.

> *even in part, is dubious* (emphasis added).

Malwarebytes, Inc. v. Enigma Software Group USA, LLC, 141 S. Ct. 13, 16 (2020) (emphasis added).

As stated previously, defendants typically cite out-of-context precedent to proof-text their own presuppositions, agendas, or biases (*i.e.,* like Facebook did in this case). As a result, courts have mistakenly accepted out of context proof and misunderstood the original intent of the case precedent, like *Zeran*. *Barnes* is a great example of the mistaken interpretation of *Zeran's* contextual intent. In *Zeran*, the Fourth Circuit held § 230(c)(1) protects the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Barnes* interpreted *Zeran* such that an ICS provider should have protection from all of its own publishing conduct (*i.e.,* how this Court applied § 230(c)(1)), but that is not the case. The ICS provider's own publishing conduct only relates to § 230(c)(2)'s limited protections.

Context is utmost when reading case precedent. The Fourth Circuit cited Professor Adam Candeub's: *Reading Section § 230 As Written,* extensively. Regarding the context surrounding *Zeran's* intended use of the phrase "traditional editorial function," he wrote:

> Some courts have taken a different approach, holding that [§] 230 bars 'lawsuits seeking to hold a [ICSP] liable for its exercise of a publisher's *traditional editorial functions*– such as *deciding whether to publish, withdraw, postpone or alter content.'* [*Zeran*, 129 F.3d at 330 (4th Cir. 1997)]. That language has been quoted extensively [*i.e.,* used as proof-text].

Candeub, Prof. Adam, *Reading Section § 230 As Written* at 148 (Mich. St. U. 2021) (emphasis added) (footnote omitted), Ex. 1.

> The language comes from the influential *Zeran* case, but *many courts forget the immediately preceding language* [*i.e.,* it's used out of context]. To quote *Zeran* fully, section 230
>
>> creates a federal immunity to any cause of action that would make [ICSPs] *liable for information originating with a third-party user of the service*. Specifically, § 230 precludes courts from entertaining claims that would place a[n] [ICSP] in a publisher's role. Thus, lawsuits seeking to hold a[n] [ICSP] liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content —are barred. [FN: *Barrett v. Rosenthal*, 146 P.3d 510, 516 (Cal. 2006) (quoting Zeran, 129 F.3d at 330) (emphasis added)]
>
> The 'traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content,' *id.*, are examples of third-party content decisions [*i.e.*, third-party conduct] that § 230 protects. It does not protect platform as to their *own editorial decisions or judgments* [*i.e., first-party conduct*].
>
> When quoted out of context [*e.g.*, "proof-texting," and textual mistakes], the 'its' would seem to suggest that [§]230 immunizes the platform's publisher role. But this is an

> example of sloppy drafting and an imprecise pronoun antecedent, as the sentence prior speaks of 'information originating with a third-party user of the service.'

Id. at 148-149 (italicized emphasis in original, bold emphasis added).

Logically, when an ICS provider makes a conscious "publication decision" to "allow" (*i.e., knowingly* provide) content, it automatically transforms itself into an ICP, as it becomes responsible for providing that content, at least "in part." It has done *something more* than providing the interactive computer publication service (*i.e.,* the platform). The ICS provider is now involved in the provision of that content at least in part. So, we raise the question again; where does "responsibility" "in part" cross the line from inconsequential publication-interactive computer service provision, into substantively contributing to content provision (the question at the heart of Fyk's case)? The Fourth Circuit explains:

> This Court has never fully defined the terms 'creation' or 'development' as they are used in the statute. But we have explained that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Zeran*, 129 F.3d at 330; *see also* Nemet, 591 F.3d at 258 *('creation' or 'development' of information requires 'something more than [what] a website operator performs as part of its traditional editorial function' [i.e., publication services]).*

> Other circuits have put more flesh onto these definitions, determining that an [ICS] provider or user is responsible for the development of the information at issue in the case if *they 'directly and 'materially' contributed to* [*i.e.,* knowingly, divisibly, consciously, and with intent] what made the content itself 'unlawful." *Force v. Facebook*, 934 F.3d 53, 68 (2d Cir. 2019) (*quoting LeadClick*, 838 F.3d at 174); *see Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) *(explaining that a defendant is an information content provider if they 'contribute[d] materially to the alleged illegality of the conduct')*; . . .

Henderson, 53 F.4th at 127.

> When Zeran proclaimed that § 230(c)(1) barred claims based on a defendant's exercise of traditional editorial functions, it also provided a suggestive list including "deciding whether to publish, withdraw, postpone or alter content." Zeran, 129 . . .
>
> Yet, Zeran's list of protected functions must be read *in its context*, and that context cabins that list to merely "editorial" functions. *It cannot be stretched to include actions that go beyond formatting or procedural alterations [i.e., interactive computer service functions] and change the substance of the content altered. An 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.*

Id. at 129.

Facebook did *"something more"* than standard "formatting or procedural alterations" here (*i.e.,* more than provider interactive computer publication services), it directly, affirmatively, and knowingly *"contribute[d] materially to the alleged illegality of the conduct"* (*i.e.,* it consciously got involved in the provision of Fyk's content). Accordingly, Facebook is responsible for the *illegality of their own conduct*, consistent with *Henderson* (and all other decisions in Ex. 1) and the opinions of dozens of other notable officials (*see* Ex. 2). This Court's decision to immunize Facebook under § 230(c)(1) does not comport with the majority of courts addressing ICS provider's own unlawful or tortious conduct.

> Numerous courts mischaracterize the *Zeran* language and interpret § 230 as immunizing platforms' *own editorial decisions*. To take a typical example, in *Levitt* the plaintiff alleged that Yelp! 'manipulate[d] . . . review pages—by removing certain reviews and publishing others or changing their order of appearance.' [*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 507-9526 at *6 (N.D. Cal. Oct. 26, 2011)]. The *Levitt* plaintiffs argued that Yelp!'s [illegal] behavior constituted *unfair or fraudulent business* under Cal. Bus. & Prof. Code § 17200. But the elements of the unfair or fraudulent business practices law have nothing to do with speaking or publishing third party content. Rather, they ask whether Yelp! engaged in an 'unlawful, unfair or fraudulent business act or practice' or an 'unfair,

> deceptive, untrue or misleading advertising and any act.'
>
> Ignoring this straightforward analysis, the court ruled that § 230(c)(1) immunized Yelp!'s conduct, supporting its conclusion by quoting the 'traditional editorial functions' language of *Zeran*. But notice the court's confusion here: Yelp! allegedly made changes and conscious re-arrangements [*i.e.*, substantive alterations without any creation] to reviews in violation of its representations to users and customers–plaintiffs sought to make Yelp! accountable for *its own* editorial decisions and false representations.

Candeub Treatise, Ex. 1 at 149 (italicized emphasis in original, bold emphasis added).

What Facebook did with Fyk's content was not a traditional "formatting or procedural alteration," it was "conscious rearrangements" done by intent (*i.e.,* for monetary gain). The deliberate de-publishing and re-publishing of Fyk's content (*i.e.,* with knowledge and intent) are *"conscious rearrangements."* Knowingly soliciting a new owner for Fyk's property, based on an anti-competitive intent, is *"elements of unfair or fraudulent business practices law [that] have nothing to do with speaking or publishing third party content."* "But for" Facebook's conduct, the illegalities espoused in the Verified Complaint would not have occurred. Had Fyk's case been brought in the Fourth Circuit Court or possibly drawn a different Judge in this Court, a different result would have occurred.

There is an inherent problem (*i.e.,* § 230's irreconcilable problem) with both allowing some content alterations (*e.g.,* § 230(c)(2)(A)'s content restrictions), while also disallowing other content alterations (*e.g.,* § 230 (c)(1)'s content provision). Both types of alteration are the *by proxy* result of content consideration. Thus, if you allow content consideration at all, you allow both content restriction and content provision. If an ICS provider can "consider" what information to remove (per § 230(c)(2)(A)), *by proxy,* it can also consider what information to provide (*i.e.,* what information to allow/develop). This inevitably causes a blurring of the line between "traditional editorial function" and a "material contribution" to the development of the information (*i.e.,* provision). SCOTUS wrestled with the complexity of this not so futile question, but failed to render a definitive answer.

> Justice Sotomayor: All right. So, even if I accept that you're right that sending you unrequested things [*i.e.,* provide unsolicited content] that are similar to what you've viewed, whether it's a thumbnail or an e-mail, how does that become aiding and abetting? . . . I guess the question is, *how do you get yourself from a neutral algorithm to an aiding and abetting? . . . An intent, knowledge. There has to be some intent to aid and abet.* You have to have *knowledge* that you're doing this. . . . So how do you get there? . . .
>
> Mr. Schnapper: . . . if they didn't know it was happening, and the other elements of an aiding-and-abetting claim were present, they would not be liable for aiding and abetting.

Ex. 3 at 24:7–25:23 (emphasis added).

Indeed, how do you get yourself from a neutral ICS provider to an ICP: *knowledge* and *intent*? If a website has no knowledge or intent behind the content it provides, § 230(c)(1) would apply. But, as soon as they "consider" the content, they are consciously involving themselves in the content provision decision and become responsible in part for their own knowledge/intent. Thus, if they have any potential liability (*i.e.,* responsibility in part), the courts should apply that conduct to § 230(c)(2)(A)'s civil liability protection, not to § 230(c)(1)'s treatment protection. This harmonious interpretation confines conduct to § 230 (c)(2)(A), and squares nicely with "good faith" and "Good Samaritan[ism]."

Therefore, if a website has *no knowledge* or *intent* when providing users' materials (*i.e., passively* hosting), the provider in that case cannot be treated as "the publisher or speaker" who consciously considered and provided the materials (*i.e.,* had knowledge and responsibility). But, as soon as the ICS provider crosses the content "consideration" line (*i.e.,* acts with intent and knowledge to develop/manipulate content), it does "something more" than just provide an interactive computer publication service, it is now consciously providing the content. Considering § 230 as a harmonious whole, § 230(c) naturally applies to the motivation /intent, § 230(c)(1) applies when the ICS provider has *no knowledge* of the content it provides, § 230(c)(2)(A) applies when the ICS provider or user "considers" content (*i.e.,* consciously develops information in part), and § 230(c)(2)(B) applies when the ICS provider provides the tools necessary to other ICS users, to restrict information for themselves.

Facebook *knowingly* considered Fyk's materials (*i.e.,* a conscious/substantive contribution), unpublished those materials (*i.e.,* a conscious rearrangement), solicited another owner for Fyk's property (*i.e.,* an anti-competitive intent), *knowingly* considered Fyk's content again (*i.e.,* another substantive contribution), and then *knowingly* re-published the same content (*i.e.,* another conscious rearrangement), based on its own anti-competitive animus (*i.e.,* the motivation/ *intent*). All of Facebook's conduct was antithetical to the "Good Samaritan" general provision (*i.e.,* the "good faith" *intent* of § 230). Facebook certainly did "something more" than traditional "formatting and procedural alterations" and consequently should not receive any protection for any of its anti-competitive conduct.

On Fyk's first 60(b) go-round with this Court, seeking to reconcile *Fyk* and *Enigma*, this Court (and the Ninth Circuit, effectively ratifying same by entirely refusing to address the merits of Fyk's appeal) held, in pertinent part: "The Order that Fyk seeks to vacate based its conclusion on 47 U.S.C. § 230(c)(1). By contrast, the Ninth Circuit's *Enigma* opinion did not involve the application of § 230(c)(1); instead, the court examined § 230(c)(2)." *Fyk*, 18-cv-05159-JSW, 2021 WL 5764249 at *1 (N.D. Cal. Nov. 1, 2021) (internal citations omitted). Rather than harmonize or even rationalize *Fyk* with *Enigma* (*i.e.,* consider § 230 as a whole), this Court adopted an absurd interpretation that the "Good Samaritan" *general* provision does not apply *"generally"* to the statute and is exclusive to a § 230(c)(2) analysis. If that is truly the case, § 230 is unconstitutional per *Jarkesy*. Either way, Fyk's case was dismissed improperly.

This Court entirely missed that Fyk's case was never a § 230(c)(1) case. As "Professor" Eric Goldman inadvertently stumbled upon in a perverse article regarding Fyk's dismissal: "Yet again, the court relies on 230(c)(1) for facts fitting the 230(c)(2) paradigm." Both *Fyk* Courts inexplicably misapplied § 230(c)(1) as "super-immunity" to a § 230(c)(2)(A) case. The facts of Fyk's case simply do not fit the § 230(c)(1) paradigm, at all. Like the District Court in *Henderson*, "[h]ere [too], th[is] district court erred by finding that § 230(c)(1) barred all counts asserted against [Facebook]. To the contrary, on the facts as alleged [by Fyk], [§ 230(c)(1)] does not apply to any of them." *Henderson*, 53 F.4th at 129.

C. Rule 60(b)(6)–Equitable Powers Can Be Used To Prevent Furtherance Of Injustice

Even if this Court were to deny Fyk's second request (now five years into litigation) to vacate the judgment pursuant to Rule 60(b)(5), it should still vacate the judgment under Rule 60(b)(6) to avoid a "manifest injustice." Rule 60 offers equitable relief to a party seeking to vacate a judgment in order 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, as explained in § I above and § IV.D below. 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 massive injustice from continuing. Issues surrounding broad CDA immunity are of national/global significance and federal courts' consistently inconsistent application of § 230 protections have "serious consequences" for millions of users like Fyk who face anti-competitive conduct by ISPs. By canning Fyk, there will never be a resolution on the open question of § 230 immunity scope (*i.e.,* Fyk's case is not *"futile in this instance"*).

D. This Motion Is Timely

Motions filed pursuant to Rule 60(b) "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). "What constitutes a reasonable time depends on the facts of each case." *In re Pac. Far E. Lines, Inc.*, 889 F.2d 242, 249 (9th Cir. 1989).

> What constitutes reasonable time depends on the facts of each case. *See Washington v. Penwell,* 700 F.2d 570, 572-73 (9th Cir. 1983) (four-year delay not unreasonable because of extraordinary circumstances); *Twentieth Century-Fox Film Corp. v. Dunnahoo,* 637 F.2d 1338, 1841 (9th Cir 1981) (six-year delay unreasonable in case of liquidated damages decree and no extraordinary circumstances); *Clarke v. Burkle,* 570 F.2d at 831-32 (six year delay not unreasonable).

U.S. v. Holtzman, 762 F.2d 720, 725 (9th Cir. 1985).

When determining if a delay was reasonable, courts consider "the danger of prejudice to the petitioner; length of the delay and its potential impact on judicial proceedings; reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Inv. Serv. Co v. Brunswick Associates L.P.*, 507 U.S. 380, 392-97, 113 S. Ct. 1489, 1497-99 (1993). In the instant matter, Fyk acted with good faith. SCOTUS denied his section petition for writ of certiorari a mere couple months ago in mid-April, and Fyk reasonably waited on SCOTUS' *Gonzalez* decision, which was handed down just a few weeks ago. Thus, there is no possible way (capable of surviving the laugh test) for this motion to be considered untimely. Moreover, and again, no prejudice will be suffered by Facebook having to finally put forth a substantive defense.

V. Conclusion

New law that directly impacts the outcome of this case has been decided: *Henderson* (Fourth Circuit), *Rumble* (this Court), *Doe* (SCOTUS), *Jarkesy* (Fifth Circuit), *Lemmon* (Ninth Circuit), *DZ Reserve* (this Court). Those decisions cannot be reconciled with this Court's previous decision. This reason alone justifies this Court's vacating the judgment under 60(b).

WHEREFORE, Plaintiff, Jason Fyk, respectfully requests entry of an order (1) granting Fyk's 60(b) motion; *i.e.*, vacating the Court's prior judgment, and/or (2) affording Fyk any other relief the Court deems equitable, just, or proper (*e.g.*, leave to amend the Verified Complaint).

Respectfully Submitted,

/s/ Jeffrey Greyber
Jeffrey L. Greyber, Esq.
GREYBER LAW, PLLC
Counsel for Plaintiff

Dated: June 16, 2023

OPINION, U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *HENDERSON v. SOURCE FOR PUBLIC DATA, L.P.* (NOVEMBER 3, 2022)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TYRONE HENDERSON, SR.; GEORGE I. HARRISON, JR.; ROBERT MCBRIDE, on behalf of himself and others similarly situated,

Plaintiffs-Appellants,

v.

THE SOURCE FOR PUBLIC DATA, L.P., d/b/a Publicdata.com; SHADOWSOFT, INC.; HARLINGTON-STRAKER STUDIO, INC.; AND DALE BRUCE STRINGFELLOW,

Defendants-Appellees.

FEDERAL TRADE COMMISSION; CONSUMER FINANCIAL PROTECTION BUREAU; NORTH CAROLINA; TEXAS; ALABAMA; ARIZONA; ARKANSAS; CONNECTICUT; GEORGIA; IOWA; MAINE; MICHIGAN; MINNESOTA; MISSISSIPPI; NEBRASKA; NEVADA; NORTH DAKOTA; OHIO; SOUTH CAROLINA; SOUTH DAKOTA; UTAH; VERMONT; VIRGINIA; NATIONAL CONSUMER

LAW CENTER; NATIONAL FAIR HOUSING ALLIANCE; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,

Amici Supporting Appellants.

No. 21-1678

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:20-cv-00294-HEH)

Before: AGEE, RICHARDSON, and QUATTLEBAUM, Circuit Judges.

RICHARDSON, Circuit Judge:

Section 230(c)(1) of the Communications Decency Act protects some parties operating online from specific claims that would lead to liability for conduct done offline. But it is not a license to do whatever one wants online. Protection under § 230(c)(1) extends only to bar certain claims imposing liability for specific information that another party provided.

Public Data sought § 230(c)(1) protection against four claims brought against it for violating the Fair Credit Reporting Act ("FCRA"). The district court agreed that the claims were precluded by § 230(c)(1). Plaintiffs appealed, arguing that § 230(c)(1) does not apply. We agree. Plaintiffs have alleged facts that, if true, render § 230(c)(1) inapplicable to their four claims. So we reverse the district court and remand for further proceedings.

I. Background

Defendants are The Source of Public Data, L.P.; ShadowSoft, Inc.; Harlington-Straker Studio, Inc.; and Dale Bruce Stringfellow. Defendants' relation to each other and to the website PublicData.com is complex but unimportant to this appeal. 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.[1] So we refer to Defendants collectively as "Public Data."

Public Data's business is providing third parties with information about individuals. Plaintiffs allege that it involves four steps.

First, Public Data acquires public records, such as criminal and civil records, voting records, driving information, and professional licensing. These records come from various local, state, and federal authorities (and other businesses that have already collected those records).

Second, Public Data "parses" the collected information and puts it into a proprietary format. This can include taking steps to "reformat and alter" the raw

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1 This case comes to us on appeal from the district court's grant of a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Our review is de novo, and we apply the same standards as we would for a Rule 12(b)(6) motion. *Massey v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014). This means that we accept all well-pleaded facts in the complaint as true. *Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014). Given the procedural posture, our factual summary takes Plaintiffs' Second Amended Complaint at face value.

documents, putting them "into a layout or presentation [Public Data] believe[s] is more user-friendly." J.A. 16. For criminal records, Public Data "distill[s]" the data subject's criminal history into "glib statements," "strip[s] out or suppress[es] all identifying information relating to the charges," and then "replace[s] this information with [its] own internally created summaries of the charges, bereft of any detail." J.A. 30.

Third, Public Data creates a database of all this information which it then "publishes" on the website PublicData.com. Public Data does not look for or fix inaccuracies in the database, and the website disclaims any responsibility for inaccurate information. Public Data also does not respond to requests to correct or remove inaccurate information from the database.

Fourth, Public Data sells access to the database, "disbursing [the] information . . . for the purpose of furnishing consumer reports to third parties." J.A. 19. All things told, Plaintiffs allege that Public Data sells 50 million consumer searches and reports per year. Public Data knows that traffic includes some buyers using its data and reports to check creditworthiness and some performing background checks for employment purposes.

Plaintiffs allege that Public Data's activities injured them. Plaintiffs Henderson, Harrison, and McBride have each requested a copy of the records Public Data keeps on them, but Public Data has not provided those records. Plaintiff McBride also alleges that he applied for a job that required a background check. As part of that check, his potential employer used a background report from Public Data. Public Data's report on McBride was inaccurate because it contained misleading and incomplete criminal history. McBride was not hired.[2]

Plaintiffs bring four claims against Public Data alleging it violated four provisions of the FCRA.[3] Underlying each claim is the contention that Public Data must comply with the FCRA because they produce "consumer report[s]" and are a "consumer reporting agency" under the Act.[4]

In Count One, Plaintiffs allege that Public Data violated § 1681g[5] by failing to provide them a copy of their own records and a notice of their FCRA rights when requested. In Count Three, Plaintiff McBride

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[2] McBride alleges that he learned about the inaccurate information included in the report when he sued his potential employer and obtained the report in discovery.

[3] Plaintiffs together represent a putative class for Count One, Plaintiff McBride alone represents a class for Counts Two and Three, and Count Four is an individual claim brought by Plaintiff McBride. Given the posture of this case, we express no opinion on the class allegations or propriety of class certification.

[4] These terms are defined in 15 U.S.C. § 1681a(d) and (f), respectively. Since the only issue on appeal is whether 47 U.S.C. § 230(c)(1) bars Plaintiffs' claims, we do not address whether Public Data qualifies as a "consumer reporting agency" under the FCRA.

[5] "Every consumer reporting agency shall, upon request . . . clearly and accurately disclose to the consumer" certain information including "[a]ll information in the consumer's file at the time of the request," "[t]he sources of the information," and the "[i]dentification of each person . . . that procured a consumer report" within the two years before the request, if procured "for employment purposes," or within one year otherwise. 15 U.S.C. § 1681g(a)(1)–(3).

alleges that Public Data violated § 1681b(b)(1)[6] by failing to get certain certifications from employers it provided reports to, and by failing to provide those employers with a consumer-rights summary. Counts Two and Four both seek to impose liability for Public Data's failure to maintain proper procedures to ensure accurate information. Count Two alleges that Public Data violated § 1681k(a)[7] by failing to notify Plaintiffs when it provided their records for employment purposes and by failing to establish adequate procedures to ensure complete and up to date information in those records. And in Count Four, Plaintiff McBride alleges, for himself only, that Public Data violated § 1681e(b)[8]

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[6] Section 1681b(b)(1) requires that a consumer reporting agency obtain certifications from its employer-customers stating they will comply with § 1681b(b)(2)(A), and that the consumer reporting agency provide those employer-customers with a summary of the consumer's rights. 15 U.S.C. § 1681b(b)(1).

[7] "A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall—(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or (2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date." 15 U.S.C. § 1681k(a).

[8] "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b).

by not implementing sufficient procedures to ensure accuracy in its reports.

Public Data moved for judgment on the pleadings, arguing that each claim was barred by § 230(c)(1). The district court agreed and granted judgment for Public Data. *See Henderson v. Source for Pub. Data*, 540 F. Supp. 3d 539, 543 (E.D. Va. May 19, 2021). Plaintiffs appealed, and we have jurisdiction under 28 U.S.C. § 1291.

II. Discussion

Section 230 provides internet platforms with limited legal protections. *See generally* Adam Candeub, *Reading Section 230 as Written*, 1 J. Free Speech L. 139 (2021). Subsection 230(c)(1) prohibits treating an interactive computer service as a publisher or speaker of any information provided by a third party. And § 230(c)(2) bars liability for a platform's actions to restrict access to obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise-objectionable material.

On appeal, this case deals exclusively with the protection provided by § 230(c)(1): "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." Read plainly, this text requires that a defendant like Public Data must establish three things to claim protection: (1) The defendant is a "'provider or user of an interactive computer service'"; (2) the plaintiff's claim holds the defendant "responsible 'as the publisher or speaker of any information'"; and (3) the relevant information was "'provided by another information content provider.'" *Nemet Chevrolet, Ltd. v. Consumer-*

affairs.com, Inc., 591 F.3d 250, 254 (4th Cir. 2009) (quoting § 230(c)(1)).[9] These three requirements look first to the defendant's status (*i.e.*, are they a provider or user of an "interactive computer service"), then to the kind of claim the plaintiff has brought (*i.e.*, does the plaintiff treat the defendant as a publisher or speaker of information), and finally to the source of the information underlying the plaintiff's claim (*i.e.*, who provided the information).

Public Data asserts that its activities, as described in Plaintiffs' FRCA claims, satisfy all three § 230(c)(1) requirements, so that § 230(c)(1) bars those claims. Plaintiffs disagree. For this appeal, they admit that Public Data is an interactive computer service[10] but

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[9] There was some confusion below about these requirements. *See Henderson*, 540 F. Supp. 3d at 547. And that is understandable given that we have not been clear about separating (c)(1)'s three distinct requirements. *See Zeran v. American Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (discussing the protection in broad terms, without separating into distinct prongs). But when grappling with § 230(c)(1), we have applied these ideas, if not always in a neat and ordered row. *See id.* (discussing (1) "service providers" being (3) held "liable for information originating with a third-party user of the service," (2) "in a publisher's role"); *see also Nemet*, 591 F.3d at 254–55; *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139–40 (4th Cir. 2019). To avoid confusion, we follow our sister circuits and read the statute to create three requirements. *See HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 681 (9th Cir. 2019); *FTC v. LeadClick Media, LLC,* 838 F.3d 158, 173 (2d Cir. 2016); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267–68 (D.C. Cir. 2019).

[10] "The term 'interactive computer service' means 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 and such systems operated or services offered by libraries or educational institutions." § 230(f)(2). Hosting a web-

challenge the other two requirements necessary for § 230(c)(1) protection. On the second requirement, Plaintiffs argue their claims do not treat Public Data as the publisher or speaker of the offending information. And on the third requirement, Plaintiffs allege that Public Data *itself* acted as an "information content provider" of the offending information such that the information did not come solely from "*another* information content provider."

We conclude that § 230(c)(1) does not bar Counts One and Three because those claims do not treat Public Data as a publisher or speaker of information. For Counts Two and Four, we need not determine whether this second requirement is met because we conclude that Plaintiffs have alleged enough facts to plausibly infer that Public Data is an information content provider that provided the improper information. As Public Data cannot establish at this stage that it meets the third requirement for Counts Two and Four, § 230(c)(1) does not now apply. So we reverse, and all claims are remanded for further proceedings consistent with this opinion.

A. Requirement Two: Publisher or Speaker of Information

Section 230(c)(1)'s second requirement asks whether the plaintiff's legal claim requires that the defendant be "treated as the publisher or speaker of any information." In other words, for protection to

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site "enables computer access by multiple users to a computer server." *See LeadClick*, 838 F.3d at 174 ("Courts typically have held that internet service providers, website exchange systems, online message boards, and search engines fall within this definition.").

apply, the claim must turn on some "information," and must treat the defendant as the "publisher or speaker" of that information. *See* § 230(c)(1) (No internet platform "shall be treated as the publisher or speaker of any information . . . "); *see also Zeran*, 129 F.3d at 330 (describing § 230(c)(1) as protecting a defendant from being "liable for information" when the defendant acts in the "publisher's role" for that information). A claim treats the defendant "as the publisher or speaker of any information" when it (1) makes the defendant liable for publishing certain information to third parties, and (2) seeks to impose liability based on that information's improper content.

Our precedent demands that we ask whether the claim "thrust[s]" the interactive service provider "into the role of a traditional publisher." *Zeran*, 129 F.3d at 332. The term "publisher" as used in § 230(c)(1) "derive[s] [its] legal significance from the context of defamation law." *Id.*[11] Thus, the scope of "the role of a traditional publisher," and therefore the scope of

[11] When "a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Stokeling v. United States,* 139 S. Ct. 544, 551 (2019) (internal citation and quotation marks omitted). "Publisher" is just such a transplanted word. Section 230(c)(1) altered the way common-law-defamation claims would apply to users and providers of interactive computer services that the common law would otherwise hold liable as publishers. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., statement respecting denial of certiorari) (discussing *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, at *3–*4 (N.Y. Sup. Ct. May 24, 1995)); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) ("Section 230 marks a departure from the common-law rule that allocates liability to publishers . . . of tortious material written or prepared by others.").

what § 230(c)(1) protects, is guided by the common law. *See id.* ("[Defendant] falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity." (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 803 (5th ed. 1984)).[12]

At common law, a publisher was someone who intentionally or negligently disseminated information to third parties.[13] In this context, a third party is someone other than the subject of the information disseminated.[14] Thus, for a claim to treat someone as

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[12] Defamation at common law distinguished between publisher and distributor liability but *Zeran* did not make this distinction. Instead, *Zeran* determined that distributor liability "is merely a subset, or a species, of publisher liability" and so treated them the same under § 230(c)(1). *Zeran*, 129 F.3d at 332. The decision has been questioned for failing to make this distinction. *See, e.g.*, *Malwarebytes*, 141 S. Ct. at 14–15 (Thomas, J., statement respecting denial of certiorari). But the approach taken in the Fourth Circuit since *Zeran* has been clear, and the parties have made no arguments based on this distinction.

[13] *See* Restatement (Second) of Torts § 577, at 201 (Am. L. Inst. 1965) ("Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed."); *Publish*, Black's Law Dictionary 1268 (8th ed. 2004) (defining "publish" as including "[t]o distribute copies . . . to the public" and "[t]o communicate (defamatory words) to someone other than the person defamed"); *Yousling v. Dare*, 98 N.W. 371, 371 (Iowa 1904) ("The cases . . . uniformly hold that . . . the sending of a communication containing defamatory language directly to the person defamed, without any proof that, through the agency or in pursuance of the intention of the sender, it has come to the knowledge of any one else, does not show such publication as to render the sender liable in damages.").

[14] *See* Restatement (Second) of Torts § 577 cmt. b, at 202 (Am. L. Inst. 1965); *Scottsdale Cap. Advisors Corp. v. The Deal, LLC*,

a publisher under § 230(c)(1), the claim must seek to impose liability based on the defendant's dissemination of information to someone who is not the subject of the information.

But that alone is not enough. To meet the second requirement for § 230(c)(1) protection, liability under the claim must be "based on the *content of the speech published*" by the interactive service provider. *Erie Insurance Co.*, 925 F.3d at 139. At common law, defamation required publishing a "false and defamatory statement." Restatement (Second) of Torts § 558(a), at 155 (Am. L. Inst. 1965). The publisher was held liable because of the improper nature of the content of the published information.[15] In other words, to hold

887 F.3d 17, 21 (1st Cir. 2018) ("[P]ublication, does not mean merely uttering or writing. Rather, 'publication' . . . means to communicate the defamatory material to a third party (that is, a party who is not the subject of the defamatory material) . . . "); *Sheffill v. Van Deusen*, 79 Mass. 304, 305 (1859) (asserting that there can be no publication unless the words spoken were heard by third persons).

[15] Other information-based torts at common law follow this mold, imposing liability on publishers for the improper nature of their disseminated content. For example, false-light claims hold a publisher liable only when there is "at least an implicit false statement of objective fact." *Flowers v. Carville*, 310 F.3d 1118, 1132 (9th Cir. 2002).

And publisher liability at common law did not always require that the "impropriety" of the content be that it was false and defamatory. Claims based on publicity given to private life impose liability on a publisher for information that is "highly offensive to a reasonable person." Restatement (Second) of Torts § 652D, at 383 (Am. L. Inst. 1965). Reaching further back, publishers in England were prosecuted under a fourteenth century statute banning "constructive treason" for printing "seditious, poisonous, and scandalous" information even if that information was not someone liable as a publisher at common law was to hold them responsible for the content's improper character. We have interpreted "publisher" in § 230(c)(1) in line with this common-law understanding. Thus for § 230(c)(1) protection to apply, we require that liability attach to the defendant on account of some improper content within their publication. *See Erie Ins. Co.*, 925 F.3d at 139–40 ("There is no claim made based on the *content of speech published* by [Defendant]—such as a claim that [Defendant] had liability as the publisher of a misrepresentation of the product or of defamatory content.").

This improper-content requirement helps dispel Public Data's notion that a claim holds a defendant liable as a publisher anytime there is a "but-for" causal relationship between the act of publication and liability. *See* Appellee's Response Brief 20–21 ("Put another way, had Public Data not published court records on its website, Plaintiffs could not have brought their Section 1681g(a) claim."). This "but-for" publication test would say a claim treats an entity as

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false and defamatory. William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 100–101 (1984); Geoffrey R. Stone et al., Constitutional Law 1009–10 (8th ed. 2018). Similarly, while libel required that the published information dishonor another or provoke violence, "truth was no defense." Philip Hamburger, *The Development of the law of Seditious Libel and the Control of the Press*, 37 Stan. L. Rev. 661, 712 (1985).

While it is commonly accepted that Congress passed § 230 in part as reaction to a case involving a defamation suit against an internet company, *see Malwarebytes, Inc.*, 141 S. Ct. at 14 (Thomas, J., statement respecting denial of certiorari) (discussing *Stratton*, 1995 WL 323710), § 230(c)(1) protection is not limited to defamation suits.

a "publisher" under § 230(c)(1) if liability hinges in any way on the act of publishing. This but-for test bears little relation to publisher liability at common law. To be held liable for information "as the publisher or speaker" means more than that the publication of information was a but-for cause of the harm. *See Erie Ins. Co.*, 925 F.3d at 139–40; *HomeAway.com*, 918 F.3d at 682.

Erie Insurance is a good example. There, we held that Amazon was not protected by § 230(c)(1) in a product-liability suit even though publishing information was a but-for cause of the harm—*i.e.*, the product was bought from Amazon's website, making the advertisement's publication a necessary link in the causal chain that led to setting the buyer's house on fire. *See Erie Insurance Co.*, 925 F.3d at 138–40. Though publishing information was a but-for cause, we refused to apply § 230(c)(1) protection because the plaintiff's product-liability claim was based on Amazon "as the seller of the defective product . . . [not] the *content of speech published* by Amazon." *Id.* at 139–40.

So, to paraphrase the test we began with, a claim only treats the defendant "as the publisher or speaker of any information" under § 230(c)(1) if it (1) bases the defendant's liability on the disseminating of information to third parties and (2) imposes liability based on the information's improper content.

Based on these two requirements, we can see that § 230(c)(1) does not provide blanket protection from claims asserted under the FCRA just because they depend in some way on publishing information. Yes, the FCRA imposes procedural obligations on any "consumer reporting agency." *See Ross v. FDIC*, 625 F.3d 808, 812 (4th Cir. 2010) ("The FCRA is a comprehensive statutory scheme designed to regulate the consumer reporting industry."). And each claim here alleges that Public Data ignored those obligations as a member of that regulated industry.[16] So publishing information online is a but-for cause of Public Data being a consumer reporting agency subject to the FCRA's requirements. Most of what Public Data allegedly does, after all, is publish things on the internet. That means that publishing information is one but-for cause of these FCRA claims against Public Data. If Public Data is a "consumer reporting agency" subject to FCRA liability, it is one because it is the publisher or speaker of consumer report information. Yet that alone is not sufficient, as we do not apply a but-for test. *See Erie Ins.,* 925 F.3d at 139–140; *HomeAway.com*, 918

[16] Each FCRA claim here is triggered by a defendant's status as a "consumer reporting agency" as defined in 15 U.S.C. § 1681a (f). *See* 15 U.S.C. §§ 1681g(a) ("Every consumer reporting agency shall"); 1681k(a) ("A consumer reporting agency . . . shall"); 1681b(b)(1) ("A consumer reporting agency may furnish a consumer report for employment purposes only if"); 1681e(b) ("Whenever a consumer reporting agency prepares a consumer report it shall").

A "consumer reporting agency" is defined as "any person which, for monetary fees . . . regularly engages . . . in the practice of assembling or evaluating consumer credit information . . . for the purpose of furnishing consumer reports to third parties." § 1681a(f). Circular as it is, "companies that regularly prepare consumer reports" are consumer reporting agencies. *Berry v. Schulman*, 807 F.3d 600, 605 (4th Cir. 2015). The district court did not determine whether Plaintiffs made sufficient allegations to prove that Public Data is a "consumer reporting agency," and we take no position on that question. Of course, Public Data may contest that claim below. But here we only consider the preliminary question of whether § 230 bars Plaintiffs' FCRA claims even if Public Data is a "consumer reporting agency."

F.3d at 682. We must instead examine each specific claim.[17]

It is also true that, at a high level, liability under the FCRA depends on the content of the information published. Both the definition of "consumer reporting agency" and the definition of "consumer reports" reference "credit information" or "information . . . bearing on a consumer's credit worthiness." § 1681a (d)(1), (f). If Public Data and its activities did not meet these definitions, there could be no liability under these FCRA claims. In this way, liability for each claim hinges on the published information's content. Yet, while the informational content matters, § 230(c)(1) protects Public Data only from claims that demand the information's content be improper before imposing liability. And, as a class, there is nothing improper about "credit information" or "information . . . bearing on a consumer's credit worthiness." Again, we must examine each specific claim in context to see if the claim treats Public Data as a publisher under § 230(c)(1).

Finally, when considering whether any claim treats Public Data as a publisher, our precedent

[17] Section 230(e) catalogues other laws for which § 230(c)(1) must not be construed to impair. And the FCRA is not on the that list. But that tells us little about whether § 230(c)(1) can bar specific FCRA claims because § 230(e) does not establish "an exception to a prohibition that would otherwise reach the conduct excepted." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 582 (1988). Instead, it suggests a "clarification of the meaning of [§ 230] rather than an exception" to its coverage. *Id.* at 586. In other words, a FCRA claim must first impose liability on the defendant as the publisher or speaker of information to trigger the FCRA in the first place. If it does, then § 230(c)(1) can apply to FCRA claims. And if it does not, then § 230(c)(1) will not apply.

teaches that we must look beyond the claim's formal elements. Beginning in *Zeran*, our Court has stressed a functional approach. In our functional analysis, we ask whether holding this defendant liable requires treating them as a publisher, not whether every abstract violation requires it. *See Zeran*, 129 F.2d at 332; *Erie Ins. Co.*, 925 F.3d at 139. To make this determination, we look to see what the plaintiff in our case must prove. If the plaintiff's recovery requires treating the defendant as a publisher, then the defendant has satisfied § 230(c)(1)'s second requirement.

Zeran itself is instructive. There, Kenneth Zeran made a negligence claim against AOL. *Zeran*, 129 F.3d at 332. A defendant can, of course, be negligent without publishing anything. Yet Zeran asserted that AOL was negligent "because it communicated to third parties an allegedly defamatory statement." *Id.* at 333. That is, Zeran's specific negligence claim treated the defendant as a publisher. So while not every negligence claim treats a defendant as a publisher, Zeran's negligence claim did; so we held that claim was foreclosed by § 230(c)(1). *Id.* at 332–33.

We thus turn to the four specific claims asserted.

Count One is based on FCRA § 1681g and does not seek to impose liability on Public Data as a speaker or publisher of any information. Section 1681g requires consumer reporting agencies to give consumers a copy of their own consumer report along with an FCRA notice upon request.[18] So it is based on a failure

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[18] *Zeran* left the door open to finding § 230(c)(1) protection applies when a claim holds a party liable for a decision not to publish, *Zeran*, 129 F.3d at 330, and we need not decide here if we should shut it. *Zeran suggested* that it might allow § 230(c)(1)

to disseminate information about an individual to that same individual, not a third party. Recall that "[p]ublication of defamatory matter is its communication intentionally or by a negligent act *to one other than the person defamed*." *See* Restatement (Second) of Torts § 577, at 201 (emphasis added). So Section 1681g does not seek to hold Public Data liable "as the publisher" under § 230(c)(1), and § 230(c)(1) does not bar Count One.

Like Count One, Count Three does not treat Public Data as a speaker or publisher. Count Three seeks to impose liability on Public Data for violating § 1681b(b)(1), which lays out two requirements that a consumer reporting agency must meet before they may provide a consumer report "for employment purposes." § 1681b(b)(1). First, the employer who gets the report must certify both that they have complied with the FCRA's requirements and that they will not use the information in violation of state or federal law. § 1681b(b)(1)(A)(i)–(ii). And, second, the consumer reporting agency must also provide a summary of the consumer's FCRA rights to the employer. § 1681b (b)(1)(B).

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to bar claims whenever avoiding liability under those claims would require acting as a publisher. *Id.* In other words, it is possible to read *Zeran* as applying § 230(c)(1) protection when an interactive service provider would be held liable for failing to publish information. *See id.; see also Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (implying that not providing a warning can be an act of publishing by considering whether § 230(c)(1) could bar a negligent-failure-to-warn claim). Since even in those circumstances the failure to publish would still need to relate to information meant to be disseminated to third-parties, we need not reach this question here.

The requirement that a consumer reporting agency obtain certification from an employer is easily disposed of because liability is in no way based on the improper content of any information spoken or published by Public Data. Here, if liability is based on information, it is only Public Data's failure to obtain the required information (certification) from the employer that matters.

Slightly more vexingly, Count Three also does not treat Public Data as a publisher because liability depends on Public Data's failure to provide a summary of consumer rights to the putative employer (§ 1681b (b)(1)'s second requirement). Even if Public Data's decision to not provide the required summary could be described as a publisher's decision, the information it failed to provide is proper and lawful content. And § 230(c)(1) applies only when the claim depends on the content's impropriety. Therefore, Public Data's failure to summarize consumer rights cannot fall within § 230(c)(1) protection.

Unlike Counts One and Three, Counts Two and Four *may* seek to hold Public Data liable as the publisher of information. Section 1681e(b), the basis for Count Four, requires that a consumer reporting agency "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." Likewise, liability under § 1681k(a), the gravamen of Count Two, requires that a consumer reporting agency that is selling consumer reports "for employment purposes" which "are likely to have an adverse effect on a consumer's ability to obtain employment" must "maintain strict procedures" to ensure that any consumer information "is complete and up to date."

§§ 1681k(a), 1681(k)(a)(2).[19] Thus, both claims seek to impose liability based on an agency's failure to maintain proper procedures to ensure accurate information. On its face, liability for failing to maintain proper procedures does not seem to fall within § 230 (c)(1)'s ambit as we have described it. After all, the FCRA's statutory language here requires neither dissemination of information to third parties nor improper content. Yet a little digging uncovers two levels of complexity.

First, current Fourth Circuit precedent requires that a plaintiff bringing a claim under both § 1681e(b), and by implication § 1681k(a), show the defendant's "consumer report contains inaccurate information." *Dalton*, 257 F.3d at 415. Though the textual basis for requiring an inaccuracy is unclear, *Dalton* provided that liability under Counts 2 and 4 depend on inaccurate information.[20] And that suggests that Counts 2 and 4 thus functionally impose liability on the defendant based on the information's impropriety.

Second, a private plaintiff bringing a claim in federal court, as is the case here, under § 1681e(b) or

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[19] Liability under § 1681k(a) also requires that the defendant fail to provide notifications to the consumer that the report was provided to a potential employer. § 1681k(a)(1). We have already explained why a consumer-notification requirement like this does not impose liability on Public Data as a publisher or speaker of information—it is a failure to disseminate information about an individual to that same individual, not a third party.

[20] *Dalton* held that violating § 1681e(b) requires inaccurate information. *Id.* While *Dalton* did not address § 1681k(a)'s reasonable-procedures requirement, we see no principled way to distinguish the two provisions and so read *Dalton* to require the same inaccuracy.

§ 1681k(a) must show that Public Data disseminated information to third parties to satisfy Article III standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021). The statutory provisions might be violated without the dissemination of any information, as the FCRA itself does not condition these provisions on disseminating the report but on failing to follow proper procedures to ensure a report's accuracy. But a private plaintiff lacks standing to bring a reasonable-procedures claim unless the plaintiff's report was provided to a third party. *Id.* So it may be that these reasonable-procedures claims turn on Public Data providing the inaccurate information to a third party.[21] *See id*; *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016) (providing "entirely accurate" information without complying fully with the FCRA's procedures is a "bare procedural violation" that cannot "satisfy . . . Article III"). Considering past precedent and the Constitution's limited judicial power, perhaps Counts Two and Four functionally depend on Public Data disseminating inaccurate information to a third party. But we need not, and do not, decide whether our functional approach can stretch the meaning of being "treated as the publisher or speaker of any information" far enough to cover Counts Two and Four. For as we will see, Public Data was "another information content provider" for the information at issue in Counts 2 and 4. So, based on the third requirement, § 230(c)(1) protection fails for those two counts.

[21] Again, at least in federal court. *See TransUnion*, 141 S. Ct. at 2224 n.9 (Thomas, J., dissenting) (suggesting a non-publication claim could be brought in state court).

B. Requirement Three: Provided by Another Information Content Provider

The third and final requirement for § 230(c)(1) protection is that the information at issue in the plaintiff's claim be "provided by *another* information content provider." § 230(c)(1) (emphasis added). An "'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." § 230(f)(3).

Plaintiffs argue that this third requirement is not met because Public Data itself is an "information content provider" for the relevant information.[22] We agree. The plaintiffs' complaint plausibly alleges that Public Data is an information content provider for the information that creates liability under these two

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[22] Public Data can be both "a provider or user of an interactive computer service" and also the "information content provider." And when a defendant is both, § 230(c)(1) provides no protection. Section 230(c)(1) applies only when the information for which liability is being imposed on the provider or user of an interactive computer service is "provided" by "another" information content provider. § 230(c)(1). The use of the modifier *another* shows that an interactive computer service provider can be an information content provider at the same time. *See* § 230(c)(1) ("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." (emphasis added)). And when a provider of an interactive computer service also provides the information at issue in a claim, it receives no protection under § 230(c)(1). *See Nemet*, 591 F.3d at 254. In other words, § 230(c)(1) does not protect entities for their own speech, it protects them only when they serve as a conduit for other's speech. *See Zeran*, 129 F.3d at 333.

counts. So, on these alleged facts, § 230(c)(1) does not bar Counts Two and Four.[23]

Public Data is an "information content provider" if they are "responsible, in whole or in part, for the creation or development" of the information at issue. This Court has never fully defined the terms "creation" or "development" as they are used in the statute. But we have explained that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Zeran*, 129 F.3d at 330; *see also Nemet*, 591 F.3d at 258 ("creation" or "development" of information requires "something more than [what] a website operator performs as part of its traditional editorial function").

Other circuits have put more flesh onto these definitions, determining that an interactive computer service provider or user is responsible for the development[24] of the information at issue in the case if they "directly and 'materially' contributed to what made the content itself 'unlawful.'" *Force v. Facebook*, 934 F.3d 53, 68 (2d Cir. 2019) (quoting *LeadClick*, 838 F.3d at

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[23] Since we determine that Public Data is an information content provider, we do not address Plaintiffs' argument that "provided" in the statute means "provided *to the internet user*" not "provided *to the internet company*." Appellee's Brief 34–35; *see, e.g.*, *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th 2003) ("The structure and purpose of § 230(c)(1) indicate that the immunity applies only with regard to third-party information provided *for use on the Internet*.").

[24] Since we find that Public Data has "developed" the information at issue we need not consider whether it might also have "created" that information.

174); *see Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (explaining that a defendant is an information content provider if they "contribute[d] materially to the alleged illegality of the conduct"); *Jones*, 755 F.3d at 413 ("Consistent with our sister circuits, we adopt the material contribution test."). And while this Court has never explicitly adopted "material contribution" as the test, we applied it in *Nemet* to determine that the website operator there was not an information content provider. *See Nemet*, 591 F.3d at 257–58 (noting that the plaintiff failed to allege that the website operator "contributed to the allegedly fraudulent nature of the comments at issue").

Additionally, the material-contribution test fits well within our broader § 230(c)(1) jurisprudence. *Zeran* and *Nemet* rest on the principle that liability for an interactive computer service user or provider must turn on "something more than . . . its traditional editorial function." *Nemet*, 591 F.3d at 258 (citing *Zeran*, 129 F.3d at 330). All the material-contribution test does is put a more helpful name to this "something more" standard. And defining "something more" as a material contribution makes sense. As *Zeran* notes, § 230 bars liability against "companies that serve as intermediaries for other parties' potentially injurious messages." *Zeran*, 129 F.3d at 330–31. But where a company materially contributes to a message's unlawful content, that company stops being a mere "intermediary" for another party's message. Instead, the company is adding new content to the message that harms the plaintiff. We thus hold that an interactive computer service is not responsible for developing the unlawful information unless they have gone beyond the exercise of traditional editorial functions and materially contributed to what made the content unlawful.

Whether a defendant developed information such that they are an "information content provider" turns on whether the defendant has materially contributed to the piece(s) of information relevant to liability. Section 230(c)(1) applies if a defendant has materially contributed only to parts of the disseminated information that do not make the disseminated information unlawful (if § 230(c)(1) is otherwise applicable). For example, in *Jones*, the Sixth Circuit determined that a website had not materially contributed to defamatory content that it hosted. *Jones*, 755 F.3d at 416. This was so even though the website operator had authored his own comments underneath the alleged defamatory material. *Id.* In drawing this conclusion, the court noted that "[t]o be sure, [the operator] was an information content provider as to his comment . . . [b]ut [Plaintiff] did not allege that [the operator's] comments were defamatory." *Id.* In other words, the § 230(c)(1)'s third requirement did not turn on whether the defendant materially contributed to some part of the total information disseminated—*i.e.*, the entire post—but on whether the defendant materially contributed to the defamatory aspect of the information. *Id.*; *see La Liberte v. Reid*, 966 F.3d 79, 89 (2d Cir. 2020) (applying liability when defendant was responsible for the content's defamatory portion). Our approach is the same. *See Nemet*, 591 F.3d at 255–60 (discussing twenty allegedly defamatory posts in separate groups based on the defendant's involvement with the posts before concluding that the plaintiff failed to show that defendant "was responsible for the creation or development of the allegedly defamatory content at issue").

Plaintiffs have alleged enough facts to show that Public Data's own actions contributed in a material way to what made the content at issue in Counts Two and Four inaccurate and thus improper. Plaintiff McBride claims that the report Public Data sent to his potential employer was inaccurate because it omitted or summarized information in a way that made it misleading. And, from Plaintiffs' allegations, it is plausible that McBride's report was misleading based on Public Data's own actions.

As a general matter, Plaintiffs claim that Public Data handles criminal matters by "strip[ping] out or suppress[ing] all identifying information relating to the charges . . . [including] dispositions" and that it then "replace[s] this information with [its] own internally created summaries of the charges, bereft of any detail." J.A. 30. As to McBride's report specifically, Plaintiffs allege that the report "suggest[ed] that Plaintiff McBride had been convicted of each of the offenses listed," but that "the report was inaccurate and incomplete as it failed to indicate that several of the offenses listed had been nolle prossed." J.A. 37–38. These allegations, and all reasonable inferences, sufficiently allege that the inaccuracies in McBride's report resulted from Public Data's stripping out the nolle prosequi disposition for McBride's charges and adding in its own misleading summaries.

Thus, on Plaintiffs' allegations, Public Data's summaries and omissions materially contribute to the report's impropriety. They are not merely an exercise of traditional editorial functions. When *Zeran* proclaimed that § 230(c)(1) barred claims based on a defendant's exercise of traditional editorial functions, it also provided a suggestive list including "deciding whether to publish, withdraw, postpone or alter content." *Zeran*, 129 F.3d at 330. Of course, in a sense, omitting the criminal charge dispositions is just "altering" their content, as is creating new charge summaries. Yet, *Zeran*'s list of protected functions must be read in its context, and that context cabins that list to merely "editorial" functions. It cannot be stretched to include actions that go beyond formatting or procedural alterations and change the substance of the content altered.[25] An 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.[26]

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[25] An extreme example helps illustrate this point. Take a writer of a ransom note who cuts letters out of a magazine to list his demands. That writer might be said to be "altering" content. Yet, the note's writer is hardly acting as an "editor" of the magazine. Instead, he has substantively changed the magazine's content and transformed it from benign information about sports or entertainment into threatening information about bags of cash and ultimatums.

[26] Drawing this line here 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 themselves rather than a third party. *See id.*; *see also Nemet*, 591 F.3d at 254 ("Congress thus established a general rule that providers of interactive computer services are liable . . . for speech that is properly attributable to them"); *cf. La Liberte*, 966 F.3d at 89 (holding that there is no § 230 immunity for a defendant who

Applying these principles to Counts Two and Four, Public Data—according to Plaintiffs' allegations—has materially contributed to what makes the content at issue unlawful. The content relevant to Counts Two and Four is only unlawful because it is inaccurate. But, as alleged, the content provided to Public Data about McBride was not inaccurate. Instead, through Public Data's actions, the records were changed so as to introduce the inaccuracies. Public Data thus made substantive changes to the records' content that materially contributed to the records' unlawfulness. That makes Public Data an information content provider, under the allegations, for the information relevant to Counts Two and Four, meaning that it is not entitled to § 230(c)(1) protection for those claims.

* * *

Section 230(c)(1) provides protection to interactive computer services. *Zeran*, 129 F.3d at 331. But it does not insulate a company from liability for all conduct that happens to be transmitted through the internet. Instead, protection under § 230(c)(1) extends only to bar certain claims, in specific circumstances, against particular types of parties. Here, the district court erred by finding that § 230(c)(1) barred all counts asserted against Public Data. To the contrary, on the facts as alleged, it does not apply to any of them. Counts One and Three are not barred because they do not seek to hold Public Data liable as a publisher under the provision. Counts Two and Four are not

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posted a third-party's photo, but who supplied her own defamatory commentary to it). So we may not read the traditional editorial functions listed in *Zeran* so broadly as to include a defendant's substantive alterations that introduced the inaccuracy or falsity at issue in the claim.

barred because Public Data is itself an information content provider for the information relevant to those counts.

REVERSED AND REMANDED

ORDER DENYING MOTION TO DISMISS AND TO STRIKE, NORTHERN DISTRICT OF CALIFORNIA IN *RUMBLE, INC. v. GOOGLE LLC* (JULY 29, 2022)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RUMBLE, INC.,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Case No. 21-cv-00229-HSG

Re: Dkt. No. 32

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

ORDER DENYING MOTION TO DISMISS AND TO STRIKE

Pending before the Court is Defendant's partial motion to dismiss and motion to strike, briefing for which is complete. *See* Dkt. No. 32 ("Mot."), 44 ("Opp."), 45 ("Reply"). Defendant asks the Court to dismiss Plaintiff's tying and search-dominance theories of liability and strike paragraphs 34, 35, and 75-176 of Plaintiff's First Amended Complaint. *See* Mot. at i.

The Court held a hearing on the motion, *see* Dkt. No. 50, and now DENIES it.

I. Background

"Since 2013, Rumble has operated an online video platform." Dkt. No. 21 ("FAC") ¶ 14. Plaintiff alleges that "Rumble is one of the most respected independent and privately owned companies in the online video platform industry and market, and its business model is premised upon helping the 'little guy/gal' video content creators monetize their videos." *Id.* According to Plaintiff, "Rumble currently has more than 2 million amateur and professional video content-creators that now contribute to more than 100 million streams per month." *Id.* ¶ 22. Plaintiff alleges that "Rumble's success, however, has been far less than it could and should have been as a direct result of Google's unlawful anticompetitive, exclusionary and monopolistic behavior. . . . " *Id.* ¶ 23.

Rumble alleges that "Google has willfully and unlawfully created and maintained a monopoly in the online video platform market by pursuing at least two anticompetitive and exclusionary strategies":

> First, by manipulating the algorithms (and/or other means and mechanisms) by which searched-for-video results are listed, Google insures [sic] that the videos on YouTube are listed first, and that those of its competitors, such as Rumble, are listed way down the list on the first page of the search results, or not on the first page at all. Second, by pre-installation of the YouTube app (which deters smart phone manufacturers from pre-installing any competitive video platform

> apps) as the default online video app on Google smart phones, and by entering into anti-competitive, illegal tying agreements with other smartphone manufacturers to do the same (in addition to requiring them to give the YouTube app a prime location on their phones' opening page and making it not-deletable by the user), Google assures the dominance of YouTube and forecloses competition in the video platform market.

Id. ¶ 27; *see also id.* ¶ 194 (alleging that Google's "anticompetitive and exclusionary conduct . . . has included rigging its search engine algorithms such that YouTube videos will always be listed first in search results and requiring pre-installation and prominent placement of Google's YouTube apps on all Android smartphones in the United States"). Plaintiff further alleges that "manufacturers and carriers are beholden to Google's Android ecosystem, which Google uses to preserve its monopolies in general search, search advertising, general search text advertising and the online video platform market." *Id.* ¶ 147. Plaintiff alleges that Defendant's "chokehold on search is impenetrable, and that chokehold allows it to continue unfairly and unlawfully to self-preference YouTube over its rivals, including Rumble, and to monopolize the online video platform market." *Id.* ¶ 146.

Plaintiff alleges that Defendant uses various agreements with Android-based mobile smart device manufacturers and distributors to ensure its monopoly of the video platform market. *See id.* ¶¶ 75–89. According to Plaintiff, Defendant "requires Android device manufacturers that want to preinstall certain of

Google's proprietary apps to sign an anti-forking agreement." *Id.* ¶ 84.[1]

Plaintiff alleges that once an Android device manufacturer signs an anti-forking agreement, Google will only provide access to its vital proprietary apps and application program interfaces if the manufacturer agrees: "(1) to take (that is, pre-install) a bundle of other Google apps (such as its YouTube app); (2) to make certain apps undeletable (including its YouTube app); and (3) to give Google the most valuable and important location on the device's default home screen (including for its YouTube app)." *Id.* ¶ 85. As another example, Plaintiff asserts that "Google provides a share of its search advertising revenue to Android device manufacturers, mobile phone carriers, competing browsers, and Apple; in exchange, Google becomes the preset default general search engine for the most important search access points on a computer or mobile device." *Id.* ¶ 86. "And, by becoming the default general search engine, Google is able to continue its manipulation of video search results using its search engine to self-preference its YouTube platform, making sure that links to videos on the YouTube platform are listed above the fold on the search results page." *Id.*; *see also id.* ¶¶ 161–72 (alleging that Google's revenue sharing agreements allow it to maintain a monopoly in the general search market and online video platform market).

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[1] Plaintiff explains that "in general an anti-forking agreement sets strict limits on the manufacturers' ability to make and sell Android-based devices that do not comply with Google's technical and design standards." FAC ¶ 84.

Plaintiff alleges that Defendant uses these agreements "to ensure that its entire suite of search-related products (including YouTube) is given premium placement on Android GMS devices." *Id.* ¶ 149. Rumble alleges that the agreements "effectuate a tie" that "re-inforces Google's monopolies." *Id.* ¶ 151. Specifically, Plaintiff alleges that Defendant provides "Android device manufacturers an all-or-nothing choice: if a manufacturer wants Google Play or GPS, then the manufacturer must also preinstall, and in some cases give premium placement to, an entire suite of Google apps, including Google's search products and Google's YouTube app." *Id.* Plaintiff alleges that "[t]he forced preinstallation of Google's apps (including the YouTube app) deters manufacturers from preinstalling those of competitors, including Rumble's app. . . . [and] fore-closes distribution opportunities to rival general search engines and video platforms, protecting Google's mono-polies." *Id.* Moreover, Plaintiff alleges that "[i]n many cases" the agreements expressly prohibit the prein-stallation of rival online video platforms, like Rumble. *See id.* ¶ 87.

According to Plaintiff, Defendant's "monopolist's stranglehold on search, obtained and maintained through anticompetitive conduct, including tying agreements in violation of antitrust laws, has allowed Google to unfairly and wrongfully direct massive video search traffic to its wholly-owned YouTube platform" and therefore secure monopoly profits from YouTube-generated ad revenue. *Id.* ¶ 176. Plaintiff alleges that because "a very large chunk of that video search traffic . . . should have rightfully been directly to Rumble's platform," Plaintiff and content creators who have exclusively licensed their videos to Rumble "have lost a massive amount of ad revenue they would otherwise have received but for Google's unfair, unlawful, exclusionary and anticompetitive conduct." *Id.*

Accordingly, Plaintiff alleges that Defendant's conduct violates Section 2 of the Sherman Act, which makes it unlawful for any person to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations. . . . " 15 U.S.C. § 2; *see id.* ¶¶ 55, 191–200.

II. Legal Standard

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Rule 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St.*

Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless, courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

III. Discussion

A. Motion to Dismiss

Plaintiff pleads a single cause of action alleging Defendant violated Section 2 of the Sherman Act. "The offense of monopoly under [Section 2] has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Plaintiff defines the relevant market as the "online video platform market," where platforms "allow content creators and other consumers to upload, view, share and download video content." FAC ¶ 55.

Without real dispute, Plaintiff has adequately alleged a Section 2 claim. First, it alleges that Defendant obtained and maintains monopoly power in the online video platform market, asserting that YouTube controls 73% of global online video activity. *Id.* ¶ 37, 63, 193. And second, Plaintiff alleges among other things that Defendant, with no valid business purpose or benefit to users, designs its search engine algorithms to show users YouTube links instead of links to its competitors' sites. *Id.* ¶ 71; *see also* ¶¶ 68-

74. According to Plaintiff, "Rumble and consumers (*e.g.* content creators) are disadvantaged, and competition is harmed, in the defined market because Google provides self-preferencing search advantages to its wholly-owned YouTube platform as a part of its scheme to maintain its monopoly power, and to reap a monopolist's financial rewards." *Id.* ¶ 74.

Instead, Defendant's motion is based on the somewhat counterintuitive premise that Plaintiff has pled *too* much. Defendant argues that Plaintiff's amended complaint should be broken into distinct theories of liability based on (1) self-preferencing, (2) tying of the YouTube app to other Google apps, and (3) unlawfully dominating the search market with agreements involving distribution of Defendant's search product. Mot. at 1. Defendant does not dispute that Plaintiff has adequately pled a Section 2 claim based on the first theory of liability, self-preferencing, but argues that the second and third theories, tying and unlawful domination of the search market, should be dismissed. *Id.* at 1-2.

The only authority Defendant cites for the premise that a court can disaggregate a single Section 2 cause of action into subtheories, then scrutinize and potentially dismiss some subtheories without dismissing the entire cause of action, comes from two unpublished district court cases, one from the Northern District of California and another from the District of Delaware. *See* Mot. at 3; *Staley v. Gilead Scis., Inc.*, No. 19-cv-02573, 2020 WL 5507555, at *11 (N.D. Cal. July 29, 2020); *see also In re Sensipar (Cinacalcet Hydrochloride Tablets) Antitrust Litig.*, No. 19-CV-01461, 2020 WL 7022364, at *3-4 (D. Del. Nov. 30, 2020).[2] Defendant does not cite, and the Court has been unable to find, any Supreme Court or Ninth Circuit authority ratifying this approach. And the sort of parsing urged by Defendants is at least arguably in tension with the Supreme Court's direction 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." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). 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." *California Comput. Prods., Inc. v. Int'l Bus. Machs. Corp.*, 613 F.2d 727, 737 (9th Cir. 1979) (quoting *United States v. Columbia Steel Co.*, 334 U.S. 495, 531-532 (1948). Ultimately, in the absence of controlling authority supporting Defendant's proposed approach, the Court declines to reach the viability of each of the purported subtheories, given that Plaintiff undisputedly has adequately pled

[2] In its Reply, Defendant cites two additional authorities referencing the expense of antitrust discovery, but these cases are also not controlling, and do not support (or even discuss) the premise that a court can dismiss select subtheories within a single cause of action. *See* Reply at 4, *Kelsey K. v. NFL Enters., LLC*, 757 F. App'x 524, 527 (9th Cir. 2018) (affirming denial of discovery where "no plausible claim for relief has been pled"); *Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1025 (N.D. Cal. 2015).

a Section 2 claim based on self-preferencing. Defendant's motion to dismiss is accordingly DENIED.[3]

B. Motion to Strike

Defendant also moves to strike paragraphs 34, 35, and 75 through 176 of the amended complaint. *See* Mot. at 2. These paragraphs generally concern Plaintiff's allegations that Google has unlawfully achieved and continues to maintain a monopoly in the online video platform market by conditioning access to its mobile operating system and Defendant's other popular services on preinstallation of the YouTube app and in some cases "expressly prohibiting the preinstallation of any rival . . . apps (which would include the Rumble app)[.]" *See* FAC ¶¶ 34, 87. Plaintiff argues that the allegations Defendant seeks to strike relate to forms of

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[3] Plaintiff also contends that Defendant's motion to dismiss is procedurally improper under Federal Rule of Civil Procedure 12(g)(2). Opp. at 19-20. However, the Court finds that the allegations in the original complaint were insufficient to place Defendant on notice of the additional theories described in the new allegations it seeks to dismiss. The Court's finding is consistent with the purpose of the federal rules, as described by the Ninth Circuit. *See In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 318 (9th Cir. 2017) (reading "12(g)(2) in light of the general policy of the Federal Rules of Civil Procedure, expressed in Rule 1"). And to the extent Defendant could have raised its arguments in a prior motion, the Court nonetheless exercises its discretion to consider those arguments in the interest of judicial economy. *See id.* (quoting *Banko v. Apple, Inc.*, No. 13–02977 RS, 2013 WL 6623913, at *2 (N.D. Cal. Dec. 16, 2013) ("Although Rule 12(g) technically prohibits successive motions to dismiss that raise arguments that could have been made in a prior motion . . . courts faced with a successive motion often exercise their discretion to consider the new arguments in the interests of judicial economy.").

exclusionary conduct that are properly considered in adjudicating a monopolization claim, and further argues that "antitrust claims are to be adjudicated as a whole, . . . not parsed into discrete pieces." Opp. at 20.

Rule 12(f) of the Federal Rules of Civil Procedure states that a district court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are "regarded with disfavor" because they are often used as delaying tactics and because of the limited importance of pleadings in federal practice. *Z.A. ex rel. K.A. v. St. Helena Unified Sch. Dist.*, No. 09-CV-03557-JSW, 2010 WL 370333, at *2 (N.D. Cal. Jan. 25, 2010). Where there is any doubt about the relevance of the challenged allegations, courts in this Circuit err on the side of permitting the allegations to stand. *See id.* (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), *rev'd on other grounds*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S. Ct. 1023 (1994)); *accord Pilgram v. Lafave*, No. 12-CV-5304 GAF-EX, 2013 WL 12124126, at *5 (C.D. Cal. Feb. 7, 2013); *Art Attacks Ink, LLC v. MGA Ent., Inc.*, No. 04-CV-1035-BLM, 2006 WL 8439887, at *4 (S.D. Cal. June 21, 2006). This is particularly true when the moving party shows no prejudice and when striking the allegations will not streamline the ultimate resolution of the action. *St. Helena Unified Sch. Dist.*, 2010 WL 370333 at *2.

For the same reasons underlying the Court's denial of the motion to dismiss, Defendant has not shown that the allegations are so redundant, immaterial, impertinent, or scandalous as to justify striking them. As noted above, substantial authority suggests that, depending on the factual record as it actually develops, all of the interrelated conduct alleged in the complaint could be relevant to the Section 2 claim that is not being challenged in this motion. That fact alone weighs dispositively against striking the allegations targeted by Defendant. Obviously, whether those allegations end up being backed by sufficient evidence to survive a summary judgment motion, or to warrant presentation to the jury at trial under the Federal Rules of Evidence, is a matter for a later stage of the case. Accordingly, Defendant's motion to strike is DENIED.

IV. Conclusion

Defendant's motion to dismiss and to strike is DENIED. The court SETS a telephonic case management conference on August 30, 2022 at 2:00 p.m. The parties shall submit an updated joint case management statement by August 23, 2022. All counsel shall use the following dial-in information to access the call:

Dial-In: 888-808-6929;

Passcode: 6064255

For call clarity, parties shall NOT use speaker phone or earpieces for these calls, and where at all possible, parties shall use landlines.

IT IS SO ORDERED.

/s/ Haywood S. Gilliam, Jr.
U.S. District Judge

Dated: 7/29/2022

OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *JARKESY v. SECURITIES AND EXCHANGE COMMISSION* (MAY 18, 2022)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GEORGE R. JARKESY, JR.; PATRIOT28, L.L.C.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

No. 20-61007

Petition for Review of an Order of the United States Securities and Exchange Commission
No. 3-15255

Before: DAVIS, ELROD, and OLDHAM,
Circuit Judges.

JENNIFER WALKER ELROD, *Circuit Judge*:

Congress has given the Securities and Exchange Commission substantial power to enforce the nation's securities laws. It often acts as both prosecutor and judge, and its decisions have broad consequences for personal liberty and property. But the Constitution constrains the SEC's powers by protecting individual rights and the prerogatives of the other branches of government. This case is about the nature and extent of those constraints in securities fraud cases in which the SEC seeks penalties.

The SEC brought an enforcement action within the agency against Petitioners for securities fraud. An SEC administrative law judge adjudged Petitioners liable and ordered various remedies, and the SEC affirmed on appeal over several constitutional arguments that Petitioners raised. Petitioners raise those same arguments before this court. We hold that: (1) the SEC's in-house adjudication of Petitioners' case violated their Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I's vesting of "all" legislative power in Congress; and (3) statutory removal restrictions on SEC ALJs violate the Take Care Clause of Article II. Because the agency proceedings below were unconstitutional, we GRANT the petition for review, VACATE the decision of the SEC, and REMAND for further proceedings consistent with this opinion.

I.

Petitioner Jarkesy established two hedge funds and selected Petitioner Patriot28 as the investment adviser. The funds brought in over 100 investors and held about $24 million in assets. In 2011, the SEC launched an investigation into Petitioners' investing activities, and a couple of years later the SEC chose to bring an action within the agency, alleging that

Petitioners (along with some former co-parties) committed fraud under the Securities Act, the Securities Exchange Act, and the Advisers Act. Specifically, the agency charged that Petitioners: (1) misrepresented who served as the prime broker and as the auditor; (2) misrepresented the funds' investment parameters and safeguards; and (3) overvalued the funds' assets to increase the fees that they could charge investors.

Petitioners sued in the U.S. District Court for the District of Columbia to enjoin the agency proceedings, arguing that the proceedings infringed on various constitutional rights. But the district court, and later the U.S. Court of Appeals for the D.C. Circuit, refused to issue an injunction, deciding that the district court had no jurisdiction and that Petitioners had to continue with the agency proceedings and petition the court of appeals to review any adverse final order. *See Jarkesy v. SEC*, 48 F. Supp. 3d 32, 40 (D.D.C. 2014), *aff'd*, 803 F.3d 9, 12 (D.C. Cir. 2015).

Petitioners' proceedings moved forward. The ALJ held an evidentiary hearing and concluded that Petitioners committed securities fraud. Petitioners then sought review by the Commission. While their petition for Commission review was pending, the Supreme Court held that SEC ALJs had not been properly appointed under the Constitution. *Lucia v. SEC*, 138 S. Ct. 2044, 2054–55 (2018). In accordance with that decision, the SEC assigned Petitioners' proceeding to an ALJ who was properly appointed. But Petitioners chose to waive their right to a new hearing and continued under their original petition to the Commission.

The Commission affirmed that Petitioners committed various forms of securities fraud. It ordered Petitioners to cease and desist from committing further violations and to pay a civil penalty of $300,000, and it ordered Patriot28 to disgorge nearly $685,000 in ill-gotten gains. The Commission also barred Jarkesy from various securities industry activities: associating with brokers, dealers, and advisers; offering penny stocks; and serving as an officer or director of an advisory board or as an investment adviser.

Critical to this case, the Commission rejected several constitutional arguments Petitioners raised. It determined that: (1) the ALJ was not biased against Petitioners; (2) the Commission did not inappropriately prejudge the case; (3) the Commission did not use unconstitutionally delegated legislative power—or violate Petitioners' equal protection rights—when it decided to pursue the case within the agency instead of in an Article III court; (4) the removal restrictions on SEC ALJs did not violate Article II and separation-of-powers principles; and (5) the proceedings did not violate Petitioners' Seventh Amendment right to a jury trial. Petitioners then filed a petition for review in this court.

II.

Petitioners raise several constitutional challenges to the SEC enforcement proceedings.[1] We agree with Petitioners that the proceedings suffered from three independent constitutional defects: (1) Petitioners were deprived of their constitutional right to a jury

[1] Multiple *amici* have filed briefs with this court as well: the Cato Institute, Phillip Goldstein, Mark Cuban, Nelson Obus, and the New Civil Liberties Alliance. Each argues that the SEC proceedings exceeded constitutional limitations for reasons that Petitioners raise.

trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power; and (3) statutory removal restrictions on SEC ALJs violate Article II.

A.

Petitioners challenge the agency's rejection of their constitutional arguments. We review such issues *de novo*. *See Emp. Sols. Staffing Grp. II, L.L.C. v. Off. of Chief Admin. Hearing Officer*, 833 F.3d 480, 484 (5th Cir. 2016); *Trinity Marine Prods., Inc. v. Chao*, 512 F.3d 198, 201 (5th Cir. 2007).

B.

Petitioners argue that they were deprived of their Seventh Amendment right to a jury trial. The SEC responds that the legal interests at issue in this case vindicate distinctly public rights, and that Congress therefore appropriately allowed such actions to be brought in agency proceedings without juries. We agree with Petitioners. The Seventh Amendment guarantees Petitioners a jury trial because the SEC's enforcement action is akin to traditional actions at law to which the jury-trial right attaches. And Congress, or an agency acting pursuant to congressional authorization, cannot assign the adjudication of such claims to an agency because such claims do not concern public rights alone.

1.

Thomas Jefferson identified the jury "as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution." Letter from Thomas Jefferson to Thomas Paine (July

11, 1789), *in* The Papers of Thomas Jefferson 267 (Julian P. Boyd ed., 1958). And John Adams called trial by jury (along with popular elections) "the heart and lungs of liberty." The Revolutionary Writings of John Adams 55 (C. Bradley Thompson ed., 2000); *see also* Jennifer W. Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 Tex. Tech L. Rev. 303, 303–04 (2012) (explaining that the jury is "as central to the American conception of the consent of the governed as an elected legislature or the independent judiciary").[2]

Civil juries in particular have long served as a critical check on government power. So precious were civil juries at the time of the Founding that the Constitution likely would not have been ratified absent assurance that the institution would be protected expressly by amendment. 2 The Debate on the Constitution 549, 551, 555, 560, 567 (Bernard Bailyn ed. 1993) (collecting various state ratification convention

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[2] Veneration of the jury as safeguard of liberty predates the American Founding. Our inherited English common-law tradition has long extolled the jury as an institution. William Blackstone said that trial by jury is "the glory of the English law" and "the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected, either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." *Mitchell v. Harmony*, 54 U.S. 115, 142–43 (1851) (quoting 4 William Blackstone, Commentaries on the Laws of England 227–29 (Oxford, Clarendon Pr. 1992) (1765)); *see also* Jennifer W. Elrod, *W(h)ither The Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 3, 7 (2011). Indeed, King George III's attempts to strip colonists of their right to trial by jury was one of the chief grievances aired against him and was a catalyst for declaring independence. The Declaration of Independence para. 20 (U.S. 1776).

documents calling for the adoption of a civil jury trial amendment); The Federalist No. 83 (Alexander Hamilton) ("The objection to the plan of the convention, which has met with most success in this State [*i.e.*, New York], and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases."); Mercy Otis Warren, Observations on the Constitution (1788), *in* 2 The Debate on the Constitution 290 (Bernard Bailyn ed. 1993) (worrying that the unamended Constitution would lead to "[t]he abolition of trial by jury in civil causes"); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830) ("One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases.").[3]

Trial by jury therefore is a "fundamental" component of our legal system "and remains one of our most vital barriers to governmental arbitrariness." *Reid v. Covert*, 354 U.S. 1, 9–10 (1957). "Indeed, '[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions. . . . '" *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 341 (1979) (Rehnquist, J., dissenting) (quoting Leonard Levy, Legacy of Suppression: Freedom of Speech and Press

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[3] *See also* Kenneth Klein, *The Validity of The Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 Hastings Const. L.Q. 1013, 1015 (1994) ("At the time the Constitution was proposed, the people of the United States greatly distrusted government, and saw the absence of a guaranteed civil jury right as a reason, standing alone, to reject adoption of the Constitution; only by promising the Seventh Amendment did the Federalists secure adoption of the Constitution in several of the state ratification debates.").

in Early American History 281 (1960)). Because "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence[,] . . . any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

The Seventh Amendment protects that right. It provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law. " U.S. Const. amend. VII. The Supreme Court has interpreted "Suits at common law" to include all actions akin to those brought at common law as those actions were understood at the time of the Seventh Amendment's adoption. *Tull v. United States*, 481 U.S. 412, 417 (1987). The term can include suits brought under a statute as long as the suit seeks common-law-like legal remedies. *Id.* at 418–19. And the Court has specifically held that, under this standard, the Seventh Amendment jury-trial right applies to suits brought under a statute seeking civil penalties. *Id.* at 418–24.

That is not to say, however, that Congress may never assign adjudications to agency processes that exclude a jury. *See Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 (1977). "[W]hen Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (internal quotations omitted).

Whether Congress may properly assign an action to administrative adjudication depends on whether the proceedings center on "public rights." *Atlas Roofing*, 430 U.S. at 450. "[I]n cases in which 'public rights' are being litigated[,] *e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact[,] the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." *Id.* Describing proper assignments, the Supreme Court identified situations "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, [and] a vast range of other cases as well are not at all implicated." *Id.* at 458.

The Supreme Court refined the public-right concept as it relates to the Seventh Amendment in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). There, the Court clarified that Congress cannot circumvent the Seventh Amendment jury-trial right simply by passing a statute that assigns "traditional legal claims" to an administrative tribunal. *Id.* at 52. Public rights, the Court explained, arise when Congress passes a statute under its constitutional authority that creates a right so closely integrated with a comprehensive regulatory scheme that the right is appropriate for agency resolution. *Id.* at 54.

The analysis thus moves in two stages. First, a court must determine whether an action's claims arise "at common law" under the Seventh Amendment. *See Tull*, 481 U.S. at 417. Second, if the action involves common-law claims, a court must determine whether the Supreme Court's public-rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial. *See Granfinanciera*, 492 U.S. at 54; *Atlas Roofing*, 430 U.S. at 455. Here, the relevant considerations include: whether "Congress 'creat[ed] a new cause of action, and remedies therefor, unknown to the common law,' because traditional rights and remedies were inadequate to cope with a manifest public problem"; and whether jury trials would "go far to dismantle the statutory scheme" or "impede swift resolution" of the claims created by statute. *Granfinanciera*, 492 U.S. at 60–63 (quoting *Atlas Roofing*, 430 U.S. at 454 n.11, 461 (first and second quotations)).

2.

The rights that the SEC sought to vindicate in its enforcement action here arise "at common law" under the Seventh Amendment. Fraud prosecutions were regularly brought in English courts at common law. *See* 3 William Blackstone, Commentaries on the Laws of England *42 (explaining the common-law courts' jurisdiction over "actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party"). And even more pointedly, the Supreme Court has held that actions seeking civil penalties are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims. *Tull*, 481 U.S. at 418–19. Thus, "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Id.* at 422.

Applying that principle, the Court in *Tull* held that the right to a jury trial applied to an action brought by an agency seeking civil penalties for violations of the Clean Water Act. *Id.* at 425. Likewise here, the actions the SEC brought seeking civil penalties under securities statutes are akin to those same traditional actions in debt. Under the Seventh Amendment, both as originally understood and as interpreted by the Supreme Court, the jury-trial right applies to the penalties action the SEC brought in this case.

That conclusion harmonizes with the holdings of other courts applying *Tull*. The Seventh Circuit followed the Supreme Court's lead in that case and has specifically said that when the SEC brings an enforcement action to obtain civil penalties under a statute, the subject of the action has the right to a jury trial. *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) ("Because the SEC was seeking both legal and equitable relief (the former under the Insider Trading Sanctions Act, 15 U.S.C. § 78u–1, which (in subsection (a)(1)) authorizes the imposition of civil penalties for insider trading at the suit of the SEC[)] . . . [the defendant] was entitled to and received a jury trial."); *see also id.* (explaining that another circuit was wrong to tacitly assume "that civil penalties in SEC cases are not a form of legal relief"[4]). Some district courts have applied *Tull* similarly. *See, e.g.*, *SEC v. Badian*, 822 F. Supp. 2d 352, 365 (S.D.N.Y. 2011) (explaining that "whether the facts are such that the defendants can be subjected to a civil penalty . . . is a question for the

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[4] The Seventh Circuit was referring to the Ninth Circuit's opinion in *SEC v. Clark*, 915 F.2d 439, 442 (9th Cir. 1990). *Clark* did not address the issue whatsoever.

jury, [and] the determination of the severity of the civil penalty to be imposed . . . is a question for the Court, once liability is established"); *SEC v. Solow*, 554 F. Supp. 2d 1356, 1367 (S.D. Fla. 2008) (applying *Tull* for the proposition that civil penalties are "legal, as opposed to equitable, in nature," and that it therefore "was [the defendant's] constitutional right to have a jury determine his liability, with [the court] thereafter determining the amount of penalty, if any").

Other elements of the action brought by the SEC against Petitioners are more equitable in nature, but that fact does not invalidate the jury-trial right that attaches because of the civil penalties sought. The Supreme Court has held that the Seventh Amendment applies to proceedings that involve a mix of legal and equitable claims—the facts relevant to the legal claims should be adjudicated by a jury, even if those facts relate to equitable claims too. *See Ross v. Bernhard*, 396 U.S. 531, 537–38 (1970); *see also Lipson*, 278 F.3d at 662 (noting that the defendant was entitled to a jury trial because the SEC sought legal relief in the form of penalties, even though the SEC also sought equitable relief). Here, the SEC sought to ban Jarkesy from participation in securities industry activities and to require Patriot28 to disgorge ill-gotten gains—both equitable remedies. Even so, the penalty facet of the action suffices for the jury-trial right to apply to an adjudication of the underlying facts supporting fraud liability.

3.

Next, the action the SEC brought against Petitioners is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine. Securities fraud actions are not new actions unknown to the common law. Jury trials in securities fraud suits would not "dismantle the statutory scheme" addressing securities fraud or "impede swift resolution" of the SEC's fraud prosecutions. And such suits are not uniquely suited for agency adjudication.

Common-law courts have heard fraud actions for centuries, even actions brought by the government for fines. *See* Blackstone, *supra* at *42; *see also Tull*, 481 U.S. at 422 ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law."). Naturally, then, the securities statutes at play in this case created causes of action that reflect common-law fraud actions. The traditional elements of common-law fraud are (1) a knowing or reckless material misrepresentation, (2) that the tortfeasor intended to act on, and (3) that harmed the plaintiff. *In re Deepwater Horizon*, 857 F.3d 246, 249 (5th Cir. 2017). The statutes under which the SEC brought securities fraud actions use terms like "fraud" and "untrue statement[s] of material fact" to describe the prohibited conduct. *See* 15 U.S.C. §§ 77a–77aa, 78j(b), 80b-6. When "Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) (explaining that "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it").

Accordingly, the Supreme Court has often looked to common-law principles to interpret fraud and misrepresentation under securities statutes. *See, e.g*, *Omnicare, Inc. v. Laborers Dist. Council Indus. Pension Fund*, 575 U.S. 175, 191 (2015) (considering the Restatement (Second) of Torts to determine whether material omissions are actionable under a securities statute); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343–44 (2005) (relying on "the common-law roots of the securities fraud action" in "common-law deceit and misrepresentation actions" to interpret the statutory securities-fraud action); *SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 192–95 (1963) (considering the principles of common-law fraud to determine the requirements of fraud under the Advisers Act). Thus, fraud actions under the securities statutes echo actions that historically have been available under the common law.

Next, jury trials would not "go far to dismantle the statutory scheme" or "impede swift resolution" of the statutory claims. *See Granfinanciera*, 492 U.S. at 60–63. For one, the statutory scheme itself allows the SEC to bring enforcement actions either in-house or in Article III courts, where the jury-trial right would apply. *See* Dodd–Frank Act § 929P(a), 15 U.S.C. § 78u-2(a). If Congress has not prevented the SEC from bringing claims in Article III courts with juries as often as it sees fit to do so, and if the SEC has in fact brought many such actions to jury trial over the years,[5] then it is difficult to see how jury trials could "dismantle the statutory scheme." Congress could have purported to assign such proceedings *solely* to administrative tribunals, but it did not. And there also is no evidence that jury trials would impede swift resolution of the claims.[6] In this case, for example, the SEC took seven years to dispose of Petitioners' case and makes no argument that proceedings with a jury trial would have been less efficient.

Relatedly, securities-fraud enforcement actions are not the sort that are uniquely suited for agency adjudication. Again, Congress has not limited the SEC's ability to bring enforcement actions in Article III courts. Consider the statutory scheme in *Atlas Roofing* for contrast. The statutes in that case were new and somewhat unusual. They provided elaborate enforcement mechanisms for the sorts of claims that likely

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[5] Indeed, the SEC regularly brings securities-fraud actions in Article III courts and adjudicates them through jury trials. *See, e.g.*, *SEC v. Fowler*, 6 F.4th 255, 258–60 (2d Cir. 2021); *SEC v. Johnston*, 986 F.3d 63, 71 (1st Cir. 2021); *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 772 (5th Cir. 2017); *SEC v. Quan*, 817 F.3d 583, 587 (8th Cir. 2016); *SEC v. Miller*, 808 F.3d 623, 626 (2d Cir. 2015); *SEC v. Jasper*, 678 F.3d 1116, 1119, 1121–22 (9th Cir. 2012); *SEC v. Seghers*, 298 F. App'x 319, 321 (5th Cir. 2008).

[6] The dissenting opinion contends that these considerations are "not decisive" (that the SEC has for decades sued in Article III courts under securities statutes) or "not determinative" (that those same suits are not unique to agency adjudication). To disregard these facts is to ignore the Supreme Court's explanation for what public rights are made of. And in any event, though the facts may not in isolation make up a private right, they together establish (along with the other considerations discussed above) that the right being vindicated here is a private right, not a public one.

could not have been brought in legal actions before that point. *See Atlas Roofing*, 430 U.S. at 445 (describing how the statutes required factfinders to undertake detailed assessments of workplace safety conditions and to make unsafe-conditions findings even if no injury had occurred). But the federal courts have dealt with actions under the securities statutes for many decades, and there is no reason to believe that such courts are suddenly incapable of continuing that work just because an agency may now share some of the workload. In fact, for the first decades of the SEC's existence, securities-fraud actions against non-registered parties could be brought *only* in Article III courts. Thomas Glassman, *Ice Skating Uphill: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. Bus. & Sec. L. 47, 50–52 (2015).[7]

The SEC counters that the securities statutes are designed to protect the public at large, and that some circuits have identified SEC enforcement actions as vindicating rights on behalf of the public. Indeed, the SEC says, the statutes allow for enforcement proceedings based on theories broader than actions like fraud that existed at common law.

Those facts do not convert the SEC's action into one focused on public rights. Surely Congress believes that the securities statutes it passes serve the public interest and the U.S. economy overall, not just indi-

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[7] Moreover, the Supreme Court has noted that agency adjudicators generally do not have special expertise to address structural constitutional claims—precisely the issues central to this case. *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021) ("[T]his Court has often observed that agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise.").

vidual parties. Yet Congress cannot convert any sort of action into a "public right" simply by finding a public purpose for it and codifying it in federal statutory law. *See Granfinanciera*, 492 U.S. at 61 (explaining that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity"). Purely private suits for securities fraud likely would have a similar public purpose—they too would serve to discourage and remedy fraudulent behavior in securities markets. That does not mean such suits concern public rights at their core. Granted, some actions provided for by the securities statutes may be new and not rooted in any common-law corollary. The fact remains, though, that the enforcement action seeking penalties in this case was one for securities fraud, which is nothing new and nothing foreign to Article III tribunals and juries.

That being so, Petitioners had the right for a jury to adjudicate the facts underlying any potential fraud liability that justifies penalties. And because those facts would potentially support not only the civil penalties sought by the SEC, but the injunctive remedies as well, Petitioners had a Seventh Amendment right to a jury trial for the liability-determination portion of their case.

4.

The dissenting opinion cannot define a "public right" without using the term itself in the definition. That leads to a good bit of question-begging. It says at times that the "SEC's enforcement action" is itself "a 'public right' because it is a case 'in which the Government sues in its sovereign capacity to enforce public rights." *Post* at 37. So the action is a public right because (1) the SEC is the government, and (2) it is vindicating a public right. And what is that public right being vindicated? The dissenting opinion does not say. In reality, the dissenting opinion's rule is satisfied by the first step alone: The action is itself a "public right" because the SEC is the government. And the not-so-far-removed consequences that flow from that conclusion: When the federal government sues, no jury is required. This is perhaps a runner-up in the competition for the "Nine Most Terrifying Words in the English Language."[8] But fear not, the dissenting opinion's proposal runs headlong into *Granfinanciera*: "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity" 492 U.S. at 61. With that limit in place, the dissenting opinion's bright-line rule burns out. Congress cannot change the nature of a right, thereby circumventing the Seventh Amendment, by simply giving the keys to the SEC to do the vindicating.

In this light, this approach treats the government's involvement as a sufficient condition for converting "private rights" into public ones. But from 1856 to 1989, the government's involvement in a suit was only a necessary condition, *not* a sufficient condition, for

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[8] *Cf.* Ronald Reagan, Presidential News Conference (Aug. 12, 1986), https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-957.

determining whether a suit vindicated public rights. *See Granfinanciera*, 492 U.S. at 65–66, 68–69 (Scalia, J., concurring in part) (referring to *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 U.S. (How.) 272, 283 (1856), and *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 68–69 (1982) (plurality op.)); *cf. N. Pipeline Constr. Co.*, 458 U.S. at 69 n.23 ("It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'"). Then *Granfinanciera* said that a dispute between two private parties could still vindicate "public rights," such that the government was no longer a *necessary* condition for such suits. *See* 492 U.S. at 53–55. The dissenting opinion thus says that, after *Granfinanciera*, the government is no longer a necessary condition, but it is now a *sufficient* condition. That is at odds with *Granfinanciera* and does not follow from any of the Court's previous decisions, which stressed that the government's involvement alone does not convert a suit about private rights into one about public rights.

The question is not just whether the government is a party, but also whether the right being vindicated is public or private, and how it is being vindicated. Tracing the roots of, and justification for, the public-rights doctrine, the Supreme Court has explained "that certain prerogatives were [historically] reserved to the political Branches of Government." *N. Pipeline Constr. Co.*, 458 U.S. at 67. Specifically, "[t]he public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently . . . judicial.'" *Id.* at

68 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)).

The inquiry is thus inherently historical. The dissenting opinion tries to avoid the history by again emphasizing that *Granfinanciera* dealt with private parties, not the government. But again, if the right being vindicated is a private one, it is not enough that the government is doing the suing. That means we must consider whether the form of the action—whether brought by the government or by a private entity—is historically judicial, or if it reflects the sorts of issues which courts of law did not traditionally decide.

As discussed in Part II.B.2, history demonstrates that fraud claims like these are "traditional legal claims" that arose at common law. Even aside from post-*Atlas Roofing* refinements of the "public rights" doctrine, this fact, among others, distinguishes that case. In *Atlas Roofing*, OSHA empowered the government to pursue civil penalties and abatement orders whether or not any employees were "actually injured or killed as a result of the [unsafe working] condition." 430 U.S. at 445; *see also id.* at 461 ("[Congress] created a new cause of action, and remedies therefor, unknown to the common law. . . . "). The government's right to relief was exclusively a creature of statute and was therefore distinctly public in nature.

In contrast, fraud claims, including the securities-fraud claims here, are quintessentially about the redress of private harms. Indeed, the government alleges that Petitioners defrauded particular investors. *Cf.* 15 U.S.C. §§ 77q(a), 78j(b), 80b-6. As explained above, these fraud claims and civil penalties are analogous to traditional fraud claims at common law in a way that the "new" claims and remedies in *Atlas Roofing* were not. *See Atlas Roofing*, 430 U.S. at 461.

That being so, *Granfinanciera*'s considerations about whether Congress created a new action unfamiliar to the common law, and whether jury trial rights are incompatible with the statutory scheme, are appropriate for us to address even if the suit involves the federal government. And as discussed above: (1) this type of action was commonplace at common law, (2) jury trial rights are consistent and compatible with the statutory scheme, and (3) such actions are commonly considered by federal courts with or without the federal government's involvement. Thus, the agency proceedings below violated Petitioners' Seventh Amendment rights, and the SEC's decision must be vacated.

C.

Petitioners next argue that Congress unconstitutionally delegated legislative power to the SEC when it gave the SEC the unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency. Because Congress gave the SEC a significant legislative power by failing to provide it with an intelligible principle to guide its use of the delegated power, we agree with Petitioners.[9]

"We the People" are the fountainhead of all government power. Through the Constitution, the People delegated some of that power to the federal govern-

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[9] This is an alternative holding that provides ground for vacating the SEC's judgment. "This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum." *Texas v. United States*, 809 F.3d 134, 178 n.158 (5th Cir. 2015) (quoting *United States v. Potts*, 644 F.3d 233, 237 n.3 (5th Cir. 2011)).

ment so that it would protect rights and promote the common good. *See* The Federalist No. 10 (James Madison) (explaining that one of the defining features of a republic is "the delegation of the government . . . to a small number of citizens elected by the rest"). But, in keeping with the Founding principles that (1) men are not angels, and (2) "[a]mbition must be made to counteract ambition," *see* The Federalist No. 51 (James Madison), the People did not vest all governmental power in one person or entity. It separated the power among the legislative, executive, and judicial branches. *See* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."). The legislative power is the greatest of these powers, and, of course, it was given to Congress. U.S. Const. art. I, § 1.

The Constitution, in turn, provides strict rules to ensure that Congress exercises the legislative power in a way that comports with the People's will. Every member of Congress is accountable to his or her constituents through regular popular elections. U.S. Const. art I, §§ 2, 3; *id.* amend. XVII, cl. 1. And a duly elected Congress may exercise the legislative power only through the assent of two separately constituted chambers (bicameralism) and the approval of the President (presentment). U.S. Const. art. I, § 7. This process, cumbersome though it may often seem to eager onlookers,[10] ensures that the People can be

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[10] Indeed, President Woodrow Wilson, the original instigator of the agency that became the SEC, believed agencies like that one could solve the "problem" of congressional gridlock and the

heard and that their representatives have deliberated before the strong hand of the federal government raises to change the rights and responsibilities attendant to our public life. *Cf.* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1017 (2006). ("[T]he Framers weighed the need for federal government efficiency against the potential for abuse and came out heavily in favor of limiting federal government power over crime.").

But that accountability evaporates if a person or entity other than Congress exercises legislative power. *See Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (" [B]y directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow."). Thus, sequestering that power within the halls of Congress was essential to the Framers. As John Locke—a particularly influential thinker at the

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burden of popular accountability. *See Cochran v. SEC*, 20 F.4th 194, 218 (5th Cir. 2021) (Oldham, J., concurring) ("Wilson's 'new constitution' would ditch the Founders' tripartite system and their checks and balances for a 'more efficient separation of politics and administration, which w[ould] enable the bureaucracy to tend to the details of administering progress without being encumbered by the inefficiencies of politics.'" (quoting Ronald J. Pestritto, Woodrow Wilson and the Roots of Modern Liberalism 227 (2005))), *cert. granted sub nom.*, *SEC v. Cochran*, 21-1239, 2022 WL 1528373 (U.S. May 16, 2022); *see also id.* ("Wilson's goal was to completely separate 'the province of constitutional law' from 'the province of administrative function.'" (quoting Philip Hamburger, Is Administrative Law Unlawful? 464 (2014))).

Founding—explained, not even the legislative branch itself may give the power away:

> The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them.

Id. at 2133–34 (quoting John Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration § 141, p. 71 (1947)).[11]

Article I of the Constitution thus provides that "[*a*]*ll* legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). In keeping with Founding conceptions of separation of powers,[12] the Supreme

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[11] Locke's perspective on the legislature's delegation of its power was influential in the United States around the time of the framing of the Constitution. *See* Hamburger, *supra* at 384.

[12] Principles of non-delegation had even taken hold in England before the American Founding. *See* Hamburger, *supra* at 381 (explaining that "even under [King] James I, the judges recognized that the king's prerogative power came from his subjects—that he was exercising a power delegated by the people" and, as

Court has made clear that Congress cannot "delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."). According to the Supreme Court's more recent formulations of that longstanding rule,[13] Congress may grant regulatory power to another entity only if it provides an "intelligible principle" by which the recipient of the power can exercise it. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The two questions we must address, then, are (1) whether Congress has delegated power to the agency that would be legislative power but-for an intelligible principle to guide its use and, if it has, (2) whether it has provided

a result, he could not transfer the royal powers to anyone else); *see also id.* ("[P]arliamentary subdelegations were widely understood to be unlawful.").

[13] Some contemporary academics have argued that the non-delegation doctrine lacks a sound historical basis. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); *but see* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021) (arguing that the doctrine was present at the Founding); Philip Hamburger, *Delegating or Divesting?*, 115 Nw. U. L. Rev. Online 88 (2020) (similar). Of course, our role as an inferior court is to faithfully apply Supreme Court precedent, so we do not reach the proper historical scope of the non-delegation doctrine. *See Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019).

an intelligible principle such that the agency exercises only executive power.[14]

We first conclude that Congress has delegated to the SEC what would be legislative power absent a guiding intelligible principle. Government actions are "legislative" if they have "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." *INS v. Chadha*, 462 U.S. 919, 952 (1983). The Supreme Court has noted that the power to assign disputes to agency adjudication is "peculiarly within the authority of the legislative department." *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).[15] And, as discussed above, in some special circumstances *Congress* has the power to assign to agency adjudication matters traditionally at home in Article III courts. *Atlas Roofing*, 430 U.S. at 455. Through Dodd–Frank § 929P(a), Congress gave *the SEC* the power to bring securities fraud actions for monetary penalties within the agency instead of in an Article III court

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[14] Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547, 1558 (2015) ("[T]here is [no] delegation of legislative power at all so long as the legislature has supplied an 'intelligible principle' to guide the exercise of delegated discretion. Where there is such a principle, the delegatee is exercising executive power, not legislative power." (emphasis and footnote omitted)).

[15] Moreover, at the Virginia Ratifying Convention in 1788, then-delegate John Marshall suggested that it is proper to the legislative power to determine the expedience of assigning particular matters for jury trial. *See* John Marshall on the Fairness and Jurisdiction of the Federal Courts, *in* 2 The Debate on the Constitution 740 (Bernard Bailyn ed. 1993) ("The Legislature of Virginia does not give a trial by jury where it is not necessary. But gives it wherever it is thought expedient. The Federal Legislature will do so too, as it is formed on the same principles.").

whenever the SEC in its unfettered discretion decides to do so. *See* 15 U.S.C. § 78u-2(a). Thus, it gave the SEC the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not. That was a delegation of legislative power. As the Court said in *Crowell v. Benson*, "the mode of determining" which cases are assigned to administrative tribunals "is completely within congressional control." 285 U.S. 22, 50 (1932) (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451).

The SEC argues that by choosing whether to bring an action in an agency tribunal instead of in an Article III court it merely exercises a form of prosecutorial discretion—an executive, not legislative, power. That position reflects a misunderstanding of the nature of the delegated power. Congress did not, for example, merely give the SEC the power to decide whether to bring enforcement actions in the first place, or to choose where to bring a case among those district courts that might have proper jurisdiction. It instead effectively gave the SEC the power to decide which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not. Such a decision—to assign certain actions to agency adjudication—is a power that Congress uniquely possesses. *See id.*

Next, Congress did not provide the SEC with an intelligible principle by which to exercise that power. We recognize that the Supreme Court has not in the past several decades held that Congress failed to provide a requisite intelligible principle. *Cf. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474–75 (2001) (cataloguing the various congressional directives that the Court has found to be "intelligible principle[s]"). But neither in the last eighty years has the Supreme Court considered the issue when Congress offered *no guidance* whatsoever. The last time it did consider such an open-ended delegation of legislative power, it concluded that Congress had acted unconstitutionally: In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 405–06 (1935), the Court considered a statutory provision granting the President the authority to prohibit the transportation in interstate commerce of petroleum and related products. The Court scoured the statute for directives to guide the President's use of that authority, but it found none. *Id.* at 414–20. It therefore explained:

> [I]n every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that section 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule.

Id. at 430.

Congress's grant of authority to the SEC here is similarly open-ended. Even the SEC agrees that Congress has given it exclusive authority and absolute discretion to decide whether to bring securities fraud enforcement actions within the agency instead of in an Article III court. Congress has said nothing at all indicating how the SEC should make that call in any given case. If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution.[16] *See Gundy*, 139 S. Ct. at 2123 (Kagan, J., plurality op.) (noting that "we *would* face a nondelegation question" if the statutory provision at issue had "grant[ed] the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time" (emphasis added)). We therefore vacate the SEC's judgment on this ground as well.

D.

The SEC proceedings below suffered from another constitutional infirmity: the statutory removal restrictions for SEC ALJs are unconstitutional.[17] SEC ALJs perform substantial executive functions. The

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[16] As a member of this court aptly noted just last year, the fact that the modern administrative state is real and robust does not mean courts are never called to declare its limits. *See Cochran*, 20 F.4th at 222 (Oldham, J., concurring) ("If administrative agencies 'are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people,' the Court warned that 'we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.'" (quoting *Jones v. SEC*, 298 U.S. 1, 24–25 (1936))).

[17] Because we vacate the SEC's judgment on various other grounds, we do not decide whether vacating would be the appropriate remedy based on this error alone. *See Collins v. Yellen*, 27 F.4th 1068, 1069 (5th Cir. 2022) (remanding to the district court to determine what remedy, if any, is appropriate in light of the Supreme Court's holding that removal restrictions applicable to the Director of the Federal Housing Finance Agency were unconstitutional).

President therefore must have sufficient control over the performance of their functions, and, by implication, he must be able to choose who holds the positions. Two layers of for-cause protection impede that control; Supreme Court precedent forbids such impediment.

Article II provides that the President must "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Supreme Court has held that this provision guarantees the President a certain degree of control over executive officers; the President must have adequate power over officers' appointment and removal.[18] *Myers v. United States*, 272 U.S. 52, 117 (1926). Only then can the People, to whom the President is directly accountable, vicariously exercise authority over high-ranking executive officials. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010). Yet not all removal restrictions are constitutionally problematic. "Inferior officers" may retain some amount of for-cause protection from firing. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 691–92 (1988). Likewise, even principal officers may retain for-cause protection when they act as part of an expert board. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020).

But a problem arises when both of those protections act in concert. In *Free Enterprise Fund*, the Supreme Court considered the constitutionality of two layers of for-cause protection for members of the Public Company Accounting Oversight Board (PCAOB). 561 U.S. at 492. The members of the board answered

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[18] Of course, the President's authority over appointments derives from the Appointments Clause as well. *See* U.S. Const. art. II, § 2, cl. 2.

to the SEC Commissioners. But the SEC could remove them only for "willful violations of the [Sarbanes–Oxley] Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing." *Id.* at 503. On top of that, the President could only remove SEC Commissioners for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 486–87, 502. The Supreme Court held that this extensive system insulating PCAOB members from removal deprived the President of the ability to adequately oversee the Board's actions. *Id.* at 492, 496.

The question here is whether SEC ALJs serve sufficiently important executive functions, and whether the restrictions on their removal are sufficiently onerous, that the President has lost the ability to take care that the laws are faithfully executed. Petitioners' argument on this point is straightforward: SEC ALJs are inferior officers; they can only be removed by the SEC Commissioners if good cause is found by the Merits Systems Protection Board; SEC Commissioners and MSPB members can only be removed by the President for cause; so, SEC ALJs are insulated from the President by at least two layers of for-cause protection from removal, which is unconstitutional under *Free Enterprise Fund*. The SEC responds that this case is not like *Free Enterprise Fund*. First, it contends that SEC ALJs primarily serve an adjudicatory role. Second, it asserts that the for-cause protections for ALJs are not as stringent as those which applied to PCAOB members at the time of *Free Enterprise Fund*—or, at least, that this court should read the removal protections for ALJs that way to avoid constitutional problems.

We agree with Petitioners and hold that the removal restrictions are unconstitutional. The Supreme Court decided in *Lucia* that SEC ALJs are "inferior officers" under the Appointments Clause because they have substantial authority within SEC enforcement actions. *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018). And in *Free Enterprise Fund* it explained that the President must have adequate control over officers and how they carry out their functions. 561 U.S. at 492, 496. If principal officers cannot intervene in their inferior officers' actions except in rare cases, the President lacks the control necessary to ensure that the laws are faithfully executed. So, if SEC ALJs are "inferior officers" of an executive agency, as the Supreme Court in *Lucia* indicated was the case at least for the purposes of the Appointments Clause, they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions. Specifically, SEC ALJs exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding. *Lucia*, 138 S. Ct. at 2053–54. But 5 U.S.C. § 7521(a) provides that SEC ALJs may be removed by the Commission "only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before the Board." (Parenthetical not in original.) And the SEC Commissioners may only be removed by the President for good cause.

The dissenting opinion's response is all built on dicta from *Free Enterprise Fund*. There, in noting what issues the Court was leaving open, the Court identified characteristics that were true of ALJs that were not true of PCAOB members: "[U]nlike members of the [PCAOB], many" ALJs "perform adjudicative rather than enforcement or policymaking functions." *Free Enterprise Fund*, 561 U.S. at 507 n.10. Far from "stat[ing]" that this "may justify multiple layers of removal protection," *post* at 22, the Court merely identified that its decision does not resolve the issue presented here. In any event, the Court itself said in *Myers* that "quasi[-]judicial" executive officers must nonetheless be removable by the President "on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." 272 U.S. at 135.[19] So even if ALJs' functions are more adjudicative than PCAOB

[19] The dissenting opinion deems this proposition from *Myers* to be *obiter dicta* that the Court subsequently disregarded in *Humphrey's Executor v. United States*, 295 U.S. 602, 626–28 (1935). *Post* at 54 n.113. But that itself is to disregard the Supreme Court's more recent guidance, which fortifies the Court's "landmark decision" in *Myers* and narrowed *Humphrey's Executor*. *See Seila Law*, 140 S. Ct. at 2191–92, 2197–99 & n.2 (limiting the *Humphrey's Executor* exception to *Myers* to cases involving "for-cause removal protections [given] to a multimember body of experts, balanced along partisan lines, that perform[] legislative and judicial functions and [are] said not to exercise any executive power," while casting doubt on the existence of wholly non-executive, quasi-legislative or quasi-judicial agency powers altogether); *see also City of Arlington v. F.C.C.*, 569 U.S. 290, 305 n.4 (2013) (noting that "[agency] activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive Power'" (citing U.S. Const. art. II, § 1, cl. 1)).

members, the fact remains that two layers of insulation impedes the President's power to remove ALJs based on their exercise of the discretion granted to them.[20]

Finally, the SEC urges us to interpret the for-cause protections for ALJs to instead allow removal for essentially any reason. Even if we could do so (and the statutory language likely does not give us that flexibility), that would not solve the Article II problem. As noted above, the MSPB is part of the mix as well. Furthermore, MSPB members "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). So, for an SEC ALJ to be removed, the MSPB must find good cause and the Commission must choose to act on that finding. And members of both the MSPB and the Com-

[20] In the next breath, the dissenting position draws from a law review article that "[t]he ALJs' role is similar to that of a federal judge." *Post* at 52. It then concludes that they must be insulated from removal by the president to maintain their independence. But that analogy runs out under a little scrutiny. The SEC's ALJs are not mere neutral arbiters of federal securities law; they are integral pieces within the SEC's powerful enforcement apparatus. The ALJs report to the Commission itself and act under authority delegated by it. SEC Organization Chart (2020), https://www.sec.gov/about/secorg.pdf; 15 U.S.C. § 78d-1(a); 17 C.F.R. § 200.30-10. As the amicus brief by the Cato Institute points out, these administrative proceedings differ significantly from cases resolved in federal district courts and reviewed by federal courts of appeals. Cato Amicus Br. at 19–31. First, the Commission has *ex parte* discussions with the prosecutors to determine whether to pursue securities-fraud claims. Then the Commission itself decides what claims should be brought by the prosecutors. Only then do ALJs resolve the claims, which are then again reviewed by the Commission. Suffice it to say, even if ALJs have some of the same "tools of federal trial judges," *Lucia*, 138 S. Ct. at 2053, they use those tools at the direction of and with the power delegated to them by the Commission.

mission have for-cause protection from removal by the President. Simply put, if the President wanted an SEC ALJ to be removed, at least two layers of for-cause protection stand in the President's way.

Thus, SEC ALJs are sufficiently insulated from removal that the President cannot take care that the laws are faithfully executed. The statutory removal restrictions are unconstitutional.

III.

In sum, we agree with Petitioners that the SEC proceedings below were unconstitutional. The SEC's judgment should be vacated for at least two reasons: (1) Petitioners were deprived of their Seventh Amendment right to a civil jury; and (2) Congress unconstitutionally delegated legislative power to the SEC by failing to give the SEC an intelligible principle by which to exercise the delegated power. We also hold that the statutory removal restrictions for SEC ALJs are unconstitutional, though we do not address whether vacating would be appropriate based on that defect alone.[21]

We GRANT the petition for review, VACATE the decision of the SEC, and REMAND for further proceedings consistent with this opinion.

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[21] Petitioners also argue that the SEC violated their equal protection rights, and that its decision was infected with bias and violated their due process rights. Because we vacate the SEC's decision on other grounds, we decline to reach these issues.

W. EUGENE DAVIS, CIRCUIT JUDGE, DISSENTING:

The majority holds that (1) administrative adjudication of the SEC's enforcement action violated Petitioners' Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated an Article I legislative power to the executive branch when it gave the SEC the discretion to choose between bringing its enforcement action in an Article III court or before the agency without providing an intelligible principle to guide the SEC's decision; and (3) the removal protections on SEC administrative law judges violate Article II's requirement that the President "take Care that the Laws be faithfully executed." I respectfully disagree with each of these conclusions.

I.

The majority holds that the Seventh Amendment grants Petitioners the right to a jury trial on the facts underlying the SEC's enforcement action, and administrative adjudication without a jury violated that right. In reaching this conclusion, the majority correctly recognizes that a case involving "public rights" may be adjudicated in an agency proceeding without a jury notwithstanding the Seventh Amendment.[1]

[1] *See, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) ("If a claim that is legal in nature asserts a 'public right,' . . . then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity. The Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right.'" (citation omitted)).

But, the majority then erroneously concludes that the SEC's enforcement action does not involve "public rights." In my view, the majority misreads the Supreme Court's decisions addressing what are and are not "public rights."

A.

As declared by Professors Wright and Miller, "A definitive statement by the Supreme Court regarding congressional authority in this context is found in *Atlas Roofing v. Occupational Safety & Health Review Commission*."[2] That case concerned the Occupational Safety and Health Act ("OSHA" or "the Act"), which created a new statutory duty on employers to avoid maintaining unsafe or unhealthy working conditions. OSHA also empowered the Federal Government, proceeding before an administrative agency without a jury, to impose civil penalties on those who violated the Act.[3] Two employers who had been cited for violating the Act argued that a suit in a federal court by the Government seeking civil penalties for violation of a statute is classically a suit at common law for which the Seventh Amendment provides a right to a jury trial; therefore, Congress cannot deprive them of that right by simply assigning the function of adjudicating the Government's right to civil penalties to an admin-

[2] 9 CHARLEs ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302.2, at 59 (4th ed. 2020) (citing *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977)) (italics added).

[3] *Atlas Roofing*, 430 U.S. at 445.

istrative forum where no jury is available.[4] The Court, in a unanimous opinion, disagreed:

> At least in cases in which "public rights" are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible. . . . This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency.[5]

Atlas Roofing drew its definition of "public rights" from, inter alia, *Crowell v. Benson*, which described "public rights" in slightly broader terms: matters "*which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments*."[6]

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[4] *Id.* at 449–50.

[5] *Id.* at 450, 455 (emphasis added; paragraph break omitted); *see also id.* at 458 ("Our prior cases support administrative factfinding in only those situations involving 'public rights,' *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.").

[6] *Id.* at 452 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)) (emphasis added); *see also id.* at 456, 457, 460 (citing *Crowell*, 285 U.S. 22).

The Supreme Court has never retreated from its holding in *Atlas Roofing*.[7] In fact, the Court implicitly re-affirmed *Atlas Roofing*'s definition of "public rights" as recently as 2018, when it decided *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*.[8] That case involved the Leahy-Smith America Invents Act, which granted the Patent and Trademark Office ("PTO") the power to reconsider a previously-issued patent via an administrative process called "inter partes review."[9] This was a departure from historical practice, which placed this function in Article III courts alone.[10] The petitioner argued that inter partes review violated both Article III and the Seventh Amendment.[11] The Court disagreed and explained that Congress has "significant latitude" to assign adjudication of "public rights" to non-Article III tribunals that do not use a jury.[12] Moreover, the Court, quoting *Crowell*, defined "public rights" as "matters 'which arise between the Government and persons subject to its authority in connection with the

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7 Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CoNST. L. 45, 95 (2016).

8 138 S. Ct. 1365 (2018).

9 *Id.* at 1370–72.

10 *Id.* at 1384 (Gorsuch, J., dissenting) ("[F]rom the time it established the American patent system in 1790 until about 1980, Congress left the job of invalidating patents at the federal level to courts alone.").

11 *Id.* at 1372.

12 *Id.* at 1373, 1379.

performance of the constitutional functions of the executive or legislative departments.'"[13]

As mentioned, *Atlas Roofing*'s definition of "public rights" is a slightly narrower version of *Crowell*'s definition. Thus, when *Oil States* reaffirmed *Crowell*, it necessarily re-affirmed *Atlas Roofing*'s definition as well.[14]

Oil States is also significant because it held that historical practice is not determinative in matters governed by the public rights doctrine, as such matters "'from their nature' can be resolved in multiple ways."[15] Accordingly, the Court rejected the view that "because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so."[16]

Like *Oil States*, this court relied on *Crowell* to define "public rights" in *Austin v. Shalala*.[17] That case involved the Government's action to recover

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13 *Id.* at 1373 (quoting *Crowell*, 285 U.S. at 50).

14 *Oil States* did not purport to provide an exhaustive definition of "public rights," and the opinion alludes to the possibility that, under certain circumstances, matters not involving the Government may also fall within the realm of "public rights." *See id.* However, the Court did not need to address these other, "various formulations" of "public rights," because inter partes review fell squarely within *Crowell*'s definition. *See id.* This court reached a similar conclusion in *Austin v. Shalala*, discussed below.

15 *Id.* at 1378 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

16 *Id.*; *see also id.* ("That Congress chose the courts in the past does not foreclose its choice of the PTO today.").

17 994 F.2d 1170, 1177 (5th Cir. 1993).

overpayment of social security benefits via an administrative proceeding before the Social Security Administration.[18] *Austin* rejected the plaintiff's argument that the proceeding violated her Seventh Amendment right, explaining that "if Congress may employ an administrative body as a factfinder in imposing money penalties for the violation of federal laws"—as was done in *Atlas Roofing* and in the securities statutes at issue here—"it plainly may employ such a body to recover overpayments of government largess."[19]

Consistent with the above cases, our sister circuits routinely hold that an enforcement action by the Government for violations of a federal statute or regulation is a "public right" that Congress may assign to an agency for adjudication without offending the Seventh Amendment.[20] For example, the Eleventh Circuit relied solely on *Atlas Roofing* when it rejected a Seventh Amendment challenge to administrative adjudication of an *SEC* enforcement action and declared "it is well-established that the Seventh Amendment

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[18] *Id.* at 1173.

[19] *Id.* at 1177-78 (citing *Oceanic Steam Navigation Co. v. Stranahan*, 412 U.S. 320, 339 (1909)).

[20] *See, e.g.*, *Imperato v. SEC*, 693 F. App'x 870, 876 (11th Cir. 2017) (unpublished) (administrative adjudication for violations of the Securities Exchange Act); *Crude Co. v. FERC*, 135 F.3d 1445, 1454–55 (Fed. Cir. 1998) (Mandatory Petroleum Allocation Regulations); *Cavallari v. Office of Comptroller of Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (Financial Institutions Reform, Recovery and Enforcement Act); *Sasser v. Adm'r EPA*, 990 F.2d 127, 130 (4th Cir. 1993) (Clean Water Act).

does not require a jury trial in administrative proceedings designed to adjudicate statutory 'public rights.'"[21]

The SEC's enforcement action satisfies *Atlas Roofing*'s definition of a "public right," as well as the slightly broader definition set forth in *Crowell* and applied in *Oil States* and *Austin*. The broad congressional purpose of the securities laws is to "protect investors."[22] For example, the Securities Act of 1933 was "designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing."[23] The Dodd-Frank Act, which, inter alia, expanded the SEC's authority to pursue civil penalties in administrative proceedings,[24] was "intended to improve investor protection," particularly in light of

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[21] *Imperato*, 693 F. App'x at 876 (citing *Atlas Roofing*, 430 U.S. at 455–56).

[22] *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 592 (5th Cir. 1974).

[23] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). In a similar vein, the Investment Advisers Act of 1940 seeks to "protect[] investors through the prophylaxis of disclosure," in order to eliminate "the darkness and ignorance of commercial secrecy," which "are the conditions upon which predatory practices best thrive." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 200 (1963).

[24] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Sec. 929P, 124 Stat. 1376, 1862–64 (2010) (codified at 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80a-9(d), 80b-3(i)).

the Bernard Madoff Ponzi scheme.[25] Other circuits have consistently recognized that "[w]hen the SEC sues to enforce the securities laws, it is vindicating public rights and furthering public interests, and therefore is acting in the United States's sovereign capacity."[26] Thus, the SEC's enforcement action is a "public right" because it is a case "in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."[27] It is also a matter "which arise[s] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[28]

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[25] Mark Jickling, Congressional Research Service, R41503 The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title IX, Investor Protection at i (2010).

[26] *SEC v. Diversified*, 378 F.3d 1219, 1224 (11th Cir. 2004*), abrogated on other grounds by Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *see also SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993); *United States v. Badger*, 818 F.3d 563, 566 (10th Cir. 2016).

[27] *Atlas Roofing*, 430 U.S. at 450.

[28] *Crowell*, 285 U.S. at 22; *Oil States*, 138 S. Ct. at 1373; *Austin*, 994 F.2d at 1177.

The majority asserts that "[t]he dissenting opinion cannot define a 'public right' without using the term itself in the definition." First, I rely on definitions the Supreme Court has provided. Second, while *Atlas Roofing* does use "public rights" to define "public rights," *Crowell* does not. Furthermore, *Granfinanciera* observed that *Atlas Roofing* "left the term 'public rights' undefined" and so looked to *Crowell* to fill in any perceived gap. *Granfinanciera*, 492 U.S. at 51 n.8; *see also id.* at 53 (noting that, under *Atlas Roofing*, a "public right" is simply "a statutory cause

Because the SEC's enforcement action is a "public right," the Seventh Amendment does not prohibit Congress from assigning its adjudication to an administrative forum that lacks a jury.[29] As discussed below, the fact that the securities statutes at issue resemble (but are not identical to) common-law fraud does not change this result.[30] It also makes no difference that federal courts have decided claims under the securities statutes for decades.[31]

B.

The majority's conclusion that the SEC's enforcement action is not a "public right" is based primarily on an erroneous reading of *Granfinanciera, S.A. v. Nordberg*.[32] Specifically, the majority interprets that

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of action [that] inheres in, or lies against, the Federal Government in its sovereign capacity").

[29] *Atlas Roofing*, 430 U.S. at 450; *Granfinanciera*, 492 U.S. at 52–54; *Oil States*, 138 S. Ct. at 1379.

[30] *See Granfinanciera*, 492 U.S. at 52 ("Congress may fashion causes of action that are closely *analogous* to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable" if the action involves "public rights.").

[31] *See Oil States*, 138 S. Ct. at 1378 ("[W]e disagree with the dissent's assumption that, because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so. Historical practice is not decisive . . . [in] matters governed by the public-rights doctrine. . . . That Congress chose the courts in the past does not foreclose its choice of the PTO today.")

[32] 492 U.S. 33.

case as abrogating *Atlas Roofing*. *Granfinanciera* did nothing of the sort.

In *Granfinanciera*, a bankruptcy trustee sued in bankruptcy court (where a jury was unavailable) to avoid allegedly fraudulent transfers the defendants had received from the debtor.[33] The defendants argued that they were entitled to a jury trial under the Seventh Amendment.[34] A key issue was whether the trustee's claim involved "public" or "private" rights. The Court held that the action was a private right.[35]

Unlike *Atlas Roofing*, *Granfinanciera* did not involve a suit by or against the Federal Government. This distinction is important. In discussing what constitutes a "public right," *Granfinanciera*, citing *Atlas Roofing*, recognized that "Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action *inheres in, or lies against, the Federal Government in its sovereign capacity*."[36] *Granfinanciera* then clarified that "the class of 'public rights' whose adjudication Congress may assign to administrative agencies . . . *is more expansive* than *Atlas Roofing*'s discussion suggests";[37] *i.e.*, the "Government need not be a party for a case to revolve around 'public rights'"

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[33] *Id.* at 36.

[34] *Id.* at 40.

[35] *Id.* at 55, 64.

[36] *Granfinanciera*, 492 U.S. at 53 (citing *Atlas Roofing*, 430 U.S. at 458) (emphasis added).

[37] *Id.* at 53 (emphasis added).

provided certain other criteria are met.[38] Nevertheless, and contrary to what is implied by the majority, *Granfinanciera*'s recognition that the public-rights doctrine can extend to cases where the Government is not a party in no way undermines or alters *Atlas Roofing*'s holding that a case where the Government sues in its sovereign capacity to enforce a statutory right is a case involving "public rights."[39]

Because the bankruptcy trustee's suit involved only private parties and not the Government, *Granfinanciera*'s analysis is solely concerned with whether the action was one of the "seemingly 'private' right[s]" that are within the reach of the public-rights doctrine. Thus, any considerations or requirements discussed in *Granfinanciera* that go beyond *Atlas Roofing* or *Crowell* apply only to cases not involving the Government.

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[38] *Id.* at 54 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586, 596–99 (1985)).

[39] *Granfinanciera* itself makes this clear when it states:

> The crucial question, *in cases not involving the Federal Government*, is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, *and if that right neither belongs to nor exists against the Federal Government*, then it must be adjudicated by an Article III court.

Id. at 54-55 (quoting *Thomas*, 473 U.S. at 593–94) (footnote omitted; emphasis added; bracketed alterations in original).

This understanding of *Granfinanciera* is supported by our subsequent decision in *Austin*, which stated:

> Although the definition is somewhat nebulous, at a minimum, suits involving public rights are those "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell v. Benson*, 285 U.S. 22, 50, 52 S. Ct. 285, 292, 76 L.Ed. 598 (1932). *Beyond that*, certain *other cases* are said to involve public rights where Congress has created a "seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Granfinanciera*, 492 U.S. at 54. . . . [40]

Similarly, while *Oil States* acknowledged that *Crowell* did not provide the sole definition of what constitutes a "public right," it did not discuss any of the other "formulations" because *Crowell*'s definition was met.[41]

The majority overlooks the fact that *Granfinanciera*'s expansion of the public-rights doctrine applies only when the Government is not a party to the case. As a result, the majority applies "considerations" that have no relevance here. For example, the majority, quoting *Granfinanciera*, states that "jury trials would not 'go far to dismantle the statutory scheme' or 'impede swift resolution' of statutory claims." Again,

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[40] *Austin*, 994 F.2d at 1177 (emphasis added).

[41] *Oil States*, 138 S. Ct. at 1373.

Granfinanciera discussed these considerations in the context of a suit between private persons, not a case involving the Government acting in its sovereign capacity under an otherwise valid statute creating enforceable public rights.[42] Indeed, neither *Austin* nor *Oil States*, both of which were decided after *Granfinanciera* and which found public rights to exist, mentions these considerations.[43]

The majority also states that the securities statutes at issue created causes of action that "reflect" and "echo" common-law fraud. But this does not matter, because, as *Granfinanciera* itself recognized, the public-rights doctrine allows Congress to "fashion causes of action that are closely *analogous* to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable."[44]

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[42] *Granfinanciera*, 492 U.S. at 61, 63.

[43] The same goes for the out-of-circuit decisions cited in footnote 20 above. *Atlas Roofing*, in a footnote, does make a passing reference to "go far to dismantle the statutory scheme." 430 U.S. at 454 n.11. But the Court was merely describing its reasoning in another bankruptcy case. Nothing in *Atlas Roofing* suggests that this consideration is relevant to whether Congress may assign the Government's enforcement action to an administrative proceeding lacking a jury.

[44] *Granfinanciera*, 492 U.S. at 52 (citations omitted); *see also id.* at 53 ("Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity." (citing *Atlas Roofing*, 430 U.S. at 458)); *accord Crude Co.*, 135 F.3d at 1455 ("The public right at issue is not converted into a common law tort simply because the theory

The majority asserts that *Atlas Roofing* is distinguishable from the SEC's enforcement action because "OSHA empowered the government to pursue civil penalties regardless of whether any employe[e]s were 'actually injured or killed as a result of the [unsafe working] condition.'"[45] But the securities statutes share this feature: The SEC may impose civil penalties on a person who makes a material misrepresentation even if no harm resulted from the misrepresentation.[46] The statutory cause of action created by the securities statutes is as "new" to the common law as the one created by OSHA.[47]

Relatedly, the majority harps on the fact that federal courts have dealt with actions under the securities statutes for decades. But *Oil States* makes clear that "[h]istorical practice is not decisive here."[48] "That Congress chose the courts in the past does not

of liability underlying the enforcement action is analogous to a common law tort theory of vicarious liability.").

[45] Majority Op. at 17–18 (quoting *Atlas Roofing*, 430 U.S. at 445).

[46] *See* 15 U.S.C. §§ 78u-2(c), 77h-1(g)(1), 80a-9(d)(3), 80b-3(i)(3).

[47] *Atlas Roofing* recognized that, before (and after) OSHA, a person injured by an unsafe workplace condition may have an action at common law for negligence. *See Atlas Roofing*, 430 U.S. at 445. Through OSHA, specific safety standards were promulgated, and the Government could bring an enforcement action for a violation even if no one was harmed by the violation. *Id.* Similarly, before enactment of the securities statutes, an investor who was defrauded in the course of a securities transaction had a common-law action for fraud. Like OSHA, the securities statutes expressly prohibited certain conduct and empowered the SEC to bring an enforcement action for a violation, even if no one was actually harmed by the violation.

[48] 138 S. Ct. at 1378.

foreclose its choice of [an administrative adjudication] today."[49]

The majority also states that "securities-fraud enforcement actions are not the sort that are uniquely suited for agency adjudication." Again, this is not relevant. As *Oil States* explained, "the public-rights doctrine applies to matters 'arising between the government and others, which from their nature do not require judicial determination *and yet are susceptible of it*.'"[50] Indeed, "matters governed by the public-rights doctrine 'from their nature' can be resolved in multiple ways."[51]

Finally, it should be emphasized that *Tull v. United States*[52] does not control the outcome here. That case concerned the Government's suit *in district court* seeking civil penalties and an injunction for violations of the Clean Water Act.[53] *Tull* did not involve an administrative proceeding. Thus, while *Tull* concluded that the Government's claim was analogous to a "Suit

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49 *Id. Oil States* likewise refutes the majority's assertion that "[t]he inquiry is thus inherently historical." I add that the majority's support for this proposition consists of a concurring opinion in *Granfinanciera* and the plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (plurality), which addressed whether a bankruptcy court may decide a breach of contract action between two private parties.

50 *Id.* at 1373 (citing *Crowell*, 285 U.S. at 50) (emphasis added).

51 *Id.* at 1378 (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451).

52 481 U.S. 412 (1987).

53 *Id.* at 414–15.

at common law" for Seventh Amendment purposes,[54] the Court did not engage in the "quite distinct inquiry" into whether the claim was also a "public right" that Congress may assign to a non-Article III forum where juries are unavailable.[55] *Tull* itself acknowledges in a footnote prior decisions "holding that the Seventh Amendment is not applicable to administrative proceedings," making clear that it was not deciding whether the defendant would be entitled to a jury in an administrative adjudication.[56]

C.

In summary, the SEC's enforcement action against Petitioners for violations of the securities laws is a "public right" under Supreme Court precedent as well as our own. Accordingly, Congress could and did validly assign adjudication of that action to an administrative forum where the Seventh Amendment does not require a jury.

II.

I also disagree with the majority's alternative holding that Congress exceeded its power by giving the SEC the authority to choose to bring its enforcement action in either an agency proceeding without a jury or to a court with a jury. The majority reasons that giving the SEC this power without providing guidelines

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54 *Id.* at 425.

55 *Granfinanciera*, 492 U.S. at 42 n.4; *accord Sasser*, 990 F.2d at 130.

56 *Tull*, 481 U.S. at 418 n.4 (citing *Atlas Roofing*, 430 U.S. at 454; *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974)).

on the use of that power violates Article I by delegating its legislative authority to the agency. The majority's position runs counter to Supreme Court precedent. As set forth below, by authorizing the SEC to bring enforcement actions either in federal court or in agency proceedings, Congress fulfilled its legislative duty.

In support of its determination that Congress unconstitutionally delegated its authority to the SEC, the majority relies on *Crowell v. Benson*, wherein the Supreme Court explained that "the mode of determining" cases involving public rights "is completely within congressional control."[57] *Crowell* did not state that Congress cannot authorize that a case involving public rights may be determined in either of two ways. By passing Dodd-Frank § 929P(a), Congress established that SEC enforcement actions can be brought in Article III courts or in administrative proceedings. In doing so, Congress fulfilled its duty of controlling the mode of determining public rights cases asserted by the SEC.

The majority maintains that because the SEC has "the power to decide which defendants should receive certain legal processes (those accompanying Article III proceedings) and which should not," then such a decision falls under Congress's legislative power. The Supreme Court's decision in *United States v. Batchelder*[58] demonstrates that the majority's position on this issue is incorrect.

In *Batchelder*, the issue presented was whether it was constitutional for Congress to allow the Govern-

[57] 285 U.S. at 50 (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451).

[58] 442 U.S. 114 (1979).

ment, when prosecuting a defendant, to choose between two criminal statutes that "provide[d] different penalties for essentially the same conduct."[59] The defendant had been convicted under the statute with the higher sentencing range, and the Court of Appeals determined that the delegation of authority to prosecutors to decide between the two statutes, and thus choose a higher sentencing range for identical conduct, was a violation of due process and the nondelegation doctrine.[60] Specifically, the Court of Appeals determined that "such prosecutorial discretion could produce 'unequal justice'" and that it might be "impermissibl[e] [to] delegate to the Executive Branch the Legislature's responsibility to fix criminal penalties."[61]

The Supreme Court disagreed. The Court explained that "[t]he provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose."[62] The Court further stated: "In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws."[63] The Court concluded: "Having informed the courts, prosecutors, and defendants of

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[59] *Id.* at 116.

[60] *Id.* at 123, 125–26.

[61] *Id.* at 125–26.

[62] *Id.* at 126.

[63] *Id.*

the permissible punishment alternatives available under each Title, Congress has fulfilled its duty."[64]

The Supreme Court has analogized agency enforcement decisions to prosecutorial discretion exercised in criminal cases.[65] If the Government's prosecutorial authority to decide between two criminal statutes that provide for different sentencing ranges for essentially the same conduct does not violate the nondelegation doctrine, then surely the SEC's authority to decide between two forums that provide different legal processes does not violate the nondelegation doctrine. Thus, the SEC's forum-selection authority is part and parcel of its prosecutorial authority.[66]

Although no other circuit court appears to have addressed the particular nondelegation issue presented in this case, a district court did so in *Hill v. SEC*.[67] Like the majority does here, the plaintiff in *Hill* relied

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64 *Id.* (citation omitted).

65 *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch. . . . ").

66 *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.") (citation omitted).

67 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (holding that SEC's forum-selection authority does not violate the nondelegation doctrine), *vacated and remanded on other grounds*, 825 F.3d 1236 (11th Cir. 2016).

on *I.N.S. v. Chadha*[68] to assert that the SEC's choice of forum is a legislative action because it "alter[s] the rights, duties, and legal relations of individuals."[69] *Chadha* addressed the question whether a provision in the Immigration and Nationality Act (INA) allowing one House of Congress to veto the Attorney General's decision to allow a particular deportable alien to remain in the United States violated the Presentment Clauses and bicameral requirement of Article I.[70] Specifically, it addressed whether Congress, after validly delegating authority to the Executive, can then alter or revoke that valid delegation of authority through the action of just one House.

I agree with the district court in *Hill* that if *Chadha*'s definition of legislative action is interpreted broadly and out of context, then any SEC decision which affected a person's legal rights—including charging decisions—would be legislative actions, which is contrary to the Supreme Court's decision in *Batchelder*.[71] *Chadha*, one of the primary authorities the majority relies on, does not touch on any issue involved in this case.

I agree with the persuasive and well-reasoned decision of the district court in *Hill* that "Congress has properly delegated power to the executive branch to make the forum choice for the underlying SEC

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[68] 462 U.S. 919 (1983).

[69] *Hill*, 114 F. Supp. 3d at 1312 (quoting *Chadha*, 462 U.S. at 952).

[70] 462 U.S. at 923, 946.

[71] *Hill*, 114 F. Supp. 3d at 1313.

enforcement action."[72] In sum, it is clear to me that Congress's decision to give prosecutorial authority to the SEC to choose between an Article III court and an administrative proceeding for its enforcement actions does not violate the nondelegation doctrine.

III.

Finally, the majority concludes that the statutory removal restrictions applicable to SEC administrative law judges are unconstitutional because they violate Article II's requirement that the President "take Care that the Laws be faithfully executed." Specifically, the majority determines that SEC ALJs enjoy at least two layers of for-cause protection, and that such insulation from the President's removal power is unconstitutional in light of the Supreme Court's decisions in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[73] and *Lucia v. SEC*.[74] I disagree. Rather than support the majority's conclusion, these cases explain why the SEC ALJs' tenure protections are constitutional: ALJs perform an adjudicative function.

Free Enterprise concerned the Public Company Accounting Oversight Board ("PCAOB"), which Congress created in 2002 to regulate the accounting industry.[75] The PCAOB's powers included promulgating standards, inspecting accounting firms, initiating

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72 *Id.*

73 561 U.S. 477 (2010).

74 138 S. Ct. 2044 (2018).

75 *Id.* at 484-85.

formal investigations and disciplinary proceedings, and issuing sanctions.[76] In other words, PCAOB members were inferior officers who exercised "significant executive power."[77] The President could not remove the members of the PCAOB; rather, they could be removed by the Securities and Exchange Commission under certain, limited circumstances.[78] Furthermore, SEC Commissioners cannot themselves be removed by the President except for inefficiency, neglect of duty, or malfeasance in office.[79] While prior cases upheld restrictions on the President's removal power that imposed one level of protected tenure, *Free Enterprise* held that these dual for-cause limitations on the removal of PCAOB members unconstitutionally impaired the President's ability to ensure that the laws are faithfully executed, because "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the [PCAOB]."[80]

Free Enterprise, however, "did not broadly declare all two-level for-cause protections for inferior officers unconstitutional."[81] Furthermore, the Court expressly declined to address "that subset of independent agency

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[76] *Id.* at 485.

[77] *Id.* at 514.

[78] *Id.* at 486, 503.

[79] *Id.* at 487.

[80] *Id.* at 496.

[81] *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1122 (9th Cir. 2021).

employees who serve as administrative law judges."[82] The Court made two observations about ALJs that potentially distinguished them from the PCAOB: (1) whether ALJs are "Officers of the United States" was, at that time, a disputed question, and (2) "unlike members of the [PCAOB], many administrative law judges of course perform *adjudicative rather than enforcement or policymaking functions or possess purely recommendatory powers*."[83]

The Supreme Court subsequently addressed the first observation in *Lucia v. SEC*.[84] There, the Court held that SEC ALJs are "inferior officers" within the meaning of the Appointments Clause in Article II.[85] However, the Court again expressly declined to decide whether multiple layers of statutory removal restrictions on SEC ALJs violate Article II.[86]

Thus, neither *Free Enterprise* nor *Lucia* decided the issue raised here: whether multiple layers of removal restrictions for SEC ALJs violate Article II. As the Ninth Circuit recently concluded, the question is open.[87]

It is important to recognize that the Constitution does not expressly prohibit removal protections for

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[82] *Free Enter. Fund*, 516 U.S. at 507 n.10.

[83] *Id.* (citations omitted; emphasis added).

[84] 138 S. Ct. 2044 (2018).

[85] *Id.* at 2055.

[86] *Id.* at 2051 & n.1.

[87] *See Decker Coal Co.*, 8 F.4th at 1122.

"Officers of the United States."[88] The concept that such protections may be unconstitutional is drawn from the fact that "Article II vests '[t]he executive Power . . . in a President of the United States of America,' who must 'take Care that the Laws be faithfully executed.'"[89] The test is functional, not categorical:

> The analysis contained in our removal cases is designed *not* to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.[90]

Consistent with this standard, *Free Enterprise* thoroughly explained why two levels of removal protection for the PCAOB interfered with the executive power.[91] The first step in the Court's analysis focused on the fact that the PCAOB exercised "significant executive power"[92] as it "determine[d] the policy and

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[88] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 4.2 (5th ed. 2015) ("No constitutional provision addresses the [President's] removal power.").

[89] *Free Enter. Fund*, 561 U.S. at 483 (quoting U.S. CONST., art. II §§ 1 & 3).

[90] *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (footnote omitted; emphasis added).

[91] *Free Enter. Fund*, 561 U.S. at 495–96.

[92] *Id.* at 514.

enforce[d] the laws of the United States."[93] Then the Court explained how the PCAOB's removal protections subverted the President's ability to oversee this power.[94] The point here is that the function performed by the officer is critical to the analysis—the Court did not simply conclude that because members of the PCAOB were "Officers of the United States" (which was undisputed)[95] that dual for-cause protections were unconstitutional.

Unlike the PCAOB members who determine policy and enforce laws, SEC ALJs perform solely adjudicative functions. As the *Lucia* Court stated, "an SEC ALJ exercises authority 'comparable to' that of a federal district judge conducting a bench trial."[96] Their powers include supervising discovery, issuing subpoenas, deciding motions, ruling on the admissibility of evidence, hearing and examining witnesses, generally regulating the course of the proceeding, and imposing sanctions for contemptuous conduct or procedural violations.[97] After a hearing, the ALJ issues an initial decision that is subject to review by the Commission.[98] Commentators have similarly observed that "SEC

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[93] *Id.* at 484; *see also id.* at 508 (describing the PCAOB as "the regulator of first resort and the primary law enforcement authority for a vital sector of our economy").

[94] *Id.* at 498.

[95] *Id.* at 506.

[96] *Lucia*, 138 S. Ct. at 2049 (quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978)).

[97] *Id.*

[98] *Id.*

ALJs do not engage in enforcement or rulemaking"[99] and proceedings before them are "analogous to that which would occur before a federal judge."[100]

Free Enterprise stated, albeit in dicta, that the fact that an ALJ performs adjudicative rather than enforcement or policymaking functions may justify multiples layers of removal protection.[101] I believe this to be the case. The ALJs' role is similar to that of a federal judge;[102] it is not central to the functioning of the Executive Branch for purposes of the Article II removal precedents.[103] As the Southern District of New York concluded, invalidating the "good cause" removal restrictions enjoyed by SEC ALJs would only "undermine the ALJs' clear adjudicatory role and their ability to 'exercise[] . . . independent judgment on the evidence before [them], free from pressures by the parties or other officials within the agency.'"[104]

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[99] Mark*, supra*, at 107.

[100] David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1166 (2016).

[101] 561 U.S. at 507 n.10.

[102] *Lucia*, 138 S. Ct. at 2049.

[103] *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 669 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citing *Morrison*, 487 U.S. at 691–92).

[104] *Duka v. SEC*, 103 F. Supp. 3d 382, 395–96 (S.D.N.Y. 2015), *abrogated on other grounds by Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016) (quoting *Butz*, 438 U.S. at 513–14). *See also* Mark, *supra*, at 102–08 (arguing that multiple layers of removal protection for SEC ALJs do not violate Article II); Zaring, *supra*, at 1191–95 (same).

In fact, the Ninth Circuit recently employed similar reasoning in *Decker Coal Co. v. Pehringer*, which held that two layers of removal protection for ALJs in the Department of Labor do not violate Article II.[105] Like SEC ALJs, the ALJs in *Decker Coal* performed "a purely adjudicatory function."[106] The majority's decision is in tension, if not direct conflict, with *Decker Coal*.

Free Enterprise also noted that the exercise of "purely recommendatory powers" may justify multiple removal protections.[107] When an SEC ALJ issues a decision in an enforcement proceeding, that decision is essentially a recommendation as the Commission can review it de novo.[108] Even when the Commission declines review, the ALJ's decision is "deemed the action of the Commission."[109] Furthermore, the Commission is not required to use an ALJ and may elect to preside over the enforcement action itself.[110] This further supports the conclusion that the SEC ALJs' removal protections do not interfere with the President's executive power.

The majority reasons that because *Lucia* determined that SEC ALJs are inferior officers under the Appointments Clause, "they are sufficiently important

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105 *Decker Coal Co.*, 8 F.4th at 1133.

106 *Id.*

107 *Free Enter. Fund*, 561 U.S. at 507 n.10.

108 *See Lucia*, 138 S. Ct. at 2049 (citing 17 C.F.R. § 201.360(d)); 5 U.S.C. § 557(b).

109 *Lucia*, 138 S. Ct. at 2049 (quoting 15 U.S.C. § 78d-1(c)).

110 *Id.* (citing 17 C.F.R. § 201.110).

to executing the laws that the Constitution requires that the President be able to exercise authority over their functions," and, consequently, multiple for-cause protections inhibit the President's ability to take care that the laws be faithfully executed. But nowhere does the majority explain *how* the ALJs' tenure protections interfere with the President's ability to execute the laws. The majority does not mention *Free Enterprise*'s observation that the performance of "adjudicative rather than enforcement or policymaking functions" or "possess[ing] purely recommendatory powers" distinguishes ALJs from the PCAOB and may justify multiples layers of removal protection for ALJs.[111] The majority does not mention that *Lucia* found SEC ALJs to be similar to a federal judge.[112] The majority does not mention *Decker Coal*. Instead, the majority applies what is essentially a rigid, categorical standard, not the functional analysis required by the Supreme Court's precedents.[113]

Accordingly, I disagree with the majority that multiple layers of removal protection for SEC ALJs violate Article II. Because SEC ALJs solely perform an adjudicative function, and because their powers are recommendatory, these removal restrictions do

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[111] 561 U.S. at 507 n.10.

[112] 138 S. Ct. at 2049.

[113] *Morrison*, 487 U.S. at 689–90. The majority also cites *Myers v. United States*, 272 U.S. 52, 135 (1926), for the proposition that quasi-judicial executive officers must be removable by the President. But that part of *Myers* is dicta, which is why the Court disregarded it in *Humphrey's Executor v. United States*, 295 U.S. 602, 626–28 (1935).

not interfere with the President's ability to "take Care that the Laws be faithfully executed."

IV.

I find no constitutional violations or any other errors with the administrative proceedings below. Accordingly, I would deny the petition for review.

JUSTICE THOMAS DISSENTING FROM DENIAL OF CERTIORARI IN *DOE v. FACEBOOK* (MARCH 7, 2022)

SUPREME COURT OF THE UNITED STATES

JANE DOE

v.

FACEBOOK, INC.

No. 21-459

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Before: THOMAS, Judge.

The petition for a writ of certiorari is denied.

Statement of JUSTICE THOMAS respecting the denial of certiorari.

In 2012, an adult, male sexual predator used Facebook to lure 15-year-old Jane Doe to a meeting, shortly after which she was repeatedly raped, beaten, and trafficked for sex. Doe eventually escaped and sued Facebook in Texas state court, alleging that Facebook had violated Texas' anti-sex-trafficking statute and committed various common-law offenses. Facebook petitioned the Texas Supreme Court for a writ of mandamus dismissing Doe's suit. The court held that a provision of the Communications Decency

Act known as § 230 bars Doe's common-law claims, but not her statutory sex-trafficking claim.

Section 230(c)(1) 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." 47 U.S.C. § 230(c)(1). The Texas Supreme Court emphasized that courts have uniformly treated internet platforms as "publisher[s]" under § 230(c)(1), and thus immune, whenever a plaintiff 's claim "'stem[s] from [the platform's] publication of information created by third parties.'" *In re Facebook*, *Inc*., 625 S.W.3d 80, 90 (Tex. 2021) (quoting *Doe v. MySpace*, *Inc*., 528 F. 3d 413, 418 (CA5 2008)). As relevant here, this expansive understanding of publisher immunity requires dismissal of claims against internet companies for failing to warn consumers of product defects or failing to take reasonable steps "to protect their users from the malicious or objectionable activity of other users." 625 S.W.3d, at 83. The Texas Supreme Court acknowledged that it is "plausible" to read § 230(c)(1) more narrowly to immunize internet platforms when plaintiffs seek to hold them "strictly liable" for transmitting third-party content, *id*., at 90–91, but the court ultimately felt compelled to adopt the consensus approach, *id*., at 91.

This decision exemplifies how courts have interpreted § 230 "to confer sweeping immunity on some of the largest companies in the world," *Malwarebytes*, *Inc. v. Enigma Software Group USA*, *LLC*, 592 U.S. ___, ___ (2020) (slip op., at 1) (statement of THOMAS, J., respecting denial of certiorari), particularly by employing a "capacious conception of what it means to treat a website operator as [a] publisher or speaker," *id.*, at ___ (slip op., at 8) (internal quotation marks omitted). Here, the Texas Supreme Court afforded publisher immunity even though Facebook allegedly "knows its system facilitates human traffickers in identifying and cultivating victims," but has nonetheless "failed to take any reasonable steps to mitigate the use of Facebook by human traffickers" because doing so would cost the company users—and the advertising revenue those users generate. Fourth Amended Pet. in No. 2018–69816 (Dist. Ct., Harris Cty., Tex., Feb. 10, 2020), pp. 20, 22, 23; *see also* Reply Brief 3, n. 1, 4, n. 2 (listing recent disclosures and investigations supporting these allegations). 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." Fourth Amended Pet., at 21.

At the very least, before we close the door on such serious charges, "we should be certain that is what the law demands." *Malwarebytes*, 592 U.S., at ___ (slip op., at 10). As I have explained, the arguments in favor of broad immunity under § 230 rest largely on "policy and purpose," not on the statute's plain text. *Id.*, at ___ (slip op., at 4). Here, the Texas Supreme Court recognized that "[t]he United States Supreme Court—or better yet, Congress—may soon resolve the burgeoning debate about whether the federal courts have thus far correctly interpreted section 230." 625 S.W.3d, at 84. Assuming Congress does not step in to clarify § 230's scope, we should do so in an appropriate case.

Unfortunately, this is not such a case. We have jurisdiction to review only "[f]inal judgments or decrees" of state courts. 28 U.S.C. § 1257(a). And finality typically requires "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). Because the Texas Supreme Court allowed Doe's statutory claim to proceed, the litigation is not "final." Conceding as much, Doe relies on a narrow exception to the finality rule involving cases where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975). But that exception cannot apply here because the Texas courts have not yet conclusively adjudicated a personal-jurisdiction defense that, if successful, would "effectively moot the federal-law question raised here." *Jefferson v. City of Tarrant*, 522 U.S. 75, 82 (1997).

I, therefore, concur in the Court's denial of certiorari. We should, however, address the proper scope of immunity under § 230 in an appropriate case.

ORDER RE: MOTION TO CERTIFY CLASS AND *DAUBERT* MOTIONS, IN *DZ RESERVE v. META PLATFORMS, INC.* (MARCH 29, 2022)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DZ RESERVE, ET AL.,

Plaintiffs,

v.

META PLATFORMS, INC.,

Defendant.

Case No. 3:18-cv-04978-JD

Re: Dkt. Nos. 282, 285, 286

Before: James DONATO, U.S. District Judge.

ORDER RE MOTION TO CERTIFYCLASS AND DAUBERT MOTIONS

In this action alleging fraud against Meta Platf-orms, Inc. (Meta), formerly known as Facebook, named plaintiffs DZ Reserve and Cain Maxwell have asked to certify a class of United States residents who paid Meta for placement of advertisements on social media platforms. Dkt. No. 282. The gravamen of the lawsuit is that Meta inflated its potential advertising reach to consumers, and charged artificially high premiums for ad placements. Meta opposes certification, and filed two *Daubert* motions challenging the opinions and conclusions proffered by plaintiffs' expert witnesses. Dkt. Nos. 285, 286.

Three claims alleged in the Third Amended Complaint (TAC) remain in play. Dkt. No. 332.[1] The Court dismissed with prejudice plaintiffs' claims for breach of the implied covenant of good faith and fair dealing and a quasi-contract claim. Dkt. No. 255 at 2. The Court sustained plaintiffs' claims for fraudulent misrepresentation and fraudulent concealment, with the proviso that plaintiffs could not pursue those claims for conduct before August 15, 2015. *Id*. at 1-2. While the certification motion was pending, the Court granted a motion for judgment on the pleadings and dismissed plaintiffs' claim of restitution under the California Unfair Competition Law (UCL). Dkt. No. 366. The UCL claim was sustained for injunctive relief only. *Id*. at 2. Consequently, the claims subject to certification are fraudulent misrepresentation and fraudulent concealment for damages, and the UCL for injunctive relief.

DISCUSSION

I. Background

Before getting into the merits, a few words about Meta's brief are in order. Meta fired a blunderbuss of objections at certification. Virtually every page of its lengthy opposition brief presented a new argument,

[1] The TAC was originally filed under seal as Dkt. No. 166. The Court denied the administrative motion to seal the TAC without prejudice, *see* Dkt. No. 320, and the TAC was refiled as Dkt. No. 332.

often in just a paragraph or two of discussion. As a result, many of its arguments were underdeveloped to the point where the Court had ample justification to disregard them. Even so, the Court undertook the burden of sorting through Meta's brief to identify and address what appear to be its main arguments. Meta aggravated this situation further by making factual arguments much more suited to summary judgment proceedings than a class certification motion. To be sure, as the ensuing certification standards make clear, the Court will review the evidence as pertinent to the question of whether a class should certified. Meta's arguments went far beyond that inquiry.

The parties' familiarity with the record is assumed. In pertinent part, the undisputed facts are that Meta sells advertising to businesses and business owners like plaintiffs DZ Reserve and Cain Maxwell. Dkt. No. 332 at ¶ 2 Meta's Ads Manager platform is used by advertisers to identify their advertising targets, including the demographic reach they desire. *Id*. at ¶ 3. After advertisers select their targeting and placement criteria, the Ads Manager displays a "Potential Reach" for the advertisement. *See* Dkt. No. 282-3. The Potential Reach is expressed as a number of people that the ad may reach. *Id*. The default Potential Reach number, before any targeting criteria are selected, is the Potential Reach for people in the United States aged 18 and up, which was shown during the putative class period to be over 200 million people. Dkt. No. 281-9 at ¶¶ 55-60. As targeting criteria are selected, the Potential Reach is revised accordingly. Dkt. No. 282-3; 281-13 at 54:21-59:25. Meta describes the Potential Reach as an estimate of people in the ad's target audience. *See* Dkt. No. 296-17 at 3.

II. Class Certification Standards

Plaintiffs propose to certify this class under Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3):

> All United States residents (including natural persons and incorporated entities) who, from August 15, 2014, to the present ("Class Period"), paid for the placement of at least one advertisement on Facebook's platforms, including the Facebook and Instagram platforms, which was purchased through Facebook's Ads Manager or Power Editor.
>
> Excluded from the class are: (1) advertisements purchased pursuant to agreements other than Facebook's Terms of Service or Statement of Rights and Responsibilities; (2) advertisements purchased using only non-lookalike Custom Audiences as the targeting criteria; (3) advertisements purchased using Reach and Frequency buying; (4) advertisements purchased with the objectives of canvas app engagement, canvas app installs, offer claims, event responses, page likes, or external; and (5) advertisements for which Facebook provided Potential Reach lower than 1000.

Dkt. No. 282 at 15.

The Court has written extensively on the standards for class certification, which informs the discussion here. *See, e.g., Sapan v. Yelp, Inc.*, No. 18-cv-3240-JD, 2021 WL 5302908 (N.D. Cal. Nov. 15, 2021); *Meek v. SkyWest, Inc.*, ___ F. Supp. 3d ___, 2021 WL 4461180 (N.D. Cal. Sep. 29, 2021). A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quotations omitted). The overall goal is "to select the metho[d] best suited to adjudication of the controversy fairly and efficiently." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013) (internal quotations omitted) (modification in original). Plaintiffs must show that their proposed class satisfies all four requirements of Rule 23(a), and at least one of the subsections of Rule 23(b). *Comcast*, 569 U.S. at 33 (2013); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir. 2001). As the parties seeking certification, plaintiffs bear the burden of showing that the requirements of Rule 23 are met for their proposed class. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012).

The Court's class certification analysis "must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claim," but merits questions may be considered only to the extent that they are "relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 465-66 (internal quotations and citations omitted). The class certification procedure is decidedly not an alternative form of summary judgment or an occasion to hold a mini-trial on the merits. *Alcantar v. Hobart Service*, 800 F.3d 1047, 1053 (9th Cir. 2015). The decision of whether to certify a class is entrusted to the sound discretion of the district court. *Zinser*, 253 F.3d at 1186.

III. Rule 23(b)(3) Class

The Rule 23(a) factors are the same for certification of the proposed class under Rule 23(b)(2) or (b)(3), and the conclusions reached here for the Rule 23(a) elements apply to both types of classes. The main difference is the predominance element of Rule 23(b)(3), which Rule 23(b)(2) does not require. The Court takes up the proposed Rule 23(b)(3) class first.

The Court granted Meta's motion for judgment on the pleadings to dismiss plaintiffs' UCL claims for restitution, *see* Dkt. No. 366, so monetary relief is only available for plaintiffs' common law fraudulent concealment and fraudulent misrepresentation claims.

A. Numerosity (23(a)(1))

Rule 23(a)(1) requires that a proposed class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs state, with evidentiary support, that "[d]uring each year of the class period, more than 2 million United States advertisers purchased Facebook ads." Dkt. No. 282 at 15. Meta does not contest numerosity, and the Court finds this element is satisfied.

B. Typicality and Adequacy (23(a)(3)-(4))

Rule 23(a) requires the named plaintiffs to demonstrate that their claims are typical of the putative class, and that they are capable of fairly and adequately protecting the interests of the class. Fed. R. Civ. P. 23(a)(3)-(4). The named plaintiffs say typicality is satisfied because they "bring the same legal claims as the rest of the putative [c]lass" and "rely on the same grounds for liability as the rest of the class." Dkt. No. 282 at 17. Plaintiffs also say that they are adequate representatives because "[t]hey have no conflicts with the class," have "participated actively in this case," and their counsel has no conflicts, has experience with class actions, and has demonstrated a "willingness to vigorously prosecute this action." *Id*.

Meta makes multiple objections to adequacy and typicality. The primary one is that the proposed class is said to include a diverse population of advertisers ranging from "'large sophisticated corporations' to 'individuals and small businesses.'" Dkt. No. 294 at 16-17. In Meta's view, this means that the putative class members are necessarily in such disparate positions vis-à-vis its advertising services that the named plaintiffs, as advertisers on the smaller end of the spectrum, cannot fairly or adequately represent them. *Id*.

The objection is not well taken. To start, typicality is demonstrated when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." (internal quotation marks omitted). *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1019.

That is the situation here. Plaintiffs have adduced evidence indicating that, regardless of size or buying power, Meta's customers saw similar representations by Meta about its advertising reach and programs. Advertisers were shown the same default Potential Reach of over 200 million people before they applied any targeting criteria. Dkt. No. 281-9 at ¶¶ 55-60. Plaintiffs' expert, Dr. Charles Cowan, states that even with different targeting criteria for each advertiser, inflated Potential Reach representations were made across Meta's platform. Dkt. No. 281-11 at ¶ 33. All advertising customers were shown Potential Reach estimates that were inflated by a similar percentage. *Id*. at ¶ 15.[2]

It may be that class members differ in advertising budgets and scope of purchases, as Meta suggests, but Meta has not shown that these differences defeat typicality or the named plaintiffs' ability to adequately represent all class members. This is not a case where the record demonstrates that the products, pricing, and programs accessed by class members were so dissimilar that typicality and adequacy could not be established. *See, e.g., In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 489-90 (N.D. Cal. 2008) (denying certification of antitrust class where evidence demonstrated putative class members purchased entirely different products at different prices). In effect, Meta simply posits that typicality and adequacy cannot be established because the class includes large and small ad purchasers. The problem

[2] Dr. Cowan's work is discussed in more detail later in the order.

with this approach is that it is *ipse dixit* and not an evidence-based objection.

Meta's case citations do not lead to a different conclusion. It overreads *In re Facebook, Inc., PPC Advertising Litig.*, 282 F.R.D. 446 (N.D. Cal. 2012), *aff'd sub nom. Fox Test Prep v. Facebook, Inc.*, 588 F. App'x 733 (9th Cir. 2014), to stand for the proposition that a "'diverse group' of advertisers" necessarily undercuts adequacy and typicality. Dkt. No. 293-4 at 16-17. But that case in fact determined that typicality had been demonstrated. *In re Facebook, Inc.*, 282 F.R.D. at 453-54. Adequacy was not found because the record failed to show that the named plaintiffs had suffered a concrete injury from the challenged conduct. *Id*. at 454. That is not a circumstance present here.

Meta also has not demonstrated an evidence-based reason to reject the adequacy of the named plaintiffs generally. Adequacy of representation asks whether: "(1) the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Meta did not make a serious effort at answering either inquiry in the negative, and plaintiffs have demonstrated that no such concerns are in play here. *See* Dkt. No. 282 at 16-17.

Meta's effort to recast its typicality and adequacy challenges as questions of reliance and UCL standing is equally unavailing. *See* Dkt. No. 294 at 15. To start, named plaintiffs demonstrated reliance by proffering evidence that DZ Reserve was deterred from using Meta ads after learning that the Potential Reach was an inaccurate metric. Dkt. No. 293-27 at 193:17-194:5.

Similarly, named plaintiff Maxwell relied on Potential Reach to set his budgets and would not have spent money on Meta ads if he knew Potential Reach was inaccurate. *See* Dkt. No. 293-29 at 199:8-12; Dkt. No. 317-2 at 257:3-14. Meta says that the named plaintiffs would still have purchased ads if they knew the Potential Reach was inaccurate. Dkt. No. 294 at 16. But plaintiffs also indicated that they would have spent less on ads after learning the Potential Reach was inaccurate, demonstrating that they were deceived into spending more money. *See, e.g.*, Dkt. No. 317-3 at 105:21-106:5. This and similar evidence also establishes reliance for UCL standing purposes. *See Walker v. Life Insurance Co. of the Sw.*, 953 F.3d 624, 630 (9th Cir. 2020) ("To bring a UCL claim, a plaintiff must establish he suffered 'as a result of' the defendant's conduct.") (quoting Cal. Bus. & Prof. Code § 17204); *In re Tobacco II Cases*, 46 Cal. 4th 298, 325 (Cal. 2009) (named plaintiffs, not absent ones, must provide evidence of actual reliance at the certification stage).

Meta's mention of an arbitration provision in contracts for advertising after May 2018, Dkt. No. 294 at 17, also does not defeat the adequacy and typicality of the named plaintiffs. The complaint in this case was filed in August 2018. Dkt. No. 1. Despite that, and knowing of the arbitration clause and its possible application to plaintiffs, Meta never sought to compel arbitration, and instead vigorously litigated this lawsuit in federal court as if arbitration were not an option. A good argument can be made that Meta has waived arbitration on this record. *See Anderson v. Starbucks Corp.*, No. 20-cv-01178-JD, 2022 WL 797014 (N.D. Cal. March 16, 2022) (and cases cited therein). In addition, the record shows that the named plaintiffs purchased ads before and after May 2018, which indicates that they are adequate representatives for advertisers who purchased ads both before and after May 28, 2018. *See* Dkt. No 328-2 at ¶ 21. If for some presently unknown reason an adjustment to the class definition might be required on arbitration grounds, the Court can alter or amend it at any time before entry of a final judgment. Fed. R. Civ. P. 23(c)(1)(C); *see also Powers v. Hamilton Cty. Pub. Def. Com'n*, 501 F.3d 592, 619 (6th Cir. 2007).

Plaintiffs have satisfied the elements of adequacy and typicality.

C. Commonality (23(a)(2)) and Predominance (23(b)(3)

The commonality requirement under Rule 23(a)(2) is satisfied when "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Because "any competently crafted class complaint literally raises common questions," the Court's task is to look for a common contention "capable of classwide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Alcantar*, 800 F.3d at 1052 (internal quotations and citations omitted). What matters is the "capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (internal quotations omitted) (emphasis in original). This does not require total uniformity across a class. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at

1019. "[E]ven a single common question will do." *Dukes*, 564 U.S. at 359. The commonality standard imposed by Rule 23(a)(2) is "rigorous." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2013).

Rule 23(b)(3) sets out the related but nonetheless distinct requirement that the common questions of law or fact predominate over the individual ones. This inquiry focuses on whether the "common questions present a significant aspect of the case and [if] they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022 (internal quotations and citation omitted); *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). Each element of a claim need not be susceptible to classwide proof, *Amgen*, 568 U.S. at 468-69, and the "important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). Rule 23(b)(3) permits certification when "one or more of the central issues in the action are common to the class and can be said to predominate, . . . even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson*, 577 U.S. at 453 (internal quotations omitted).

"Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)," *Comcast*, 569 U.S. at 34, and the main concern under subsection (b)(3) is "the balance between individual and common issues." *In re Hyundai and Kia Fuel Economy Litigation*, 926 F.3d 539, 560 (9th Cir. 2019) (en banc) (internal quotations omitted). The Court finds it appropriate to assess commonality and predominance in tandem, with a careful eye toward ensuring that the specific requirements of each are fully satisfied. *See*, *e.g.*, *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120-21 (9th Cir. 2017).

1. Liability

Plaintiffs have demonstrated that the main liability issues are common to the class members and are capable of resolution with common evidence. For the fraudulent concealment and fraudulent misrepresentation claims, plaintiffs must show: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, *i.e.* to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 974 (1997). For plaintiffs' UCL claims (for which only commonality must be shown as part of the 23(a) factors, given the unavailability of monetary relief), plaintiffs must show that members of the public were likely to be deceived. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (claims under UCL and CLRA are "governed by the 'reasonable consumer' test"; plaintiffs "must show that members of the public are likely to be deceived") (internal quotations and citations omitted).

Consequently, the main liability question is the same for all class members: did Meta's Potential Reach metric mislead advertisers? Meta does not disagree, and instead hurls a grab bag of challenges to plaintiffs' ability of proving an answer in their favor. Much of Meta's argument against commonality and predominance is simply that the evidence does not support plaintiffs' case. That is not the pertinent inquiry at the certification stage. The question is whether it makes sense under Rule 23 and as a matter of due process and efficiency to present the liability dispute to a jury on behalf of a class. Whether plaintiffs can ultimately prove it up at trial is a different matter altogether.

To the extent a merits inquiry is warranted, plaintiffs have adduced evidence showing that all class members were exposed to a similar representation about the ability of Potential Reach to reach "people," namely unique individuals. *See, e.g.*, Dkt. No. 282-3; Dkt. No. 281-9 at ¶¶ 55-60. This is seen in the Ads Manager interface, which represented Potential Reach as a number of people. *See, e.g.*, Dkt. No. 281-8. The evidence further shows that Meta's Potential Reach metric was not actually an estimate of people reached, but an estimate of "accounts" reached. *See* Dkt. No. 281-60 at ECF 10. Because the number of unique accounts and unique people were different, this led to an inaccurate representation of how many people the advertisements could reach. *See* Dkt. No. 281-11 at ¶ 15.

Meta does not dispute that the Potential Reach numbers were presented in terms of people. Instead, Meta says that the Potential Reach numbers were not uniformly inaccurate as a result of different targeting criteria producing different Potential Reach numbers. Dkt. No. 293-4 at 18-20. Even so, Potential Reach was always expressed as a number of "people," and the discrepancy between people and accounts made the number inaccurate, even if the numerical value of the inaccuracy varied across advertisers. Consequently, plaintiffs have shown that the question of whether

Meta made misrepresentations to all class members can be shown through common evidence.

Meta's knowledge of the misleading statements, and intent to deceive, also lend themselves to resolution by common evidence. *See, e.g.*, *Brickman v. Fitbit, Inc.*, No. 15-cv-2077-JD, 2017 WL 5569827, at *6 (N.D. Cal. Nov. 20, 2017) (citing *Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 173-74 (2003)). Several documents show that Meta knew that its Potential Reach estimate did not accurately reflect the number of people its advertisements could reach. *See* Dkt. No. 281-25; Dkt. No. 281-27. Meta's intent for advertisers to rely on its Potential Reach numbers is also provable through common evidence. Meta knew that the potential reach number was the most important number in its ads creation interface and that advertisers frequently relied on the estimated audience to build their budgets and advertising strategies. Dkt. No. 281-8.

So too for materiality and reliance. In common law and UCL fraud cases, questions of materiality and reliance do not necessarily undermine predominance and commonality. *Brickman*, 2017 WL 5569827, at *6-*7; *Milan v. Clif Bar & Co.*, No. 18-cv-2354-JD, 2021 WL 4427427, at *5 (N.D. Cal. Sep. 27, 2021). "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material." *Tobacco II Cases*, 46 Cal. 4th at 327. A misrepresentation is material "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Id.* (internal quotations omitted). The question of materiality "can be proved through evidence common to the class." *Amgen*, 568 U.S. at 467. Plaintiffs have established that materiality and reliance can be shown in this case through common evidence. Potential Reach metrics were shown to all advertisers in the Ads Manager. Dkt. No. 282-3; Dkt. No. 282-4. Meta has acknowledged that Potential Reach is an important number for advertisers. Dkt. No. 281-8. A majority of advertisers rely on Potential Reach as a metric for their advertisements. Dkt. No. 281-22.

Plaintiffs have also established that proof of injury is susceptible to common evidence. Among other evidence, a report from Pivotal Research showed that Potential Reach numbers exceeded census counts for various demographics, Dkt. No. 282-22 and several internal documents indicated various causes of inflated Potential Reach levels, *see, e.g.*, Dkt. No. 282-28; 282-7; 282-31; 282-32. Plaintiffs' expert, Dr. Cowan, conducted a statistical analysis to determine the percentage of inflation for both nationwide and targeted advertisements. *See* Dkt. No. 282-8. He concluded that it was a statistical certainty that, for any advertisement with a Potential Reach of at least 1,000 people or more, the estimate would be significantly inflated above the actual number of people the advertisement could reach. *Id*.

Meta says that Dr. Cowan improperly assumed that the inflated estimates found in the default national population (United States, aged 18-65) Potential Reach were equally applicable across all targeted groups, and that each measure of inflation was distributed across targeted groups. Dkt. No. 281-11 ¶ 82. Meta's expert, Dr. Steven Tadelis, says that this is a flawed assumption because Meta's data sampling shows that sources of inflation are not distributed evenly across all smaller demographics that an advertiser might choose. Dkt. No. 293-44 ¶ 125.

But Dr. Tadelis does not conclude that no inflation occurred at all, only that Dr. Cowan did not measure the exact inflation resulting from any given targeting criteria because inflation for any given sub population may be different from the inflation for the default national population. This criticism does not foreclose classwide proof of injury.

2. Damages and *Daubert* Motions re Dr. Allenby and Mr. McFarlane

While a damages methodology need not deliver mathematical precision, and may accommodate some individual variability among class members, *see In re Capacitors Antitrust Litigation*, No. 17-md-2801-JD, 2018 WL 5980139, at *9 (N.D. Cal. Nov. 14, 2018), it must be capable of determining damages across the class in a reasonably accurate fashion. *Comcast*, 569 U.S. at 35 (plaintiffs bear burden of showing that "damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)"). The damages model "must measure only those damages attributable to" the plaintiffs' theory of liability. *Id*. Put plainly, the damages model must reasonably reflect the claims and evidence in the case.

Plaintiffs have proffered experts who analyzed the evidence to arrive at a price premium that advertisers paid for inflated Potential Reach values. Dkt. No. 281-3 at 21. Dr. Cowan measured the amount of inflation associated with Potential Reach as a result of the misleading "people" metric. *Id*. Dr. Allenby used a "conjoint survey" to test the impact of inflated Potential Reach on advertisers' budgets. *Id*. Dr. Roughgarden, an auction expert, calculated a price premium. *Id*. Dr. Levy, an economist, confirmed that Dr.

Roughgarden's price premium properly considered supply and demand, and that damages could be calculated on a classwide basis. *Id*. Plaintiffs also offer expert witness Mr. McFarlane, who opined about the price premium class members paid compared to if no potential reach metric was provided at all. *Id*.

Meta offers little in its class certification brief to attack plaintiffs' damages models. It relies instead on two separately filed *Daubert* motions to exclude the opinions of Dr. Allenby and Mr. McFarlane, and by extension, the portions of Dr. Levy and Dr. Roughgarden's opinions that rely on the reports of Dr. Allenby and Mr. McFarlane. Dkt. Nos. 284-4, 284-6.

Overall, Meta has not demonstrated a good reason to exclude Dr. Allenby's work. Under the familiar standards of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), there is no "definitive checklist or test" used to evaluate the reliability of proposed expert testimony. *Daubert*, 509 U.S. at 593-94. The question for the Court at this stage is to decide whether Dr. Allenby will use a generally accepted method for determining price premiums, or whether his approach is "junk science" akin to predicting criminality by feeling the bumps on a person's head. *General Electric Co. v. Joiner*, 522 U.S. 136, 153 n.6 (1997) (Stevens, J., concurring in part).

The "inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage." *Sali v. Corona Reg'l Med. Ctr.*, 9-9 F.3d 996, 1006 (9th Cir. 2018). The Court determines whether the expert evidence helps to establish whether class certification is appropriate.

See Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011).

Dr. Allenby conducted a conjoint survey and analyzed the data using both a linear regression model and a "logit model" (another type of statistical analysis) before determining that the logit model did not best fit the data. Meta does not suggest that a conjoint survey is an untested method, nor does it claim that it is improper to use a linear regression to analyze survey data. Rather, Meta says that the specific regression that Dr. Allenby used was a novel type of analysis that purposely excluded data from the analysis. Dkt. No. 284-4 at 10-12.

This Court has found conjoint analysis to be a reliable method of determining price premiums. *See, e.g.*, *Milan v. Clif Bar & Co.*, No. 18-cv-2354-JD, 2021 WL 4467427, at * 7 (N.D. Cal. Sep. 27, 2021). Meta does not dispute the generally utility of conjoint analysis, and focuses its critique on Dr. Allenby's use of a linear regression model to analyze the data from the conjoint survey. Dkt. No. 284-4 at 10. Plaintiffs have shown that Dr. Allenby chose a linear regression model that is a standard method for analyzing this data. Dkt. No. 304-17 at 143:9-18; 304-20 at 57:23-58:7. Dr. Allenby's choice of one particular data analysis method over another goes to the weight of his opinion, not its admissibility. *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1036 (9th Cir. 2010). To the extent that Meta suggests that Dr. Allenby improperly limited his data set, this too is a question of weight to be afforded to the opinion, not its admissibility. *In re Capacitors Antitrust Litig.*, No. 17-md-2801-JD, 2018 WL 5980139, at *6 (N.D. Cal. Nov. 14, 2018). Dr. Allenby states that he chose a subset of the data to analyze based on the fact that his conjoint survey included allocations of advertising for both Meta and Google ads, but only Meta ads are at issue in this case. Dkt. No. 304-17 at 288:10-289:8.

This is enough to be sound and useful for certification purposes. If evidence emerges at trial that substantially impeaches Dr. Allenby's methods and conclusions, the door may be opened to consideration of decertification.

Meta's objections to Mr. McFarlane's report lead to a different outcome. Meta says that Mr. McFarlane offered nothing more than his personal interpretation of documents and evidence. Dkt. No. 284-6 at 7. Meta also says that Mr. McFarlane used a price premium figure that he did not calculate, and merely applied it in an obvious fashion to the amount of money plaintiffs are said to have spent on advertising. *Id*. at 3.

These objections are well taken. Overall, Mr. McFarlane's report does not offer any specialized or scientific expertise, or anything beyond the typical knowledge and experience of a jury. *See* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 592. The documents Mr. McFarlane interprets are reasonably intelligible to a jury without special assistance. Consequently, exclusion of Mr. McFarlane's opinions and report is required. Any portion of Dr. Roughgarden's opinions that is drawn on Mr. McFarlane's work is also excluded, unless an independent basis for it is demonstrated. The Court declines to undertake that analysis on the record as it currently stands. Meta may pursue it in a motion in limine, as circumstances warrant.

Because plaintiffs have adequately shown that they can calculate damages on a classwide basis using

Dr. Allenby's report and evidence from their other experts (excluding Mr. McFarlane), they have shown an adequate damages model under Rule 23(b)(3).

D. Superiority

The final certification question is whether the ends of justice and efficiency are served by certification. Rule 23(b)(3) requires a finding that proceeding as a class is superior to other ways of adjudicating the controversy, which in this case would mean individual actions by each putative class member. There can be no doubt here that a class is the superior method of handling the claims of individual advertisers. The price premium at issue here for each advertiser is no more than $32, Dkt. No. 281-3, and it is not likely for class members to recover large amounts individually if they prevailed. No reasonable person is likely to pursue these claims on his or her own, especially given the cost and other resources required to litigate against a company like Meta, which has already retained multiple experts and shown that it is committed to strongly defending this case. This all "vividly points to the need for class treatment." *Just Film*, 847 F.3d at 1123.

IV. Rule 23(b)(2) Class

Plaintiffs seek certification of a class under Rule 23(b)(2) for the UCL injunctive relief claim. Such a class may be certified when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Zinser*, 253 F.3d at 1195. The primary use of Rule 23(b)(2) classes has been the certification of civil rights class actions, but courts have certified many different kinds of classes under Rule 23(b)(2). *See Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014). The Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy must also be shown for a Rule 23(b)(2) class. *Zinser*, 253 F.3d at 186. As discussed, plaintiffs have met their burden for proving the Rule 23(a) requirements.

For Rule 23(b)(2), the Court is not required "to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). "It is sufficient to meet the requirements of Rule 23(b)(2) that class members complain of a pattern or practice that is generally applicable to the class as a whole." *Id.* (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)) (internal quotations omitted).

The California Supreme Court has held that "[i]njunctions are the 'primary form of relief available under the UCL to protect consumers from unfair business practices." *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 337 (2011); *see also Tobacco Cases II*, 46 Cal. 4th at 319. For the proposed Rule 23(b)(2) class, plaintiffs seek injunctive relief in the form of an order directing Meta to "either (a) correct the [Potential Reach] metric by removing known sources of inflation, or (b) remove the [Potential Reach] metric altogether." Dkt. No. 281-3 at 18.

Plaintiffs have standing to seek an injunction. As our circuit has determined, "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase," because "[k]nowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018). Plaintiffs have proffered deposition testimony to the effect that they would consider purchasing ads from Meta again if Meta corrected or removed the misleading Potential Reach metric. Dkt. No. 282-65 at 242:18-23; Dkt. No. 282-64 at 105:24-106:5. This establishes plaintiffs' standing to pursue injunctive relief in this case.

Meta's arguments to the contrary are unavailing. To start, Meta repeats the same arguments that it already made in its motion for judgment on the pleadings, Dkt. No. 270, that plaintiffs have failed to show they lack an adequate remedy at law. The Court has already determined that plaintiffs have shown an inadequate remedy at law for their injunctive relief claim under the UCL. Dkt. No. 366 at 2.

Meta also says that plaintiffs did not show they face a threat of actual future harm because at least one inflation source has already been remediated and Meta updated disclosures about multiple accounts. Dkt. No. 293-4 at 25. This is a merits question that is not properly decided at the class certification stage.

Meta's passing comment that the injunction plaintiffs seek is "overbroad and unworkable," Dkt. No. 293-4 at 25, is no basis for denying certification.

The remark was not developed in a meaningful way, and concerns about the scope of an inunction are premature at this stage. *See B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 972 (9th Cir. 2019). There is considerably more to be done in this case, namely trial, before the specific terms of an injunction might warrant debate.

Consequently, a Rule 23(b)(2) class is appropriate for plaintiffs' UCL claims.

CONCLUSION

The Court certifies the proposed class under Rule 23(b)(3) for the common law fraud claims, and under Rule 23(b)(2) for the UCL injunction claim. Plaintiffs DZ Reserve, Inc. and Cain Maxwell are appointed class representatives, and their counsel at Cohen Milstein Sellers & Toll PLLC and the Law Offices of Charles Reichmann are appointed class counsel.

Meta's motion to exclude the report and testimony of Dr. Allenby is denied. Meta's motion to exclude the report and testimony of Mr. McFarlane is granted.

Plaintiffs are directed to file by April 29, 2022, a proposed plan for dissemination of notice to the classes. Plaintiffs will meet and confer with Meta at least 10 days in advance of filing the plan so that the proposal can be submitted on a joint basis, to the fullest extent possible.

A status conference is set for May 26, 2022, at 10:00 a.m. in Courtroom 11, 19th Floor, San Francisco. The parties are directed to file a joint statement by May 19, 2022, with proposed dates for the final pretrial conference and trial.

The parties are referred to Magistrate Judge Hixson for a settlement conference to be held as his schedule permits.

IT IS SO ORDERED.

/s/ James Donato
U.S. District Judge

Dated: March 29, 2022

OPINION, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT IN *LEMMON ET AL. v. SNAP* (MAY 4, 2021)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARLY LEMMON; MICHAEL MORBY, as surviving parents of Hunter Morby (deceased); SAMANTHA BROWN; MARLO BROWN, as surviving parents of Landen Brown (deceased),

Plaintiffs-Appellants,

v.

SNAP, INC., doing business in California as Snapchat, Inc.,

Defendant-Appellee.

No. 20-55295

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Before: Kim McLane WARDLAW and Carlos T. BEA, Circuit Judges, and James DAVID CAIN, JR.,* District Judge.

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* The Honorable James David Cain, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

OPINION

WARDLAW, Circuit Judge:

Carly Lemmon, Michael Morby, Samantha Brown, and Marlo Brown ("the Parents") are the surviving parents of two boys who died in a tragic, high-speed car accident. They sued Snap, Inc. ("Snap"), a social media provider, alleging that it encouraged their sons to drive at dangerous speeds and thus caused the boys' deaths through its negligent design of its smartphone application Snapchat. We must decide whether the district court correctly dismissed that action when it concluded that the Communications Decency Act ("CDA") barred the Parents' claim because it sought to treat Snap "as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

We conclude that, because the Parents' claim neither treats Snap as a "publisher or speaker" nor relies on "information provided by another information content provider," Snap does not enjoy immunity from this suit under § 230(c)(1). We therefore reverse the district court's Rule 12(b)(6) dismissal of the Parents' lawsuit and remand for further proceedings.

I.

Because the district court dismissed this action pursuant to Federal Rule of Civil Procedure 12(b)(6), we accept as true the allegations contained in the Parents' amended complaint and view them in the light most favorable to the Parents. *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096 (9th Cir. 2019).

A.

According to the Parents' amended complaint, Jason Davis (age 17), Hunter Morby (age 17), and Landen Brown (age 20) were driving down Cranberry Road in Walworth County, Wisconsin at around 7:00 p.m. on May 28, 2017. Jason sat behind the wheel, Landen occupied the front passenger seat, and Hunter rode in the back seat. At some point during their drive, the boys' car began to speed as fast as 123 MPH. They sped along at these high speeds for several minutes, before they eventually ran off the road at approximately 113 MPH and crashed into a tree. Tragically, their car burst into flames, and all three boys died.

Shortly before the crash, Landen opened Snapchat, a smartphone application, to document how fast the boys were going. Snapchat is a social media platform that allows its users to take photos or videos (colloquially known as "snaps") and share them with other Snapchat users. To keep its users engaged, Snapchat rewards them with "trophies, streaks, and social recognitions" based on the snaps they send. Snapchat, however, does not tell its users how to earn these various achievements.

The app also permits its users to superimpose a "filter" over the photos or videos that they capture through Snapchat at the moment they take that photo or video. Landen used one of these filters—the "Speed Filter"—minutes before the fatal accident on May 28, 2017. The Speed Filter enables Snapchat users to "record their real-life speed." An example of the digital content that a Snapchat user might create with this filter is portrayed below.

A Snapchat user could also "overlay" the above information onto a mobile photo or video that they previously captured.

Many of Snapchat's users suspect, if not actually "believe," that Snapchat will reward them for "recording a 100-MPH or faster [s]nap" using the Speed Filter. According to plaintiffs, "[t]his is a game for Snap and many of its users" with the goal being to reach 100 MPH, take a photo or video with the Speed Filter, "and then share the 100-MPH-Snap on Snapchat."

Snapchat allegedly knew or should have known, before May 28, 2017, that its users believed that such a reward system existed and that the Speed Filter was therefore incentivizing young drivers to drive at dangerous speeds. Indeed, the Parents allege that there had been: a series of news articles about this phenomenon; an online petition that "called on Snapchat to address its role in encouraging dangerous speeding"; at least three accidents linked to Snapchat users' pursuit of high-speed snaps; and at least one other lawsuit against Snap based on these practices. While Snapchat warned its users against using the Speed Filter while driving, these warnings allegedly proved ineffective. And, despite all this, "Snap did not remove or restrict access to Snapchat while traveling at dangerous speeds or otherwise properly address the danger it created."

B.

On May 23, 2019, Hunter's and Landen's parents filed this negligent design lawsuit against Snap. Snap moved to dismiss the Parents' initial complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), contending that the Parents had failed to allege a plausible negligence claim and that the Communications Decency Act immunized it from liability. The district court agreed and dismissed the Parents' first complaint for failure to allege "a causal connection between Defendant's Speed Filter and the car accident" and because it was "not clear whether their claim is barred under the [CDA]." However, it granted leave to amend so that the Parents could cure these deficiencies.

On November 18, 2019, the Parents filed an amended complaint, which Snap moved to dismiss on the same grounds as before. This time, the district court granted the motion to dismiss solely on the basis of immunity under 47 U.S.C. § 230(c)(1). Because it concluded that the CDA rendered Snap immune from the Parents' claim, it did not address Snap's argument that the Parents had again failed to plead causation adequately. The district court denied further leave to amend, and entered a final judgment on February 25, 2020. The Parents then filed this timely appeal.

II.

We review de novo both the district court's order dismissing the Parents' claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and any questions of statutory interpretation that informed that decision. *Dyroff*, 934 F.3d at 1096. The Parents' amended complaint will survive at this stage if it states "a plausible claim for relief," *i.e.*, if it permits "the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). This standard requires determining whether the CDA bars the Parents' claim as pleaded in the amended complaint. *See id.*

III.

In 1996, when the internet was young and few of us understood how it would transform American society, Congress passed the CDA. *See* 47 U.S.C. § 230. That act "provide[d] internet companies with immunity from certain claims" in order "'to promote the continued development of the Internet and other interactive computer services.'" *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 681 (9th Cir. 2019) (quoting 47 U.S.C. § 230(b)(1)). Specifically, Congress commanded 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."[1] 47 U.S.C. § 230(c)(1); *see also id.* § 230(e)(3) (explicitly preempting any state or local law inconsistent with this section). Though somewhat jargony, this provision shields from liability those individuals or entities that operate internet platforms, to the extent their platforms publish third-party content.

To determine whether § 230(c)(1) applies here—and thus immunizes Snap from the Parents' claim—we apply the three-prong test set forth in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009). Snap thus enjoys CDA immunity only if it is "(1) a provider or

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[1] The statute defines an "interactive computer service" 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(f)(2). Meanwhile, an "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3).

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." *Dyroff*, 934 F.3d at 1097 (quoting *Barnes*, 570 F.3d at 1100–01). We examine each of these questions in turn.

A.

The parties do not dispute that Snap is a provider of an "interactive computer service," and we agree that Snap qualifies as one given the CDA's "expansive" definition of that term. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016) (citation omitted); *see also Barnes*, 570 F.3d at 1101. According to the amended complaint, the Snapchat application permits its users to share photos and videos through Snap's servers and the internet. Snapchat thus necessarily "enables computer access by multiple users to a computer server," 47 U.S.C. § 230(f)(2), and Snap, as the creator, owner, and operator of Snapchat, is therefore a "provider" of an interactive computer service. *Id.* § 230(f)(3).

B.

The second *Barnes* question asks whether a cause of action seeks to treat a defendant as a "publisher or speaker" of third-party content.[2] *Dyroff*, 934 F.3d at

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[2] The district court and the parties have, at various times, suggested that this aspect of the *Barnes* test is undisputed. Having parsed the Parents' arguments and citations before both our court and the district court, we do not agree. Though those arguments could have benefited from greater analytic exposition, the Parents have sufficiently preserved this issue for our review. In any event, it is within our discretion to reach this issue. *See In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 992

1097; *Barnes*, 570 F.3d at 1100. We conclude that here the answer is no, because the Parents' claim turns on Snap's design of Snapchat.

In this particular context, "publication" generally "involve[s] reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *HomeAway*, 918 F.3d at 681 (citation omitted). A defamation claim is perhaps the most obvious example of a claim that seeks to treat a website or smartphone application provider as a publisher or speaker, but it is by no means the only type of claim that does so. *Barnes*, 570 F.3d at 1101–02; *see also Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016). Thus, regardless of the type of claim brought, we focus on whether "the duty the plaintiff alleges" stems "from the defendant's status or conduct as a publisher or speaker." *Barnes*, 570 F.3d at 1107.

Here, the Parents seek to hold Snap liable for its allegedly "unreasonable and negligent" design decisions regarding Snapchat. They allege that Snap created: (1) Snapchat; (2) Snapchat's Speed Filter; and (3) an incentive system within Snapchat that encouraged its users to pursue certain unknown achievements and rewards. The Speed Filter and the incentive system then supposedly worked in tandem to entice young Snapchat users to drive at speeds exceeding 100 MPH.

(9th Cir. 2010) (noting we may exercise our discretion in this regard when "the issue presented is purely one of law and . . . does not depend on the factual record developed below" (citation omitted)). We exercise that discretion here, given that Snap addressed this issue both in its answering brief and before the district court.

The Parents thus allege a cause of action for negligent design—a common products liability tort. This type of claim rests 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." Lewis Bass, *Prods. Liab.: Design & Mfg. Defects* § 2.5 (2d ed., Sept. 2020 Update). Thus, a negligent design action asks whether a reasonable person would conclude that "the reasonably foreseeable harm" of a product, manufactured in accordance with its design, "outweigh[s] the utility of the product." *Merrill v. Navegar, Inc.*, 28 P.3d 116, 125 (Cal. 2001) (citation omitted); *see also Morden v. Cont'l AG*, 611 N.W.2d 659, 674 (Wis. 2000) (explaining that the relevant "duty of care requires manufacturers to foresee all reasonable uses and misuses and the consequent foreseeable dangers" of their products "and to act accordingly" (citation omitted)).[3]

The 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. *See* Dan B. Dobbs et al., *Dobbs' Law of Torts* § 478 (2d ed., June 2020 Update). Meanwhile, entities acting solely as publishers—*i.e.*, those that "review[] material submitted for

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[3] The parties have agreed that the tort law of either California or Wisconsin governs in this case. *See generally* Restatement (Second) of Torts § 398 (1965) ("A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.").

publication, perhaps edit[] it for style or technical fluency, and then decide[] whether to publish it," *Barnes*, 570 F.3d at 1102—generally have no similar duty. *See Dobbs' Law of Torts* § 478.

It is thus apparent that the Parents' amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker. Their 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). Thus, the duty that Snap allegedly violated "springs from" its distinct capacity as a product designer. *Barnes*, 570 F.3d at 1107. This is further evidenced by the fact that Snap could have satisfied its "alleged obligation"—to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat's users generate. *Internet Brands*, 824 F.3d at 851. 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. *Id.* at 852.

To the extent Snap maintains that CDA immunity is appropriate because the Parents' claim depends on the ability of Snapchat's users to use Snapchat to communicate their speed to others, it disregards our decision in *Internet Brands*. That Snap allows its users to transmit user-generated content to one another does not detract from the fact that the Parents seek to hold Snap liable for its role in violating its distinct duty to design a reasonably safe product. As in *Internet Brands*, Snap "acted as the 'publisher or speaker' of user content by" transmitting Landen's snap, "and that action could be described as a 'but-for' cause of [the boys'] injuries." 824 F.3d at 853. This is unsurprising: Snap "is an internet publishing business. Without publishing user content, it would not exist." *Id.* But though publishing content is "a but-for cause of just about everything" Snap is involved in, that does not mean that the Parents' claim, specifically, seeks to hold Snap responsible in its capacity as a "publisher or speaker." *Id.* The duty to design a reasonably safe product is fully independent of Snap's role in monitoring or publishing third-party content.[4]

Because the Parents' claim does not seek to hold Snap responsible as a publisher or speaker, but merely "seek[s] to hold Snapchat liable for its own conduct, principally for *the creation* of the Speed Filter," § 230(c)(1) immunity is unavailable. *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 81 (Ga. Ct. App. 2018) (emphasis added).

C.

CDA immunity is also unavailable in this case because the Parents' negligent design claim does not

[4] Nor would proving causation through the snap that Landen sent shortly before his death implicate § 230(c)(1) immunity, because the Parents do not fault Snap for publishing that photo message. Instead, that snap merely suggests, as circumstantial evidence, that the alleged negligent design of Snapchat had the very causal effect that the Parents' otherwise allege. By contrast, we note that the Parents 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. For attempting to hold Snap liable using such evidence would treat Snap as a publisher of third-party content, contrary to our holding here. *See* Section III.C. *infra*.

turn on "information provided by another information content provider." *Barnes*, 570 F.3d at 1101.

By its plain terms, and as the last part of the *Barnes* test recognizes, § 230(c)(1) cuts off liability only when a plaintiff's claim faults the defendant for information provided by third parties. 47 U.S.C. § 230(c)(1). Thus, internet companies remain on the hook when they create or develop their own internet content. *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). And they also may face liability to the extent they are "'responsible . . . in part, for the creation or the development of' the offending content" on the internet. *Id.* at 1162 (quoting 47 U.S.C. § 230(f)(3)); *see also Kimzey*, 836 F.3d at 1269 (asking whether a defendant "ma[de] a material contribution to the creation or development of [the] content" underlying a given claim).

This case presents a clear example of a claim that simply does not rest on third-party content. Snap indisputably designed Snapchat's reward system and Speed Filter and made those aspects of Snapchat available to users through the internet. *See Roommates*, 521 F.3d at 1168 (noting that the word "develop" in the CDA connotes "making usable or available"). And the Parents' negligent design claim faults Snap solely for Snapchat's architecture, contending that the app's Speed Filter and reward system worked together to encourage users to drive at dangerous speeds.

Notably, the Parents do not fault Snap in the least for publishing Landen's snap. Indeed, their amended complaint fully disclaims such a reading of their claim: "The danger is not the Snap [message using the Speed Filter] itself. Obviously, no one is harmed by the post. Rather, the danger is the speeding." AC ¶ 14. While we need not accept conclusory allegations contained in a complaint, we must nonetheless read the complaint in the light most favorable to the Parents. *See Dyroff*, 934 F.3d at 1096. And this statement reinforces our own reading of the Parents' negligent design claim as standing independently of the content that Snapchat's users create with the Speed Filter.

To sum up, even if Snap is acting as a publisher in releasing Snapchat and its various features to the public, the Parents' claim still rests on nothing more than Snap's "own acts." *Roommates*, 521 F.3d 1165. The Parents' claim thus is not predicated on "information provided by another information content provider." *Barnes*, 570 F.3d at 1101.

Each of Snap's novel attempts to expand CDA immunity beyond these straightforward principles is to no avail. To start, while providing content-neutral tools does not render an internet company a "creator or developer" of the downstream content that its users produce with those tools, our case law has never suggested that internet companies enjoy absolute immunity from all claims related to their content-neutral tools. *See Dyroff*, 934 F.3d at 1099; *Kimzey*, 836 F.3d at 1269–70; *Roommates*, 521 F.3d at 1175. To the contrary, "[t]he [CDA] was not meant to create a lawless no-man's-land on the Internet." *Roommates*, 521 F.3d at 1164. Those who use the internet thus continue to face the prospect of liability, even for their "neutral tools," so long as plaintiffs' claims do not blame them for the content that third parties generate with those tools.

Next, the Parents' allegations concerning the Speed Filter and Snapchat's reward system are not a creative attempt to plead around the CDA. In the cases where such creative pleading has posed a concern, the plaintiff's claims, at bottom, depended on a third party's content, without which no liability could have existed. *See Dyroff*, 934 F.3d at 1096 (alleging defendant developed content because its website's "recommendation and notification functions were 'specifically designed to make subjective, editorial decisions about users based on their posts'"); *Kimzey*, 836 F.3d at 1269 (alleging defendant developed content when it integrated a third party's defamatory review "into its own 'advertisement' or 'promotion' on Google" using its "unique star-rating system"). However, as already explained, the Parents' claim does not depend on what messages, if any, a Snapchat user employing the Speed Filter actually sends. This is thus not a case of creative pleading designed to circumvent CDA immunity.

Last, Snap misunderstands the import of our statement in *Dyroff* that a website's "tools meant to facilitate the communication and content of others" were "not content in and of themselves." 934 F.3d at 1098. For even accepting that statement at face value, it does nothing to advance Snap's argument. It is by now clear that the Parents' negligent design claim does not turn on the content of Landen's particular snap. Thus, if Snapchat's Speed Filter and award system were not content for purposes of the CDA, then the Parents' negligence or negligent design claim would rest on no CDA "content" whatsoever, and Snap would still receive no immunity. After all, CDA immunity is available only to the extent a plaintiff's claim implicates third-party content. *See* 47 U.S.C. § 230(c)(1).

* * *

In short, Snap "is being sued for the predictable consequences of" designing Snapchat in such a way that it allegedly encourages dangerous behavior. *Roommates*, 521 F.3d at 1170. The CDA does not shield Snap from liability for such claims. *See Internet Brands*, 824 F.3d at 853 ("Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses.").

IV.

Snap has also urged us to affirm the district court's decision on the alternative ground that the Parents have failed to plead adequately in their amended complaint the causation element of their negligent design claim. Though we may affirm on any ground supported by law, we decline to exercise that discretion here for three reasons. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018).

First, the district court dismissed the Parents' amended complaint based "entirely on the CDA[,] and we refrain from deciding an issue that the district court has not had the opportunity to evaluate." *Roommates*, 521 F.3d at 1175 n.40. Second, the district court stated when it dismissed the Parents' amended complaint that it would ordinarily have granted leave to amend, but it declined to do so based on its belief that the Parents could not surmount the issue of CDA immunity. It thus appears the district court would have granted further leave to amend if the sole defect in the Parents' amended complaint was a mere failure to plead legal causation. Third, the district court has yet to decide whether there exists a conflict between Wisconsin and California law on the issue of legal causation. Nor has it decided, in the event there is such a conflict, which state's law governs that claim. *See generally Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 559 (9th Cir. 2020) (laying out the relevant analytic framework), *cert. denied sub nom. Cooper v. TEPCO*, No. 20-730, 2021 WL 1163742 (U.S. Mar. 29, 2021).

V.

For these reasons, we REVERSE the district court's dismissal of the Parents' amended complaint on the ground of immunity under 47 U.S.C. § 230(c)(1) and REMAND this matter for further proceedings consistent with this opinion.

READING SECTION 230 AS WRITTEN, BY ADAM CANDEUB, PUBLISHED IN JOURNAL OF FREE SPEECH LAW

*Adam Candeub**

Section 230 of the Communications Decency Act gives internet platforms legal protection for content moderation. Even though the statute is 25 years old, courts have not clearly stated which provision within section 230 protects content moderation. Some say section 230(c)(1), others section 230(c)(2). But section 230(c)(1) speaks only to liability arising from third-party content, codifying common carriers' liability protection for delivering messages.

And while section 230(c)(2) addresses content moderation, its protections extend only to content moderation involving certain types of speech. All content moderation decisions for reasons not specified in section 230(c)(2), such as based on material being considered "hate speech," "disinformation," or "incitement," stand outside section 230's protections. More important, because section 230(c)(2) regulates both First Amendment protected and unprotected speech,

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it does raise constitutional concerns, but they may not be fatal.

[TOC Omitted]

INTRODUCTION

Those who want the dominant internet platforms to impose greater restrictions on expression often claim, "Freedom of speech is not freedom of reach."[1] The slogan asks social media platforms to refrain from amplifying hurtful, threatening, or otherwise injurious speech. The slogan's supporters do not appear to call for censorship—but only for social media to limit the ability to spread ideas they find dangerous or objectionable through the platforms' content moderation and promotion policies.

An alternative vision posits that democratic deliberation needs an agora, a place where citizens can discuss views in a free and open way, approaching each other as equals. Social media is, as the Supreme Court has declared, the "public square"[2] and therefore should afford a place for all citizens to engage in political debate *with a relatively equal opportunity for reach*. Dominant social media firms that have the

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[1] *See, e.g.*, Renee Diresta, *Free Speech Is Not the Same As Free Reach*, WIRED (Aug. 30, 2018), https://tinyurl.com/ysfcrddx; Andrew Pulver, *Sacha Baron Cohen: Facebook Would Have Let Hitler Buy Ads for 'Final Solution,'* THE GUARDIAN (Nov. 22, 2019), https://tinyurl.com/ec33e3ed.

[2] Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017) ("Social media . . . are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.").

power to control public discourse should refrain from censoring controversial or threatening ideas. Otherwise, political discussion devolves into something analogous to Karl Wittfogel's "beggar's democracy," in which we are free to discuss only those matters about which the Big Tech oligarchs care little. those matters about which the Big Tech oligarchs care little.[3]

Section 230 of the Communications Decency Act limits platforms' legal liability for the content moderation policies they impose. How courts apply this provision will advance one, or the other, vision of the internet.

Even though the statute is 25 years old, courts disagree as to which provision in section 230 protects content moderation. Some conclude that section 230(c)(1) provides such protection.[4] But section 230(c)(1) speaks only to liability arising from third-party content, codifying common carriers' liability protection for the messages they deliver. Its text says nothing about platforms' *own* moderation. In his statement concerning a denial of certiorari, the only Supreme Court statement on section 230 to date, Justice Thomas has recognized how interpreting section 230 to cover content moderation departs from the statutory text.[5]

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3 KARL WITTFOGEL, ORIENTAL DESPOTISM, A COMPARATIVE STUDY OF TOTAL POWER 125–26 (1957).

4 *See, e.g.,* Levitt v. Yelp! Inc., No. C-10-1321 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014); *see* ERIC GOLDMAN, INTERNET LAW: CASES & MATERIALS 298 (2021), https://perma.cc/KVX9-7ENN

5 Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 16 (2020) (Thomas, J., respecting the denial of certiorari)

Rather, section 230(c)(2) protects content moderation, but only content moderation involving speech of the types it lists. As is argued in *Interpreting 47 U.S.C. § 230(c)(2)* (published in this volume),[6] this list should be read under the *ejusdem generis* canon of statutory construction and refers to categories of speech considered regulable in 1996, the year Congress wrote the statute. Restrictions based on justifications not specified in section 230(c)(2)—such as that certain posts constitute "hate speech," "disinformation," or "incitement" which do not reach the level of criminal behavior—stand outside section 230's protections.

Reading section 230(c)(2) as written poses a question that courts have ignored, largely because most content moderation cases have been decided under section 230(c)(1): Is Section 230(c)(2) an unconstitutional, content-based regulation of speech? This Article provides some tentative answers to that question.

The article proceeds as follows. Part I describes the well-known history that led to section 230's passage. Drawing on this history, as well as a textual analysis, Part II sets forth the most natural understanding of sections 230(c)(1) and (c)(2): the former limits platform liability for third party content and the

("Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content. Section 230(c)(1) protects a company from publisher liability only when content is 'provided by another information content provider.' . . . But from the beginning, courts have held that § 230(c)(1) protects the 'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.'").

[6] Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175 (2021).

latter limits platform liability for content moderation. This section critiques courts that have expanded section 230(c)(1) to include content moderation protection. Part III examines the relationship between sections 230(c)(1) and (f)(3). Parts IV and V set forth textual analyses of sections 230(c)(1) and (c)(2) respectively. (Part V briefly summarizes the analysis from *Interpreting 47 U.S.C. § 230(c)(2).*) Part VI analyzes the constitutionality of section 230(c)(2), first under a non-*ejusdem generis* reading and then an *ejusdem generis* reading. Given precedent's lack of clarity, the Article concludes tentatively that even in the unlikely event that section 230 is ruled unconstitutional, severability would be the best remedy.

I. Section 230 and Congressional Purpose

Congress passed section 230 as part of the Communications Decency Act of 1996 (CDA), an effort to control pornography and other non-family-friendly material on the internet. As opposed to the outright speech bans in the CDA that were struck down in *Reno v. ACLU*,[7] section 230 aimed to empower parents to control internet content. It did so, in part, by overruling a New York state case, *Stratton Oakmont v. Prodigy*.[8] Early platforms, such as Prodigy and its numerous bulletin boards, claimed they could not offer porn-free environments because of *Stratton Oakmont*. Developing the common law of defamation, the court had ruled that Prodigy was a "publisher" for all statements on its bulletin board (and thus potentially liable for those

[7] Reno v. ACLU, 521 U.S. 844, 859 n.25 (1997).

[8] 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

statements) because it content-moderated posts to render its forum "family friendly."

Stratton Oakmont's legal conclusion created a Hobson's choice for platforms' content moderation: either moderate content and face liability for all posts on your bulletin board, or don't moderate and have posts filled with obscenity or naked images. That legal rule was hardly an incentive for platforms to create family-friendly online environments.

Congress came to the rescue with section 230(c)(2),[9] which states that all inter-net platforms "shall not be held liable" for editing to remove content that they consider to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[10] Congress eliminated the Hobson's choice: when platforms content-moderate for these

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[9] 47 U.S.C. § 230(c)(2); 141 Cong. Rec. S8310–03 (daily ed. June 14, 1995) (statement of Sen. Coats) ("I want to be sure that the intent of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable. . . . Am I further correct that the subsection (f)(4) defense is intended to protect companies from being put in such a catch-22 position? If they try to comply with this section by preventing or removing objectionable material, we don't intend that a court could hold that this is assertion of editorial content control, such that the company must be treated under the high standard of a publisher for the purposes of offenses such as libel."); 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox, referring to *Stratton* decision as "backward"); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte, criticizing *Stratton* decision).

[10] The question of whether "otherwise objectionable" should be understood as an open-ended term is examined in Candeub & Volokh, *supra* note 6.

specific reasons, they would no longer be held liable for everything on their site.

Notice what section 230's text does *not do:* give platforms protection for content moderation for any reason not specified in section 230(c)(2). That would include "disinformation," "hate speech," "misgendering," "religious hatred," or for that matter the traffic prioritizations the platforms perform to give people content they want. Yet, some courts have blessed such an untextual expansion,[11] which is only possible under an all-inclusive reading of "otherwise objectionable" that seems implausible.[12]

Not only is the text silent about content moderation for such a broad range of reasons, but the legislative history is too. Representatives Christopher Cox and Ron Wyden floated a bill, titled "Internet Freedom and Family Empowerment Act,"[13] that became section 230.[14] It was an alternative to Senator J. James Exon's bill that criminalized the transmission of indecent material to minors, which was codified in section

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[11] *See*, *e.g.*, Fed. Agency of News LLC, et al. v. Facebook, Inc., 395 F. Supp. 3d 1295 (N.D. Cal. 2019) (dismissing discrimination claims under Title II and 42 U.S.C. § 1983); Sikhs for Justice "SFJ", Inc. v. Facebook, Inc., 144 F. Supp. 3d at 1095–96 (N.D. Cal. 2015) (holding that section 230 bars discrimination claims).

[12] *See* Candeub & Volokh, *supra* note 6.

[13] Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995–96).

[14] Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 Fed. Comm. L.J. 51, 69 (1996).

223.[15] Both became part of the Communications Decency Act, but the Supreme Court struck down Senator Exon's portion, leaving section 230.[16]

In comments on the House floor, Representative Cox explained that section 230 would reverse *Stratton Oakmont* and advance the regulatory goal of allowing families greater power to control online content, protecting them from "offensive material, some things in the bookstore, if you will that our children ought not to see. . . . I want to make sure that my children have access to this future and that I do not have to worry about what they might running into online. I would like to keep that out of my house and off of my

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[15] *Id.*; Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 Notre Dame L. Rev. 293, 316 (2011); 141 Cong. Rec. H8468–69 (daily ed. Aug. 4, 1995). The Supreme Court declared unconstitutional Senator Exon's part of the CDA. *See* Ashcroft v. ACLU, 535 U.S. 564, 564 (2002) ("This Court found that the Communications Decency Act of 1996 (CDA)—Congress' first attempt to protect children from exposure to pornographic material on the Internet—ran afoul of the First Amendment in its regulation of indecent transmissions and the display of patently offensive material. That conclusion was based, in part, on the crucial consideration that the CDA's breadth was wholly unprecedented.").

[16] Reno v. ACLU, 521 U.S. 844, 859 n.24 (1997) ("Some Members of the House of Representatives opposed the Exon Amendment because they thought it 'possible for our parents now to child-proof the family computer with these products available in the private sector.' They also thought the Senate's approach would 'involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected.' These Members offered an amendment intended as a substitute for the Exon Amendment, but instead enacted as an additional section of the Act entitled 'Online Family Empowerment.'").

computer. How should we do this?"[17] He stated that "[w]e want to encourage [internet services] . . . to everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see."[18]

In fact, the comments in the Congressional record from *every* supporting legislator—and it received strong bipartisan support—reveal an understanding that the Online Family Empowerment amendment, now codified as section 230, was a non-regulatory approach to protecting children from pornography and other material perceived to be harmful that the federal government *already* regulated.[19]

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[17] 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

[18] *Id.* at H8470.

[19] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden) ("We are all against smut and pornography. . . . [rather] than give our Government the power to keep offensive material out the hands of children . . . We have the opportunity to build a 21st century policy for the Internet employing . . . the private sector"); 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Danner) ("I strongly support . . . address[ing] the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornography materials available on the Internet"); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. White) ("I have got small children at home. . . . I want to be sure can protect them from the wrong influences on the Internet."); *id.* (statement of Rep. Lofgren) ("[The Senate approach] will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment"); *id.* (statement of Rep. Goodlatte) ("Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on

II. The Relationship Between Sections 230 (c)(1) & 230(c)(2)

Both section 230's text and congressional intent target a narrow set of harms: pornography, indecency, and other material considered regulable at the time. This understanding undermines the claim that section 230 claims must be read "broadly" as a seminal charter of online internet immunity carefully considered by Congress. Certain legislators, decades later, may make claims to that effect.[20] And some commentators have echoed these post hoc claims.[21] But, as the Supreme

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the Internet"); *id.* (statement of Rep. Markey) (supporting the amendment because it "deals with the content concerns which the gentlemen from Oregon and California have raised"); *id.* (statement of Rep. Fields) (congratulating the legislators for "this fine work").

[20] Ron Wyden, *I Wrote This Law to Protect Free Speech. Now Trump Wants to Revoke It*, CNN Business Perspectives (June 9, 2020), https://tinylink.net/4KNX2 ("Republican Congressman Chris Cox and I wrote Section 230 in 1996 to give up-and-coming tech companies a sword and a shield, and to foster free speech and innovation online. Essentially, 230 says that users, not the web-site that hosts their content, are the ones responsible for what they post, whether on Facebook or in the comments section of a news article. That's what I call the shield. But it also gave companies a sword so that they can take down offensive content, lies and slime—the stuff that may be protected by the First amendment but That Most People Do Not Want to Experience Online."); Jeff Kosseff, the Twenty-Six Words That Created the Internet 64 (2019) (quoting a June 2017 interview with Ron Wyden, in which he says, "We really were interested in protecting the platforms from being held liable for the content posted on their sites and being sued out of existence").

[21] As an example, Jeff Kosseff's the Twenty-Six Words That Created the Internet recounts the legislative history of section 230, arguing that its motivation was to counter pornography and duly footnoting the legislative history. However, when the book

Court says, "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."[22]

While section 230(c)(2) dominated the legislative discussion, section 230(c)(1) has dominated judicial decisions.[23] Section 230(c)(1) eliminates internet platforms' "publisher or speaker" liability for the third-party user content they post. It 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."[24] In short, it treats internet platforms as conduits, such as the telephone or telegraph companies. Unlike publishers, these entities do not face strict liability under common law for the content they carry.

And section 230(c)(1), though *not* the focus of legislative attention as evidenced from the legislative history, makes good sense as written. Early platforms, such as AOL and Prodigy, would have been crushed with the legal liability of having to review all posts. Section 230(c)(1) said they were not liable for third party content—and Section 230(c)(2) said they would not become so even if they edited such content for

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goes on to claim that Section 230 sought to protect online actors from crushing liability, it cites to post-enactment claims by legislators. *See id*. ch. 3 ("Chris and Ron Do Lunch") and accompanying footnotes.

[22] Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011).

[23] *See* Elizabeth Banker, Internet Ass'n, *A Review of Section 230's Meaning & Application Based on More Than 500 Cases* (July 27, 2020), https://perma.cc/4B7B-U88S.

[24] 47 U.S.C. § 230(c)(1).

certain, enumerated reasons. Thus, Section 230(c)(1) ratified and expanded on *Cubby v. Compuserve*, an early internet opinion that ruled that because Compuserve did not moderate or edit content, Compuserve had no liability for user posts.[25]

In a manner roughly analogous to the liability protections extended to conduits and common carriers, such as telegraphs and telephones,[26] section 230(c)(1)

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[25] Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

[26] Telegraph companies generally had no liability for the statements they transmitted, but they could be liable if they acted with malice or with knowledge that the sender was not privileged to make the statement. *See* Restatement (Second) of Torts § 612(2); Mason v. Western Union Tel. Co., 125 Cal. Rptr. 53, 56 (1975); Figari v. New York Tel. Co., 303 N.Y.S.2d 245, 259 (1969); Western Union Tel. Co. v. Lesesne, 182 F.2d 135, 137 (4th Cir. 1950); Von Meysenbug v. Western Union Tel. Co., 54 F. Supp. 100, 101 (S.D. Fla. 1946); O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940); Klein v. Western Union Tel. Co., 13 N.Y.S.2d 441, 443 (App. Div. 1939); Peterson v. W. Union Tel. Co., 65 Minn. 18, 23 (1896); Annotation, *Liability of Telegraph or Telephone Company for Transmitting or Permitting Transmission of Libelous or Slanderous Messages*, 91 A.L.R.3d 1015 (1979).

It is often said that telephone companies have absolute immunity. Cases support this claim, *see* Anderson v. New York Tel. Co., 320 N.E.2d 647 (1974), and the Restatement of Torts also reaches this conclusion. RESTATEMENT (SECOND) OF TORTS § 581 cmt. b (1976). *Anderson* reasons that because telephone companies have an obligation to carry all messages, they should not be liable for them. But common carriage law predating *Anderson* and comprehensive public utility regulation took a different approach, reasoning that, because companies have the right to refuse unlawful messages, they are liable for their *knowing* transmission. Godwin v. Carolina Tel. & Tel. Co., 136 N.C. 258, 48 S.E. 636, 637 (1904); Application of Manfredonio, 183 Misc. 770, 770–71, 52 N.Y.S.2d 392, 392 (Sup. Ct. 1944);

removes liability for causes of action that include, in their elements, treating the "interactive computer service," *i.e.,* platform, as a publisher or speaker of another's words. The classic example is defamation: A Facebook user posts a defamatory statement, and the defamed plaintiff sues Facebook on the theory that, by allowing the post to stay up on its site, Facebook acted as a publisher of the post. The plain-tiff's cause of action would include an element that treats the platform as "a publisher or speaker" of the user's words. Section 230(c)(1) would bar the action against Facebook, leaving the only action available to the plaintiff to be one against the user. Section 230(c)(1) thereby allowed AOL and Prodigy to run bulletin boards without the potential liability risk that hosting millions of user generated posts presents.

Taken together, both section 230's text and legislative history point to the same interpretation: Section 230(c)(1) allows platforms to accept posts from their users without liability for such speech, *i.e.*, the situation in *Cubby*. It generally shields platforms for liability created by speech that the platform hosts. Section 230(c)(2), in turn, protects platforms that want to content-moderate, giving them protection when removing, editing, or blocking third-party, user-generated content for certain enumerated reasons:[27]

Lesesne v. Willingham, 83 F. Supp. 918, 924 (E.D.S.C. 1949); Bruce Wyman, *Illegality As an Excuse for Refusal of Public Service*, 23 HARV. L. REV. 577, 584–85 (1910); *see also* O'Brien v. W.U. Tel. Co., 113 F.2d 539, 543 (1st Cir. 1940) (so suggesting).

[27] This view of section 230(c)(1) has been explored in greater detail elsewhere. *See* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230,* 22 YALE J. L. & TECH. 391, 429 (2020); Edward Lee, *Moderating*

Section	Legal Protection
230(c)(1)	No liability as publishers based on third-party posts
230(c)(2)	No liability for content-moderating obscene, lewd, lascivious, filthy, excessively violent, and harassing content, and similar content
Not covered	No immunity for liability (if some cause of action so provides) for content-moderating types of speech not mentioned in 230(c)(2)

Some courts have taken a different approach, holding that section 230 bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content."[28] That language has been quoted extensively.[29]

Content Moderation: A Framework for Nonpartisanship in Online Governance, 70 AM. U. L. REV. 913, 945–62 (2021).

[28] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[29] According to a Westlaw search, at least 98 cases quote the language directly from *Zeran*. That count probably underestimates the

The language comes from the influential *Zeran* case, but many courts forget the *immediately preceding* language. To quote *Zeran* fully, section 230

> creates a federal immunity to any cause of action that would make service providers *liable for information originating with a third-party user of the service*. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.[30]

The "traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" are examples of third-party content decisions that section 230 protects. It does not protect platform as to their *own* editorial decisions or judgments.

When quoted out of context, the "its" would seem to suggest that section 230 immunizes the platform's publisher role. But this is an example of sloppy drafting and an imprecise pronoun antecedent, as the sentence prior speaks of "information originating with a third-party user of the service."

Numerous courts mischaracterize the *Zeran* language and interpret section 230 as immunizing

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influence of the language, because the quotation appears in other cases that are themselves quoted.

[30] Barrett v. Rosenthal, 146 P.3d 510, 516 (Cal. 2006) (quoting *Zeran*, 129 F.3d at 330) (emphasis added).

platforms' *own editorial decisions.* To take a typical example, in *Levitt v. Yelp!,* the plaintiff alleged that Yelp! "manipulate[d] . . . review pages—by removing certain reviews and publishing others or changing their order of appearance."[31] The *Levitt* plaintiffs argued that Yelp!'s behavior constituted unfair or fraudulent business under Cal. Bus. & Prof. Code § 17200. But the elements of the unfair or fraudulent business practices law have nothing to do with speaking or publishing third party content. Rather, they ask whether Yelp! engaged in an "unlawful, unfair or fraudulent business act or practice" or an "unfair, deceptive, untrue or misleading advertising and any act."

Ignoring this straightforward analysis, the court ruled that section 230(c)(1) immunized Yelp!'s conduct, supporting its conclusion by quoting the "traditional editorial functions" language of *Zeran*.[32] But notice the court's confusion here: Yelp! allegedly made changes and conscious re-arrangements to reviews in violation of its representations to users and customers—plaintiffs sought to make Yelp! accountable for *its own* editorial decisions and false representations.

The *Levitt* court's reading of section 230(c)(1) would protect platforms from contract, consumer fraud or even civil rights claims, freeing them to discriminate against certain users and throw them off their platforms. Courts are thus relying upon Section 230 to immunize platforms for their own speech and

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[31] Levitt v. Yelp! Inc., No. C-10-1321 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014).

[32] *Id.*

actions—from contract liability with their own users,[33] their own consumer fraud,[34] their own violation of users' civil rights,[35] and even assisting in terrorism.[36]

The only statement by a Supreme Court Justice on section 230 recognized the error of reading section 230(c)(1) to include a platform's "editorial functions." In his statement respecting the denial of certiorari, Justice Thomas strongly criticized "construing § 230 (c)(1) to protect any decision to edit or remove content." He realized that, for instance, "[w]ith no limits on an Internet company's discretion to take down material,

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[33] Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016) (stressing that "the immunity bestowed on interactive computers service providers by § 230(c) prohibits all of Plaintiff's claims [including contract claims] against Facebook"), *aff'd*, 700 F. App'x 588 (9th Cir. 2017); Lancaster v. Alphabet Inc., No. 15-CV-05299-HSG, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016) (finding that, where "plaintiff[s] asserting breach of the implied covenant of good faith and fair dealing sounding in contract," "CDA precludes any claim seeking to hold Defendants liable for removing videos from Plaintiff's YouTube channel"); Fed. Agency of News LLC v. Facebook, Inc., 395 F. Supp. 3d 1295, 1307–08 (N.D. Cal. 2019) (asserting that CDA "immunizes Facebook from . . . the fourth cause of action for breach of contract [between plaintiff and Facebook]").

[34] Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 836 (2002) (interpreting that "Appellants' UCL cause of action is based upon . . . [the claim] that eBay misrepresented the forged collectibles offered for sale in its auctions").

[35] Sikhs for Justice "SFJ", Inc., 144 F. Supp. 3d 1088, 1094–95 (N.D. Cal. 2015).

[36] Force v. Facebook, Inc., 934 F.3d 53, 57 (2d Cir. 2019).

§ 230 now apparently protects companies who racially discriminate in removing content."[37]

Similarly, in a recent statement, the Ninth Circuit in *Lemmon v. Snap* made clear that section 230(c)(1) only protects against claims that include speaking or publishing third party content and does not protect against claims merely involving a platform's "editorial functions." Clarifying the applicable law, the *Lemmon* court stated that section 230 only protects a defendant internet platform if the claims seek to treat the platform, "*under a state law cause of action, as a publisher or speaker . . . of information provided by*

[37] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 17 (2020). Goldman & Miers collect cases "show[ing] that Internet services have won essentially all of the lawsuits to date brought by terminated/removed users. Accordingly, Internet services currently have unrestricted legal freedom to make termination/removal decisions." Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 192 (2020). It is worth observing that most of the removals in the dataset have been under section 230(c)(1), supporting Justice Thomas's concern that this provision has been overread; the text is clear that section 230(c)(2) controls removals. Judges across the country are expressing misgiving similar to Justice Thomas's. *See* In re Facebook, Inc., ___ S.W.3d ___, 2021 WL 2603687, at *7 (Tex. June 25, 2021) ("We agree that Justice Thomas's recent writing lays out a plausible reading of section 230's text."); Force v. Facebook, Inc., 934 F.3d 53, 77 (2d Cir. 2019) (Katzman, C.J., dissenting) ("Instead, we today extend a provision that was designed to encourage computer service providers to shield minors from obscene material so that it now immunizes those same providers for allegedly connecting terrorists to one another. Neither the impetus for nor the text of § 230(c)(1) requires such a result.").

another information content provider."[38] This makes clear that section 230(c)(1) only applies to causes of action which contain as elements publishing or speaking third party information, such as defamation and criminal threat.

Last, reading section 230(c)(1) to protect content moderation reads section 230(c)(2) out of the statute. If section 230(c)(1) protects "editorial functions," that includes the removals and content moderation that section 230(c)(2) addresses. Reading one provision of a statute to render another superfluous violates the canon against surplusage, a basic rule of statutory construction. As the Supreme Court has held, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[39] The Court emphasizes that the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme."[40] Here, the expansive *Zeran* reading of section 230(c)(1) renders superfluous section 230(c)(2), the immediately succeeding provision. Justice Thomas has recognized this point.[41]

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[38] Lemmon v. Snap, Inc., 995 F.3d 1085, 1091 (9th Cir. 2021) (emphasis added) (quoting Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1097 (9th Cir. 2019), and Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009)).

[39] Corley v. United States, 556 U.S. 303, 314 (2009) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)).

[40] Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013).

[41] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 17 (2020) (Thomas, J., respecting the denial of certiorari) (citing e-ventures Worldwide, LLC v. Google, Inc., 2017 WL 2210029, *3 (M.D. Fla. Feb. 8, 2017) (rejecting the interpretation

III. The Relationship Between Sections 230 (c)(1) & 230(f)(3)

Section 230(f)(3) as well as section 230(c)(2) constrains the scope of section 230(c)(1), a point Justice Thomas recognized in *Malwarebytes*.[42] But courts have not carefully explained the relationship between these sections, as the recent *Gonzales* case (discussed below) indicates. A proper understanding of section 230(f)(3) would limit a platform's protections under section (c)(1) against liability for third-party content, although concededly the statutory text does not define a sharp line between the provisions.

Section 230(f)(3) defines an "internet content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information."[43] The term "interactive computer service" 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 and such systems operated or services offered by libraries or educational institutions."[44] Section 230(c)(1) only protects "interactive computer services," and internet content providers do not receive section 230(c)(1) protection. Putting these provisions together, if an interactive computer service creates "in whole or part" content then it becomes an

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that § 230(c)(1) protects removal decisions because it would "swallow[] the more specific immunity in (c)(2)").

[42] *Id.* at 16–19.

[43] 47 U.S.C. § 230(f)(3).

[44] 47 U.S.C. § 230(f)(2).

internet content provider, at least with respect to that content—and stands outside section 230(c)(1) protection.

While the mere deletion of a comment here or there likely does not constitute content creation or development, some types of content moderation do. Moderating and editing which, pursuant to a distinct plan or policy, change or shape the nature of online discussion likely cross the line into content creation. As a starting principle, an anthology editor does create or develop content when he selects certain works to publish or promote. Similarly, an editor that moderates content pursuant to a clear plan or bias creates content. For example, Thomas Bowdler developed content when he moderated the content of Shakespeare's plays to make them more acceptable to Victorian audiences.

Analogously, imposing complex content moderation regimes for acceptable posting very well might be closer to bowdlerizing than to deleting the odd comment. This would be particularly the case if the content moderation regime had biases that promoted or retarded certain types of discussions even in subtle ways—as social media critics allege. And, if so, then the platforms, when they engage in content moderation, are internet content providers that lack section 230(c)(2) protections because they are content creators under section 230(f)(3).

But the line between editing a few comments and Thomas Bowdler is not clear, and very few courts have attempted to draw the line. Courts have proposed differing tests, most influentially in the Ninth Circuit in *Fair Housing Council of San Fernando Valley v. Roommates.Com*. There, the court found that "[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information."[45] The court reasoned that, by requiring information from users that other users could use to make discriminatory judgments, the platform became a content creator and potentially liable under anti-discrimination laws. Other courts reason that a platform that makes a "material contribution" to online material becomes an internet content provider, leaving much vagueness as to how to define "material contribution."[46]

A recent case, *Gonzalez v. Google LLC,*[47] demonstrates the difficulty—and indeed perils—of drawing the line. The case involved allegations that internet platforms contributed to or promoted terrorist activity in violation of the Anti-Terrorism Act (ATA).[48] Plaintiffs alleged that "Google uses computer algorithms to match and suggest content to users based upon their viewing history. . . . [I]n this way, Google has 'recommended ISIS videos to users' and enabled users to 'locate other videos and accounts related to ISIS,' and that by doing so, Google assists ISIS in spreading its message."[49]

In *Gonzales*, over a vigorous and insightful dissent, the court distinguished *Roommates* on the grounds

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[45] 521 F.3d 1157, 1166 (9th Cir. 2008).

[46] Huon v. Denton, 841 F.3d 733, 742 (7th Cir. 2016).

[47] 2 F.4th 871 (9th Cir. 2021).

[48] 18 U.S.C. § 2333.

[49] *Gonzalez*, 2 F.4th at 881.

that "The Roommates website did not employ 'neutral tools'; it required users to input discriminatory content as a prerequisite to accessing its tenant-landlord matching service."[50] Rather, in *Gonzales*, "the algorithms do not treat ISIS-created content differently than any other third-party created content, and thus are entitled to § 230 immunity."[51]

This claim is strange. Platforms use algorithms to allow them to selectively distinguish, with ever greater power and specificity, different content for different users. If users type in searches of type X, they will receive promoted content of type X; if users type in searches of type Y, they will receive promoted content of type Y. The business model of these platforms requires them to identify different preferences of consumers and precisely match them to (i) content that will keep their attention focused on the platform and (ii) advertisers interested in sending them advertisements.

The problem with the *Gonzales* court's reading is that it is far from clear that there are "neutral" algorithms or even that the term is coherent. The court never defines "neutrality" and asserts, without justification, that "algorithms do not treat ISIS-created content differently than any other third-party created content, and thus are entitled to § 230 immunity." But, of course, platforms treat different content differently. That is their *raison d'etre*, as the more precise distinctions among users and their content leads to more effective matching for advertisers.

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[50] *Id.* at 894.

[51] *Id.*

Indeed, Big Tech's defenders, at least when arguing against non-discrimination requirements, use this evident fact to argue that social media "neutrality" is impossible. For instance, Kir Nuthi explains that "[n]ondiscrimination is a central feature of traditional common carriers, but it is not a feature of social media. Unlike the railroads and communications companies of the Gilded Age, social media relies on the ability to contextualize and discriminate between different content."[52]

Section 230(f)(2) implies there is a point at which content moderation becomes content creation. The provision does not state where that point is, and courts have yet to provide useful tests to locate it. While this article does not suggest a test, a textual reading of section 230 must not read section 230(f)(2) out of the statute, and must recognize that the interactive computer services that cross a line into content provision lose their protection as to the content that they provide.

IV. Interpreting Section 230(c)(1)

Section 230(c)(1) 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.[53]

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[52] Kir Nuthi, Conservatives Want Common Carriage. They're Not Going to Like It., TECHDIRT (June 8, 2021), https://tinyurl.com/32sdp82r.

[53] 47 U.S.C. § 230(c)(1).

The first appellate decision interpreting this provision, *Zeran v. AOL,*[54] read the word "publisher" to include what the common law would consider "distributor" liability as well as "publisher" liability. Its opinion was extremely influential and, with perhaps one exception,[55] the courts of appeals have followed *Zeran,* conceding what can only be viewed as a first mover advantage. But as the recent statement from Justice Thomas points out, it is far from clear that this interpretation is correct.

At common law, a person is subject to "publisher" liability if he makes "an affirmative act of publication to a third party."[56] This "affirmative act requirement" ordinarily "depict[s] the defendant as part of the initial making or publishing of a statement."[57] A "distributor," under common law, in contrast, is "one who only delivers or transmits defamatory matter published by a third person."[58]

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54 Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

55 Chicago Lawyers' Committee For Civil Rights Under Law v. Craigslist, 519 F.3d 666, 668–669 (7th Cir. 2008) ("Subsection (c)(1) does not mention 'immunity' or any synonym. Our opinion in *Doe* explains why § 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts").

56 Benjamin C. Zipursky, *Online Defamation, Legal Concepts, and the Good Samaritan*, 51 VAL. U. L. REV. 1, 18 (2016); RESTATEMENT (SECOND) OF TORTS § 558 (1977) (listing a statement and publication as separate elements of defamation).

57 Zipursky, *supra* note 56, at 19.

58 RESTATEMENT (SECOND) OF TORTS § 581.

Publishers or speakers are subject to a higher liability standard, traditionally strict liability, although that standard is rarely imposed given the constitutional limits on libel law set forth in *New York Times v. Sullivan* and *Gertz.*[59] By contrast, distributors, which do not exercise editorial control, face liability only when they have knowledge or constructive knowledge that the content they are transmitting is illegal.[60]

Following this common law understanding, the word "publisher" is ambiguous because it sometimes references initial publication and other times subsequent distribution of content.[61] Because a "distributor" can be thought of as a type of "publisher," the word "publisher" has developed a generic sense, referring to publishers and distributors, as well as a specific sense, referring to the "initial" maker of the statement.

It is not clear whether Congress intended the generic or the specific meaning of publisher. Like the term "congressman," which refers to both senators

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59 *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 113, at 810–11 (5th ed. 1984); *compare* RESTATEMENT (SECOND) OF TORTS § 581(1) *with* New York Times Co. v. Sullivan, 376 US 254 (1964), *and* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

60 *See generally* Smith v. California, 361 U.S. 147, 152–54 (1959).

61 *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 578 ("Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.").

and representatives, but usually refers to representatives, "publisher" refers both to those who "actually publish" and those who republish or distribute.

Recognizing this textual ambiguity, Justice Thomas has written that "To be sure, recognizing some overlap between publishers and distributors is not unheard of. Sources sometimes use language that arguably blurs the distinction between publishers and distributors. One source respectively refers to them as 'primary publishers' and 'secondary publishers or disseminators,' explaining that distributors can be 'charged with publication.'"[62]

Nonetheless, because a distributor is a type of publisher, the *Zeran* court ruled that section 230(c)(1) protects against both types of liability. And the results of that decision have been dramatic—essentially eliminating any platform responsibility for the content they carry.

The *Zeran* court's textual reasoning is not solid. It simply states that distributors are a type of publisher and assumes Congress intended the generic, not specific, meaning. It ignores textual evidence in the statute that points in the opposite direction: If Congress wanted to eliminate both publisher and distributor liability, it would have created a categorical immunity in § 230(c)(1), stating that "No provider shall be held liable for information provided by a third party" and would not have used language that explicitly limited its protection to speaking and publishing third-party content. In fact, when Congress

[62] *See* Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 15 (2020) (Thomas, J., respecting denial of certiorari) (quoting KEETON ET AL., *supra* note 59, at 799, 803).

wants to use categorical language to block liability on any theory (and not just on a speaker-or-publisher theory), it does so—using such categorical language in the very next subsection, Section 230(c)(2).[63]

Second, as Justice Thomas recently observed in a statement respecting the denial of certiorari, "Congress expressly imposed distributor liability in the very same Act that included § 230. Section 502 of the Communications Decency Act makes it a crime to 'knowingly . . . display' obscene material to children, even if a third party created that content. This section is enforceable by civil remedy. It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability in the very Act in which Congress explicitly imposed it."[64] If the Act follows consistent usage throughout the statute, section 230 would not affect distributor liability.

The *Zeran* court also relied on policy arguments, worrying that,

> If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid

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[63] "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." 47 U.S.C. § 230(c)(2).

[64] *Enigma Software Grp.*, 141 S. Ct. at 15 (emphasis in original) (citing 47 U.S.C. § 223(d)).

> investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.[65]

This policy concern may have had some force in 1996. However, in today's world of AI and automated takedowns—and the large platforms' moderating teams that number well into the tens of thousands—the concern seems misplaced. And imposing distributor liability on mid-sized or small web firms would not force them to hire armies of staff to review allegations of libel or similar unlawfulness: Rather, as with data breach obligations and other cybersecurity duties, reasonable behavior for dealing with notices could be scaled to firm size and resources. Under current law, the myriad internet data breach obligations found in statutes such as HIPAA[66] and title V of the Gramm-

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[65] Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

[66] Fero v. Excellus Health Plan, Inc., 236 F. Supp. 3d 735, 763 (W.D.N.Y. 2017), *on reconsideration*, 304 F. Supp. 3d 333 (W.D.N.Y. 2018), *order clarified*, 502 F. Supp. 3d 724 (W.D.N.Y. 2020) (in lawsuit for data breach for HIPAA-regulated entity, "both the breach of contract claim and implied covenant claim arise out of the Excellus Defendants' failure to protect the confidentiality of Plaintiffs' personal information and to comply with policies, industry standards, and best practices for data security").

Leach-Bliley Act have premised and scaled liability for unlawful behavior on the capacities of small firms to follow best practices.[67] While this is not the forum to spell out the details, small firms could be exempted or best practices could be developed for what constitutes "knowledge" for distributor liability.[68] Such a burden is hardly crushing—after all, both small and large websites already have takedown obligations under the Digital Millennium Copyright Act.[69]

There is another problem: Websites will have to determine whether something is, in fact, libelous. Or, more realistically, they will have the obligation to assess the risk of libel associated with certain statements and gauge whether to accept such risk. This problem was addressed in distributor liability for telegraph liability. Courts solved this problem by only assigning liability if the libel was "apparent on the

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[67] Title V of the GLBA states that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 U.S.C. § 6801(a); *see also* Board of Governors of the Federal Reserve System, *Interagency Guidelines Establishing Information Security Standards [Small-Entity Compliance Guide]* (Aug. 2, 2013), https://tinyurl.com/5d43nb3z ("To achieve these objectives, an information security program must suit the size and complexity of a financial institution's operations and the nature and scope of its activities.").

[68] This idea resonates with Kyle Langvardt's *Can The First Amendment Scale?*, 1 J. FREE SPEECH L. 273 (2021), which suggests that traditional publisher and distributor categories may need to soften in the face of changing technology.

[69] 17 U.S.C.A. § 512(c).

face" of the message."[70] Under this rule, only the most egregious types of speech would incur liability, as well as speech previously adjudged libelous or unlawful, which some courts have ruled section 230(c)(1) protects.[71] And, again, the accuracy of judgment to which a platform is to be held could scale to its resources, and best practices or safe harbors could be created either by courts or the Federal Communications Commission.

V. Interpreting Section 230(c)(2)

Title 47 U.S.C. § 230(c)(2) states:

> 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."

The provision's scope turns on how the final "otherwise objectionable" should be interpreted. There are two choices: (i) an *ejusdem generis* reading in which the term refers to those objectionable things that are similar to the rest of the list and (ii) a non-*ejusdem-generis* reading in which "otherwise objectionable" is read "in the abstract" referring to literally any other objectionable thing. (Under the canon of *ejusdem generis*, "Where general words follow specific words in

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[70] *See* sources cited in note 26.

[71] Hassell v. Bird, 5 Cal. 5th 522, 532 (2018).

a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[72])

Courts have had difficulty in determining what is the "similar nature" that unites the section 230(c)(2) list. *Interpreting 47 U.S.C. § 230(c)(2)*[73] shows that all these terms referred in the 1990s to areas of then-permitted, or commonly believed to be permitted, types of telecommunications regulation. "Obscene, lewd, lascivious, and filthy" speech had been regulated on cable television and in telephone calls—and of course in broadcasting.[74] "Harassing" telephone calls had also long been seen by Congress as regulable, and continue to be regulated to this day.[75] "Excessively violent" speech was considered regulable content, like indecent content, in the context of regulating over-the-air broadcasting.[76]

An *ejusdem generis* reading would constrain the legal immunities in section 230(c)(2). If section 230's content moderation protections are found *only* in section 230(c)(2), not section 230(c)(1), then platforms receive such immunity only when moderating the types of speech section 230(c)(2) enumerates.

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[72] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001).

[73] Candeub & Volokh, *supra* note 6.

[74] *Id.* at 180–83.

[75] 47 U.S.C. § 223.

[76] Candeub & Volokh, *supra* note 6, at 182.

Of course, courts may ignore statutory canons even if there is a convincing argument for their application—and the canons sometimes can point in opposite directions.[77] Without *ejusdem generis*, "otherwise objectionable" would be interpreted in the abstract—*and not refer* to the list at all but rather to any possible objectionable content. This reading would provide immunity for virtually any content-moderation decision that a platform deems appropriate.

The *ejusdem* and non-*ejusdem* readings are subject to different constitutional analyses. The former is content-based. The latter is likely not. The following section examines the constitutionality of section 230(c)(2) under each interpretation.

VI. The Constitutionality of Section 230(c)(2)

The *ejusdem generis* reading of section 230(c)(2) seems less likely to survive First Amendment scrutiny than the non-*ejusdem-generis* reading, though the matter is not certain.

A. Non-Ejusdem Generis Reading

Under a non-*ejusdem* interpretation, section 230(c)(2)'s "otherwise objectionable" catchall term assumes an "in abstract" meaning, referring to any content objectionable in the platform's view. The statute's use of the phrase "material that the provider or user considers" to be objectionable bolsters this interpretation. The word "considers" suggests a subjective, or at least, individualized judgment.

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[77] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS $21–3$ (1960).

Yet, even a non-*ejusdem-generis*, "in abstract" reading of "otherwise objectionable" has ambiguity. It could be read in a subjective way which would allow *any* objectionable material—or in an objective way which would refer to the category of speech people would likely find objectionable. The following examines the provision's constitutionality (1) under an objective reading and (2) under a subjective reading. An objective reading is likely content-based while a subjective reading could be content-neutral.

1. "Otherwise objectionable": objective reading

The "objective" interpretation has several arguments for it. First, "objectionable" has a meaning that describes and categorizes speech independent of individual's particular judgments. For instance, "otherwise religious" in the phrase "Christian, Hindi, Jewish, or otherwise religious" has a distinct content—and if section 230(c)(2) were to be so read, it would be clearly content-based.

Second, Congress intended "otherwise objectionable" to refer to a distinct set of speech. The statute's clear purpose was to combat certain speech in media, such as indecency and profanity. In other words, Congress likely intended to catch other types of speech it thought to be regulable in telecommunications media in 1996. There is no evidence from the legislative history that Congress intended a purely subjective understanding of "objectionable." The evidence suggests that Congress intended to impose some sort of community standards even if imposed via individual internet platforms.

Third, when Congress wants individual subjective judgments about particular content be controlling, it does so explicitly. For instance, the statute banning "pandering advertisements in the mails" "provides a procedure whereby any householder may insulate himself from advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative.'"[78] Under Post Office procedure, which the Supreme Court has upheld, the Post Office must accept *any* advertisement as qualifying under the statute that a mail householder judges arousing or provocative. If Congress had wanted a subjective reading, it would have used language similar to that found in this statute, *i.e.,* used words like "sole discretion." The use of the word "consider" does not convey subjectivity in such a definitive way.

An "objective" reading of "otherwise objectionable" would be subject to a constitutionality analysis similar to that of an *ejusdem generis* reading,[79] as both are content-based and refer to a similar set of things.

2. "Otherwise objectionable": subjective reading

On the other hand, a purely subjective reading is also reasonable and probably the better of the two readings (assuming one rejects the *ejusdem generis* approach, which I think is the best reading of all). As mentioned above, the text references what the platform "considers" to be objectionable, suggesting a subjective approach. Also, even if what everyone considers to be

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78 Rowan v. U.S. Post Office. Dep't, 397 U.S. 728, 729–30 (1970).

79 *See* Part VI.B.1.

objectionable could be defined in some theoretical way as a distinct set of speech, this category is fuzzy and amorphous—suggesting that in practice the statute refers to whatever a platform subjectively deems objectionable.

A purely subjective reading of section 230 does not at first blush appear to be a regulation of speech at all. A platform can choose to moderate content according to the factors in section 230(c)(2) or not. Section 230 does not mandate or compel any particular type of speech, nor does it punish any particular type of speech. The statute does not define objectionable but leaves the definition and application to individuals.

Yet it could still be a regulation of speech, even if a content-neutral one. Section 230 favors the expression of a certain type of speech—those that interactive computer services would likely find objectionable. "Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional."[80] Certainly, Congress *intended* restrictions on the flow of speech.

Further, by encouraging private censorship, Congress successfully made certain types of information more difficult to obtain. "'[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions

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[80] Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011).

can significantly impair the ability of individuals to communicate their views to others.'"[81]

In order to justify a content-neutral regulation, the government must demonstrate, among other things, that "it furthers an important or substantial governmental interest [and that] the governmental interest is unrelated to the suppression of free expression."[82] Courts typically do not require a "least restrictive means" test, requiring instead that the means be narrowly tailored and leave ample alternative outlets.[83] But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[84] We must identify the content-neutral governmental goal of section 230 and see whether section 230 is narrowly tailored to that goal.

Identifying neutral interests supporting section 230 is not an easy inquiry. Most of its stated policy goals are quite content-based. Congress sought to empower parents' power to limit children's access to "objectionable and inappropriate"[85] speech and further "vigorous enforcement of obscenity and harassment."[86]

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[81] City of Ladue v. Gilleo, 512 U.S. 43, 55 n.13 (1994) (quoting Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 57 (1987)).

[82] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[83] *See* Ward v. Rock Against Racism, 491 U.S. 781, 797–99 (1989).

[84] McCullen v. Coakley, 573 U.S. 464, 486 (2014).

[85] 47 U.S.C. § 230(b)(4).

[86] 47 U.S.C. § 230(b)(5).

Similarly, as discussed below, the legislative history as it exists suggests that the justifications for Congress passing the statute were content-based.

On the other hand, the stated justifications include some neutral justifications, such as to "promote the continued development of the Internet and other interactive computer services," "preserve the vibrant and competitive free market," and "encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools."[87]

This ambiguity could lead to a finding of neutrality because the Court allows itself flexibility in determining statutory justification. For instance, in *Turner*,[88] the Court ruled on the constitutionality of the "must carry" obligations of the 1992 Cable Television Consumer Protection and Competition Act.[89] This law required cable systems to carry over-the-air television broadcasting. As some of the justices recognized, this appeared to be a content-based regulation.[90] Con-

[87] 47 U.S.C. § 230(b)(1)-(3).

[88] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

[89] 47 U.S.C. §§ 534(b)(1)(B), (h)(1)(A), 535(a).

[90] 512 U.S. at 677 (O'Connor, J., dissenting) ("Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications."); *id.* at 680 ("But when a content-based

gressmen, ever solicitous to the local broadcaster who carries their political advertisements and whose news shows cover politicians' deeds, granted broadcasters favors by forcing cable systems to carry their content.[91]

The Court looked past this obvious purpose and found that the law's stated justification was to preserve free, over-the-air television. The Court ruled that the regulation, in simply specifying the source of programming to be carried, was not content-based.[92]

The Court could follow the *Turner* approach in interpreting section 230. The statute's stated purposes of "promot[ing] the continued development of the Internet and other interactive computer services" and "encourag[ing] the development of technologies which maximize user control over what information is received by individuals, families, and schools" might serve as content-neutral justifications.[93] One could

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justification appears on the statute's face, we cannot ignore it because another, content-neutral justification is present.").

[91] Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1767 (1995) ("What was the purpose of the must-carry rules? This is a complex matter. A skeptic, or perhaps a realist, might well say that the rules were simply a product of the political power of the broadcasting industry. Perhaps the broadcasting industry was trying to protect its economic interests at the expense of cable.").

[92] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) ("[T]he importance of local broadcasting outlets 'can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.' The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene.").

[93] 47 U.S.C. § 230(b)(1)–(3).

say that limiting liability for content moderation furthers these goals by lowering the cost of blocking and moderation technologies. If you want to create markets in what is essentially private censorship, then lowering liabilities associated with creating tools for censorship is a good idea.

While this argument might very well win the day, there are a few caveats. First, *Turner* explicitly recognized the market power of the cable systems as justifying, in part, must-carry.[94] Given the market power of cable, it had the power to silence others, and therefore access was required. In contrast, section 230(c)(2) affects Twitter as well as your personal website—the big and the little. It is possible that the Court's willingness to find a content-neutral justification—which would be more likely to be upheld—stemmed from its overall greater willingness to accept regulation of dominant firms than smaller actors.

Second, the provision favors certain types of expression—namely forwarding a set of opinions and views through editing, amplifying, muting, shaping, and content-moderating posters' comments. It is perhaps odd to think of comment deletion as expression or speech. But, it can be, for reasons similar to those discussed in Part III in relation to section 230(f)(3). A comment thread subject to a strict content moderation policy certainly expresses something different than a comment thread that is not so subject—just as a

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94 *Turner*, 512 U.S. at 632–33 ("In brief, Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues.").

bonsai tree, which is pruned to control its growth, is different from a tree than is allowed to develop freely.

By adopting content moderation policies, platforms can promote (or hide) ideas and control discussion. They become the anthologists of the internet, editing discussion to create versions of expression they prefer. Similarly, they become, in a sense, book publishers.[95] They promise to provide a free service—access to their platforms—in exchange for producing speech that they like. The exchange is analogous to an advance that a book publisher would give an author.

Third, even though stated in broad language, Congress's policies in section 230 cannot be plausibly read to support massive private censorship on any topics that the platforms please, which is what section 230 as interpreted by many courts today protects. To the degree section 230 allows the dominant internet firms to impose their own censorship rules—rules that can promote anything—section 230 minimizes "user

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[95] Daphne Keller speaks of "amplification," which she defines "to encompass various platform features, like recommended videos on YouTube or the ranked newsfeed on Facebook, that increase people's exposure to certain content beyond that created by the platform's basic hosting or transmission features." Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. FREE. SPEECH L. 227, 231 (2021). This seems to be a type of publication, in which the platform acts like an anthologist selecting messages to be repeated and shaping and directing discourse. It is not simply transmitting messages, and therefore falls outside section 230(c)(1). Ashutosh Bhagwat makes the argument that such editorializing is constitutionally protected. Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 111–23 (2021). If so, however, such editorializing is the *platform's speech* and thus not within section 230(c)(1).

control over what information is received." Congress never even considered section 230 as protecting giant internet platforms, which did not exist in 1996 and which, with the other "FAANG" companies, now enjoy close to 22% of the S&P's total market capitalization.[96]

Finally, it may be that a subjective section 230 in fact subverts the goals of "promoting the continued development of the Internet and other interactive computer services" and "encourag[ing] the development of technologies which maximize user control over what information is received by individuals, families, and schools"—particularly given the ill-defined line between interactive computer services and internet content providers set forth in sections 230(c) and 230(f)(3).

If one combines the subjective reading of "otherwise objectionable" with a highly restrictive view of section 230(f)(3), as some courts appear to have done, then platforms would be free to content-moderate in ways that could undermine users' willingness to express themselves online. Comments or arguments can be deleted, specially segregated, or, under some understandings of "content moderation," tagged with warnings. If these types of content moderation do not qualify as content provision under section 230(f)(3), then section 230(c)(2) would protect all such efforts. Exposing comments to such treatment does not further the goals of "user control" or the "growth of the internet."

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96 Sergei Klebnikov, *Apple, Microsoft, Amazon, Google and Facebook Make up a Record Chunk of the S&P 500. Here's Why That Might Be Dangerous*, FORBES.COM (July 24, 2020), https://tinyurl.com/cy49pkr9.

B. Ejusdem Reading

The arguments for an *ejusdem generis* reading are discussed in *Interpreting 47 U.S.C. § 230(c)(2)*. An *ejusdem* reading likely renders section 230 content-based, as the terms in § 230(c)(2) refer to a distinct type of content: speech Congress thought regulable because it was inappropriate for children and families. The next question is whether a content-based section 230 is constitutional. To survive strict scrutiny, a content-based regulation of speech must be narrowly tailored to serve a compelling governmental interest, and that is a difficult test to pass.

On the other hand, classifying a provision as content-based does not necessarily doom it to strict scrutiny.[97] In particular, viewpoint-neutral (even though content-based) speech restrictions may not need to be subjected to strict scrutiny in certain contexts, particularly in designated public fora.

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[97] In *Denver Area,* arguably the case closest on point, the Court refrained from specifying what level of scrutiny should be applied to decency regulation on cable television. *See* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 741–42 (1996) (plurality opin.) ("But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard—they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, *see, e.g.*, Telecommunications Act of 1996 . . . , we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.")

1. Section 230 as content-based restriction on protected speech

Under the *ejusdem* reading, section 230(c)(2) covers matters Congress thought regulable in 1996. In particular, it explicitly disfavors a whole category of speech that now receives full or near full First Amendment protection under the Supreme Court's decision in *Brown v. Entertainment Merchants Association.*[98] In that case, the Court used strict scrutiny to strike down a restriction on the sale of violent video games to minors without parental permission.

And section 230 places a much higher burden on violent speech than does the California statute, which didn't restrict access to violent video games by adults or by minors who had adults who were willing to get the games for them. Section 230 limits the amount of violent content available to everyone, including adults.

While section 230's limit on speech is permissive and incentivizing—platforms do not have to block but are also not required to do so—the Court has found similar laws to be unconstitutional restrictions of speech. For instance, the Court ruled unconstitutional a statute giving permissive authority to cable systems to censor indecent material in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[99] More generally, the Court has rejected for First Amendment reasons laws that place special

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[98] 564 U.S. 786 (2011).

[99] 518 U.S. 727 (1996).

burdens, legal or financial, on certain types of speech or speakers.[100]

Denver Area is probably the case most on-point to the question of whether content-based pro-decency regulation on the internet is constitutional. Yet it is a fractured opinion that by design does not offer clear precedent, as the Justices could not agree on the applicable constitutional standard or even if there should be one. Each of the three challenged provisions received different votes—with the plurality opinion failing to win a majority for any provision. Arguably, however, the guidance that it does provide suggests that section 230 is unconstitutional, though just barely.

The case involved three provisions of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), a statute that dealt with leased access of cable channels and public, educational, and government (PEGs) cable channels. Section 10(a) required cable systems to lease channels to local programmers as a way of providing competition to the large cable programming networks and encouraging the creation of local content; section 10(c) required cable systems to carry (for free) public, educational, and government channels, which give free access for community programming, school programs, government meetings, and the like; and section 10(b) required cable systems to segregate indecent material on specific cable channels.[101]

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[100] Leathers v. Medlock, 499 U.S. 439, 447 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987).

[101] 47 U.S.C. §§ 532(h), 532(j), and note following § 531.

Section 10(a), which applies to "leased access channels," reversed prior law by permitting cable operators to allow or prohibit "programming" that they "reasonably believe[s] . . . depicts sexual . . . activities or organs in a patently offensive manner." Section 10(c) gives cable operators the same authority over PEGs. Under section 10(b), which applies only to leased access channels, operators must segregate "patently offensive" programming on a single channel, block that channel from viewer access, and unblock it (or later reblock it) upon subscriber's written request.[102]

Sections 10(a) and 10(c) permit cable systems to proscribe content depicting "sexual activities or organs in a patently offensive manner." The plurality opinion—and the other opinions—understood this language as including unprotected obscenity as well as the indecent programming covered in *Pacifica.*[103]

There was disagreement about the theory of state action, the first step in any First Amendment analysis. Justice Breyer in his plurality recognized that the government mandates to carry certain cable channels

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102 *Id.*

103 *Denver Area*, 518 U.S. at 744 (plurality opin.) ("[T]he problem Congress addressed here is remarkably similar to the problem addressed by the FCC in *Pacifica*, and the balance Congress struck is commensurate with the balance we approved there. In *Pacifica* this Court considered a governmental ban of a radio broadcast of 'indecent' materials, defined in part, like the provisions before us, to include 'language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.'" (quoting FCC v. Pacifica Found., 438 U.S. 726, 732 (1978)).

were a type of state action. He did not go so far as Justice Kennedy to find a public forum, but found the channel set-aside to be sufficient government action for First Amendment purposes.

Given this type of government action, the plurality concluded, the First Amendment required a free speech balancing between speakers (PEG and leased access channels) against cable operators.[104] In contrast, Justice Kennedy, joined by Justice Ginsburg, went further and considered the public access cable channels to be designated public fora—in which the First Amendment would prohibit virtually any restriction on speakers' expression.[105]

In elaborating upon his balancing test, Justice Breyer pointed out that cable operators have monopoly power, allowing them to engage in private censorship if unchecked; they are extraordinarily involved with government regulation on a local level; and, as a realistic matter, their First Amendment interests as editors are weak.[106] Given these considerations, Breyer ruled that for section 10(a), the balance tipped in favor of the cable operators, permitting them to limit indecent speech. In addition, section 10(a) simply restores the rights that cable operators once had over leased access channels.[107]

On the other hand, with section 10(c), Justice Breyer found that the expressive rights of speakers

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[104] *Id.* at 744–47.

[105] *Id.* at 792 (Kennedy, J., dissenting).

[106] *Id.* at 738, 760–61 (Breyer, J., plurality opin.).

[107] *Id.* (citing 47 U.S.C. § 532(c)(2)).

predominated and therefore, the plurality found it unconstitutional. Unlike section 10(a), section 10(c) does not give back to cable operators the editorial rights that they once enjoyed. The countervailing cable operator's First Amendment interest is nonexistent, or at least much diminished, because these channels were meant for public access,[108] and cable operators did not historically exercise editorial control over them.[109] Last, local boards and commissions and other governmental or quasi-governmental groups typically oversee public access channels. These supervisory regimes presumably would control offensive content consistent with community standards

The peculiar facts of *Denver Area*—government-required cable channel set-asides—do not permit a clear application to section 230. But section 230 is closer to section 10(c) than 10(a), which suggests it may be unconstitutional.

First, the Cable Act targets indecent speech of approximately the sort *Pacifica* permitted to be regulated, and indeed likely just a subset of indecent speech, closer to obscenity.[110] The speech section 230 covers (even under the *ejusdem generis* reading) is much broader than that in *Pacifica*, because it includes fully First Amendment protected "excessively violent" speech. If it is unconstitutional for government even to permit a cable operator to censor regulable *indecent* speech, on its own volition on a quasi-governmental channel, then constitutional concerns seem present

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108 *Id.* at 761.

109 *Id.*

110 *Id.* at 749, 755, 761–51.

when the government disadvantages *protected* un-regulable speech on the entire internet. This factor weighs against section 230's constitutionality.

Second, the interest in protecting children from indecent programming supported the Court's ruling that section 10(a) is constitutional. The government interest in protecting children from fully First Amendment-protected speech is *less* powerful than the interest in protecting them from unprotected speech, such as obscenity. Here, section 230 regulates fully protected speech, *i.e.*, speech that is excessively violent. This factor weighs against section 230's constitutionality.

Third, the plurality opinion balances the interests of the cable operators and the public, finding that the cable operators' interests predominated in section 10(a), but making the opposite determination in section 10(c).[111] The interests the Court identified as determinative were cable operators' historical rights of control over leased access and section 10(a)'s viewpoint neutrality. Significantly, section 10(a) only returned cable operators the discretion they once had.

This factor probably cuts against section 230. Congress, in the CDA, was responding to *Stratton Oakmont*, a case that determined whether an internet bulletin board was more like a telephone company or

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[111] *Id.* at 743–44 ("The First Amendment interests involved are therefore complex, and require a balance between those interests served by the access requirements themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them) and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the operator would have assigned the channels devoted to access)").

bookstore, which had limited liability for third party content, or like a newspaper, which is generally liable for the content it prints. *Stratton Oakmont* said that platforms that edit are more like newspapers. In reversing *Stratton Oakmont,* if Congress had simply imposed carrier liability, *i.e.,* only passed section 230(c)(1), not (c)(2), Congress could have been said to have "restore[d]" internet platforms to their rightful protection against liability. Instead, Congress created an entirely new, content-based regime that has no obvious precedent in United States communications law.

But these observations are speculative. The unusual facts of *Denver Area* and its hesitance to announce a level of scrutiny for regulations on cable television—let alone the internet—diminish its precedential force for section 230.

The strongest argument for section 230's unconstitutionality is probably its inclusion of the "excessively violent" term, which targets unregulatable, constitutional protected speech. Striking the phrase from the statute would help solve that problem, and the power of the federal judiciary to partially invalidate a statute in that fashion has been firmly established since *Marbury v. Madison.*[112]

When Congress includes an express severability clause in the relevant statute, courts generally follow it.[113] The Communications Act, which section 230 is

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[112] Barr v. Am. Ass'n of Political Consultants, Inc, 140 S. Ct. 2335, 2350 (2020).

[113] *Id.* at 2349.

part of, has an express severability clause.[114] Lower courts have relied upon this clause for statutes aimed at indecency in almost exactly the same situation presented in section 230. In *Carlin Commc'ns, Inc. v. FCC*,[115] the court had to interpret section 223(b) of the Federal Communications Commission Authorization Act of 1983, which prohibits "obscene and indecent" telephone communications. The court reasoned that, . . . "[w]ere the term 'indecent' to be given meaning other than *Miller* obscenity, we believe the statute would be unconstitutional. . . . [T]he words 'or indecent' are separable so as to permit them to be struck and the statute otherwise upheld.[116]

2. Viewpoint-neutral but content-based regulation and section 230

Another way of analyzing the *ejusdem generis* reading of section 230(c)(2) is as a viewpoint-neutral but content-based regulation.

As an initial matter, it is not clear that section 230(c) is viewpoint-neutral, although it seems likely. Protecting platforms' ability to ban types of speech Congress thought regulable in telecommunications

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[114] 47 U.S.C. § 608 ("If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby."). The "chapter" referred to in the severability clause is Chapter 5 of Title 47, which includes sections 151 through 700 of Title 47, a group of provisions of which section 230 is part.

[115] 837 F.2d 546 (2d Cir. 1988).

[116] Carlin Commc'ns, Inc. v. FCC, 837 F.2d 546, 560–61 (2d Cir. 1988) (citing Regan v. Time, Inc., 468 U.S. 641, 652–53 (1984)).

media in 1996, section 230 does not, for instance, target speakers advocating obscenity or advocating against it—it applies to all who distribute obscenity, whether they think obscenity sexually liberating, find it sexist and objectifying, or aren't trying to express any viewpoint at all. Like the FCC's regulation of "obscene, indecent, and profane" broadcast programming, or prohibitions on loud speakers in public parks, section 230 is viewpoint-neutral, as it prohibits speech regardless of one's view on these matters.

On the other hand, the line between viewpoint-neutral and viewpoint-based regulations is "is not a precise one."[117] The Court has held that a statute is viewpoint-based if it "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation."[118] In *Brunetti*, the Supreme Court found that the PTO's exclusion of "immoral or scandalous" trademarks from the trademark registration system did precisely that.

Following *Brunetti*, section 230 arguably forwards a "sense of propriety,"[119] and "distinguishes between two opposed sets of ideas": those types of speech considered so "objectionable" and so likely to 'provoke offense" in 1996 as to justify regulation in telecommunications media versus those types of ideas that were

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117 Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 831 (1995).

118 Iancu v. Brunetti, 139 S. Ct. 2294, 2300 (2019).

119 *Id.* (internal quotation marks omitted).

sufficiently acceptable that would not be considered regulable.

The strength of this argument rests on whether one thinks "regulable in 1996" speech is truly a discernible viewpoint in the same way that "immoral" or "scandalous" is. Given that very few people would even know what "regulable in 1996" encompasses, it likely refers to a "set of ideas" that is theoretical at best. This argument may simply point to the fuzziness of the viewpoint-based/viewpoint-neutral distinction rather than to a practical legal barrier.

CONCLUSION

Section 230 sets forth the immunity regime for internet content. Courts sometimes erroneously read section 230(c)(1), not section 230(c)(2), as immunizing content moderation decisions. And, similarly, courts ignore that section 230(f)(2) limits the immunity that the statute provides for content moderation. This misreading has expanded section 230 protections in ways that ignore the text and congressional intent.

Identifying section 230(c)(2) as the source of liability protection raises constitutional concerns, particularly under an *ejusdem generis* reading. However, it is not clear that these concerns render the provision unconstitutional; and to the degree constitutional concerns are present, severability may offer the best solution.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR IN *GONZALEZ, ET AL. v. GOOGLE LLC* (DECEMBER 7, 2022)

IN THE SUPREME COURT OF THE UNITED STATES

REYNALDO GONZALEZ, ET AL.,

Petitioners,

v.

GOOGLE LLC,

Respondent.

No. 21-1333

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

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QUESTION PRESENTED

Whether 47 U.S.C. 230(c)(1), which 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," bars petitioners' claims alleging that Google LLC violated the Antiterrorism Act of 1990, 18 U.S.C. 2331 et seq., by hosting on its YouTube platform, and providing targeted recommendations for, videos created by a foreign terrorist organization.

[TOC, TOA, Omitted]

INTEREST OF THE UNITED STATES

This case concerns a federal statute commonly known as Section 230 of the Communications Decency Act of 1996,[1] which prohibits courts from treating a provider of an interactive computer service as the "publisher or speaker" of third-party content posted on its platform. 47 U.S.C. 230(c)(1). The United States has a substantial interest in the proper interpretation

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[1] That common name is technically a misnomer, as the provision appeared in Section 509 of the Telecommunications Act of 1996 (of which the Communications Decency Act was one title), and was enacted as a new Section 230 of the Communications Act of 1934. *See* Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, § 509, 110 Stat. 137-139.

of that provision. Congress enacted Section 230 "to promote the continued development of the Internet," 47 U.S.C. 230(b)(1), by protecting online service providers and users from unwarranted liability. But an overly broad reading of Section 230(c)(1) would undermine the enforcement of other important federal statutes by both private plaintiffs and federal agencies.

STATEMENT

A. Section 230

Congress enacted the Communications Decency Act of 1996 (CDA) as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, Tit. V, 110 Stat. 133; *see Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-858 (1997). One CDA provision, entitled "Protection for private blocking and screening of offensive material" and commonly referred to as Section 230, establishes protections for online service providers, including websites and other online platforms. CDA § 509, 110 Stat. 137-139 (47 U.S.C. 230).

A "specific purpose[]" of the provision was to respond to a state trial-court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. 1995). H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 194 (1996). Stratton Oakmont involved a defamation suit against an online service provider, Prodigy, based on messages a third party had posted on one of Prodigy's online bulletin boards. 1995 WL 323710, at *1. Under common-law defamation principles, one who "publishes" a defamatory statement—i.e., communicates it to someone other than the person defamed—can be held liable without proof that he knew the statement was defamatory, resulting in a form of strict liability. *See* Dan B. Dobbs et al., Hornbook on Torts 938 (2d ed. 2016) (Dobbs). And subsequent publishers can likewise face strict liability under the general rule that "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (Friendly, J.) (quoting Restatement (Second) of Torts § 578 (1977) (Restatement)).[2]

The Stratton Oakmont court used the term "publisher" to refer to the kind of entity who could be held strictly liable in this way, and understood the term to include entities like newspapers, which are presumed to have editorial control over what they print. 1995 WL 323710, at *3. The plaintiffs had argued that Prodigy maintained that kind of control over the content on its bulletin boards because Prodigy screened postings in some respects and sometimes removed postings it deemed objectionable. *Id.* at *2-*3. The court agreed that those attempts at content moderation rendered Prodigy a "publisher" of, and thus liable for, any defamatory speech that remained. *Id.* at *4-*5.

In the legislative findings accompanying Section 230, Congress recognized that the Internet "represent[s] an extraordinary advance in the availability of educational and informational resources" and "offer[s] a forum for a true diversity of political discourse,

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2 Notwithstanding these common-law principles, the First Amendment limits the imposition of strict liability in this context. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *see also Dobbs* 938-940.

unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. 230(a)(1) and (3). Congress declared it the "policy of the United States" to "promote the continued development of the Internet and other interactive computer services," 47 U.S.C. 230(b)(1), and to "remove disincentives for the development and utilization of blocking and filtering technologies" that could better restrict access to objectionable material online, 47 U.S.C. 230(b)(4).

To that end, Section 230(c) establishes 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." 47 U.S.C. 230(c)(1). And Section 230(c)(2) 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." 47 U.S.C. 230(c)(2)(A). The statute expressly preempts any "cause of action" or "liability" "under any State or local law that is inconsistent with" those provisions. 47 U.S.C. 230(e)(3).

B. The Present Controversy

1. Plaintiffs (petitioners here) are relatives of Nohemi Gonzalez, an American citizen who was murdered in a November 2015 terrorist attack in Paris, France, for which the Islamic State of Iraq and Syria (ISIS) claimed responsibility. J.A. 14, 19-20. In 2016, plaintiffs sued respondent Google LLC under the Antiterrorism Act of 1990 (ATA), 18 U.S.C. 2331

et seq. The ATA authorizes American nationals injured "by reason of an act of international terrorism" to bring a civil action for treble damages in federal court. 18 U.S.C. 2333(a). In 2016, Congress amended the ATA to impose secondary civil liability on "any person who aids and abets, by knowingly providing substantial assistance" to, "an act of international terrorism." Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 4(a), 130 Stat. 854 (18 U.S.C. 2333(d)(2)).

In their operative complaint, plaintiffs allege that Google is liable under the ATA for providing resources and assistance to ISIS through Google's ownership of the YouTube video-sharing platform. J.A. 18. YouTube allows users to register an account, establish a "channel," post videos, and post comments on other users' videos. J.A. 59, 62. According to plaintiffs, ISIS and its adherents have used YouTube "to disseminate its videos and messages and execute its propaganda, recruitment, and operational campaigns." J.A. 72. Plaintiffs allege that, notwithstanding YouTube's policies prohibiting terrorist content, J.A. 65, "[p]rior to the Paris attacks, [YouTube] refused to actively monitor" the site "to block ISIS's use of" the platform, J.A. 157-158. Plaintiffs further allege that, even after identifying ISIS content, YouTube took inadequate steps to remove those accounts or to prevent blocked accounts from being reestablished. J.A. 158.

Plaintiffs also allege that YouTube supplies its users with videos that other users have posted. First, a user can "subscribe[]" to another user's "channel," and YouTube will "distribute" new videos on that channel to the channel's subscribers. J.A. 172. Second, plaintiffs allege that YouTube implements "computer algorithms" to "suggest[]" to particular users "videos and accounts" that are "similar" to those the user has previously watched and that play automatically when another video ends. J.A. 173; *see* J.A. 170 (screenshot of this feature showing a sidebar titled "Up next" with five videos listed). Plaintiffs allege that, by using the algorithms and related features to "recommend[] ISIS videos," YouTube "assists ISIS in spreading its message." J.A. 169.

Plaintiffs additionally allege that Google maintains a commercial service called "AdSense," which allows users to "share in the revenue" from advertisements placed alongside the users' YouTube videos. J.A. 163. Plaintiffs allege that ISIS-affiliated users have received revenue from Google for participating in AdSense. J.A. 164-165.

2. The district court dismissed plaintiffs' complaint for failure to state a claim. Pet. App. 172a. The court held that Section 230(c)(1) barred plaintiffs' ATA claims except to the extent they were premised on revenue sharing through AdSense. *Id*. at 193a-207a. The court further held that the revenue-sharing claims did not plausibly allege an ATA violation. *Id*. at 214a-215a.

3. A divided panel of the Ninth Circuit affirmed. Pet. App. 1a-169a.

a. The court of appeals agreed with the district court that plaintiffs' non-revenue-sharing ATA claims were barred by Section 230(c)(1). Pet. App. 17a-44a. The court of appeals first held that YouTube provides an "interactive computer service" and is thus eligible for Section 230 protection. *Id*. at 29a-30a. The court then held that most of plaintiffs' ATA claims seek "to treat YouTube as a publisher or speaker" of ISIS content within the meaning of Section 230(c)(1). *Id*. at 30a-31a. The court stated that "[p]ublishing encompasses 'any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.'" *Id*. at 31a (citation omitted). And it concluded that, "[b]ecause the non-revenue sharing claims seek to impose liability for allowing ISIS to place content on the YouTube platform, they seek to treat [YouTube] as a publisher." *Ibid*.

The court of appeals further held that YouTube had not acted as an "information content provider" with respect to ISIS videos. Pet. App. 31a-44a. Plaintiffs had argued that YouTube "develop[s] the ISIS content that appears on YouTube, at least in part," *id.* at 32a (brackets in original), by recommending ISIS content to other users through its algorithms, *id.* at 38a. The court disagreed. It emphasized the absence of allegations that YouTube's algorithms treated ISIS-created content more favorably than any other content type. *Id.* at 37a. The court concluded that, because YouTube recommends content "based upon users' viewing history and what is known about the users," its recommendations reflect the same "core principle" as "a traditional search engine." *Id.* at 38a.

Finally, the court of appeals held that Section 230(c)(1) did not apply to plaintiffs' AdSense-related claims because those claims were premised on Google "giving ISIS money," not on "the publication of third-party information." Pet. App. 46a (emphasis omitted). The court agreed with the district court, however, that the revenue-sharing allegations did not state a claim for either direct or aiding-and-abetting liability under the ATA. *Id.* at 47a-68a.

b. Judge Berzon concurred. Pet. App. 81a-92a. She viewed circuit precedent as dictating the conclusion that Section 230(c)(1) bars claims based on YouTube's recommendations. *Id*. at 81a-82a. She explained, however, that if she were writing on a clean slate, she would hold that the term "publisher" in Section 230(c)(1) "does not include activities that promote or recommend content." *Id*. at 82a.

c. Judge Gould concurred in part and dissented in part. Pet. App. 92a-110a. He agreed with the majority that Section 230(c)(1) protects YouTube from liability for "carrying the posts from ISIS on its platform." *Id.* at 102a. He would have held, however, that Section 230(c)(1) does not immunize YouTube from claims based on conduct that "that goes beyond merely publishing" ISIS videos, such as "recommending terrorism-related content based on past content viewed." *Ibid*. Judge Gould endorsed the views articulated by Chief Judge Katzmann's separate opinion in a similar case, *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020). Pet. App. 98a.

SUMMARY OF ARGUMENT

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." 47 U.S.C. 230(c)(1). That text is typically analyzed in three elements: (1) the defendant must be a provider of an "interactive computer service," and (2) the plaintiff's claim must seek to treat the defendant as a "publisher or speaker" of (3) "information provided by another information content provider." Section 230(c)(1) precludes a plaintiff's claim only if all three elements are met.

A. Section 230(c)(1)'s text is most naturally read to prohibit courts from holding a website liable for failing to block or remove third-party content, but not to immunize other aspects of the site's own conduct.

1. The statute's definition of "interactive computer service" covers most interactive websites and other providers of online services. 47 U.S.C. 230(f)(2).

2. A claim "treat[s]" an online-service-provider defendant "as the publisher or speaker" of information if it seeks to hold the defendant liable for the presence of unlawful content on the defendant's platform. 47 U.S.C. 230(c)(1). "Publisher" is best read in this context to refer to one who commits the common-law act of "publication": the communication or dissemination of expressive material to another. Claims alleging liability based on a platform operator's failure to block or remove material created and posted by third parties meet this element, regardless of the precise cause of action. This includes claims alleging that the defendant was negligent or reckless with respect to, or had actual or constructive knowledge of, the disseminated material's objectionable character. Challenges to other aspects of the defendant's conduct, however—such as certain kinds of claims targeting the platform's own design choices—do not treat the defendant as a "publisher or speaker" of content provided by others and therefore do not trigger Section 230(c)(1) protection.

3. The third required element is that the disseminated material must have been "provided by another information content provider." 47 U.S.C. 230(c)(1).

The statute defines "information content provider" to include anyone who "is responsible, in whole or in part, for the creation or development of information." 47 U.S.C. 230(f)(3). A website operator therefore loses Section 230(c)(1) protection when it is partially responsible for the content at issue. But a website does not become a co-developer (and thus an "information content provider") of third-party content merely by taking actions to display it or make it more accessible or usable.

B. Section 230(c)(1) bars plaintiffs' ATA claims to the extent those claims are premised on YouTube's alleged failure to block or remove ISIS videos from its site, but the statute does not bar claims based on YouTube's alleged targeted recommendations of ISIS content. The judgment below therefore should be vacated.

1. Plaintiffs' broadest theory of direct and secondary ATA liability is that YouTube is liable for allowing ISIS-affiliated users to create accounts and post videos on the site. The court of appeals correctly held that Section 230(c)(1) precludes liability on that basis. YouTube is undoubtedly a provider of an interactive computer service, and plaintiffs do not allege that YouTube edited or otherwise contributed to the creation of the videos at issue. To the extent plaintiffs allege that YouTube violated the ATA by allowing its platform to be used for the dissemination of videos, Section 230(c)(1) bars their claims.

2. Plaintiffs' allegations regarding YouTube's use of algorithms and related features to recommend ISIS content require a different analysis. That theory of ATA liability trains on YouTube's own conduct and its own communications, over and above its failure to

block or remove ISIS content from its site. Because that theory does not ask the court to treat YouTube as a publisher or speaker of content created and posted by others, Section 230(c)(1) protection is not available.

That does not mean that YouTube should be deemed an information content provider with respect to the videos themselves. Although Section 230(c)(1) does not preclude liability premised on YouTube's recommendations if the elements of a private ATA suit are otherwise met, liability must be determined without regard to the fact that the recommended videos appeared on YouTube's own platform. Because the court of appeals did not consider whether plaintiffs have adequately pleaded the elements of ATA liability on that theory, the case should be remanded so that the court may do so in the first instance.

3. Plaintiffs' other arguments lack merit. YouTube acts as a provider of an interactive computer service when it displays content on its site to users, even in the absence of an affirmative request. An online platform does not become an information content provider by taking the technical steps necessary to render user-generated content available to others on the site, such as creating URLs for videos and embedding them in hyperlinks. Finally, plaintiffs suggest that a platform becomes an information content provider by "notifying" users about new content. But to the extent they are challenging YouTube's distribution of new videos on a channel to the channel's subscribers, that feature is not meaningfully different from YouTube hosting the channel in the first place, and it does not justify treating YouTube as a co-creator of that content.

ARGUMENT

Section 230(c)(1) directs that a website operator may not be "treated as the publisher or speaker" of content provided by others. 47 U.S.C. 230(c)(1). This Court has never construed that provision. Over the last quarter century, however, the courts of appeals have developed a substantial body of precedent applying Section 230(c)(1) to disparate factual settings.

Congress's most immediate objective in enacting Section 230(c)(1) was to protect online service providers from possible defamation liability when they remove some objectionable third-party content but allow other postings to remain. The lower courts have correctly recognized that Section 230(c)(1)'s text goes beyond that immediate objective. Many courts, however, have concluded that Section 230 should be construed "broadly, so as to effectuate Congress's 'policy choice'" to protect the operators of interactive websites. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *see, e.g., Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). And they have applied that approach to foreclose claims even when platform operators' allegedly wrongful conduct went well beyond a failure to block or remove objectionable third-party content.

That approach to Section 230(c)(1) contradicts this Court's admonition that, absent some contrary "'textual indication,'" a court's views about the policy Congress sought to achieve provide "no license" to give statutory provisions "anything but a fair reading." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (citation omitted). The Court should give Section 230(c)(1) a fair reading, with no thumb on the scale in favor of either a broad or a narrow construction. Properly construed, Section 230(c)(1) protects YouTube from asserted ATA liability for hosting or failing to remove ISIS-related content, but not for claims based on YouTube's own conduct in designing and implementing its targeted-recommendation algorithms.

A. Section 230 Prohibits Courts From Holding A Website Liable For Failing To Block Or Remove Third-Party Content, But It Does Not Immunize The Site's Own Conduct

Section 230(c)(1) 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." 47 U.S.C. 230(c)(1). That text is typically analyzed in three elements, all of which must be present for Section 230(c)(1) to bar the claim: (1) the defendant must be a provider of an "interactive computer service," and (2) the plaintiff 's claim must seek to treat the defendant as a "publisher or speaker" of (3) "information provided by another information content provider." We address those elements in turn.

1. The defendant must be a provider of an interactive computer service

Section 230 defines "interactive computer service" 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). That definition encompasses early online service providers like Prodigy and America Online. *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 328-329 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998). It also includes interactive websites such as dating or housing services, *see, e.g., Fair Hous. Council v. Room-mates.com, LLC*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) (en banc); search engines that reproduce content from other websites, *see, e.g., Marshall's Locksmith Serv., Inc. v. Google, LLC*, 925 F.3d 1263, 1268 (D.C. Cir. 2019); and social media services like YouTube, Face-book, and Twitter, *see, e.g., Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020). In most Section 230(c)(1) cases, this element is not disputed.

2. The plaintiff 's claim must seek to treat the defend-ant as a "publisher or speaker" of third-party content

In the view of the United States, a plaintiff's claim seeks to "treat[]" a website provider as "the publisher or speaker" of third-party content, 47 U.S.C. 230(c)(1), if liability turns on the provider's failure to block or remove unlawful content from its platform, so that avoiding liability would require the defendant to withdraw or refuse to publish that content. By contrast, if the plaintiff 's claim seeks to hold the defendant liable for other aspects of its own conduct, imposing liability does not "treat" the defendant as a "publisher or speaker," even if third-party speech is essential to the plaintiff 's cause of action.

a. Section 230 does not define the term "publisher." As a matter of ordinary usage, that term can refer broadly to "one that makes [something] public," or more narrowly to "one whose business is publishing." Webster's Third New International Dictionary of the English Language 1837 (1993)

(Webster's Third). Several clues suggest that Section 230(c)(1) uses "publisher" in its broader sense. The word is paired with "speaker," which carries the more general sense of "one that speaks." *Id*. at 2185. The broader sense of "publisher" also accords with the word's common-law meaning and Section 230(c)(1)'s origin. As noted above, "publication" is an element of the tort of defamation that encompasses all "communication intentionally or by a negligent act to one other than the person defamed." Restatement § 577(1). In that context, the term is not limited to persons whose business is publishing. *See* Dobbs § 37.4, at 940. And at common law, publication specifically includes a failure to remove speech exhibited on one's property. *See* Restatement § 577(2).

b. The more difficult interpretive task is to identify the types of legal claims that would "treat[]" an entity like YouTube "as the publisher or speaker" of third-party content displayed on its site. 47 U.S.C. 230(c)(1). Section 230(c)(1) reflects Congress's recognition that "imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages" could substantially impede the development of online platforms. Zeran, 129 F.3d at 330-331. "It would be impossible for service providers to screen each of their millions of postings for possible problems." *Id.* at 331. And if (as in Stratton Oakmont, *see* p. 3, *supra*) the provider's removal of some content triggered potential legal liability for any unlawful third-party content that remained, providers would have a strong incentive to eschew screening mechanisms—the opposite of Congress's intent in enacting the CDA. *See Zeran*, 129 F.3d at 331; *see also* 47 U.S.C. 230(b)(4). Alternatively, "providers might choose to severely restrict the number and type of messages posted," Zeran, 129 F.3d at 331, to the detriment of Americans who have turned to the Internet for "a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. 230(a)(3).

Section 230(c)(1) represents Congress's effort to avoid those harms. The provision most obviously applies to causes of action, like defamation, that allege the violation of legal duties imposed on publishers and speakers as such. But other causes of action may likewise "be premised on the publication or speaking of what one might call 'information content.'" *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009). "[W]hat matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress"—but "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.* at 1101-1102.

Section 230(c)(1) applies, however, only when a plaintiff 's theory of liability seeks to hold the defendant liable for allowing unlawful third-party information to remain on its platform. "[T]o hold someone liable as a publisher at common law was to hold them responsible for the content's improper character." *Henderson v. The Source for Public Data, L.P.*, 53 F.4th 110, 122 (4th Cir. 2022). The protection is not triggered merely because "there is a 'but-for' causal relationship between the act of publication and liability." *Ibid.*

For instance, Section 230(c)(1) should not bar a products-liability claim against an online marketplace, even if a third-party retailer creates the product's online listing, if the plaintiff's claim is based on the product's defect. *Cf. Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139-140 (4th Cir. 2019). Section 230(c)(1) should not insulate a review website from claims that it manipulated third-party reviews to extort businesses. *But see Levitt v. Yelp! Inc.*, No. C-10-1321, 2011 WL 5079526, at *6-*9 (N.D. Cal. Oct. 26, 2011). And, as the courts below recognized here, Section 230(c)(1) should not immunize Google from plaintiffs' ATA claims based on Google sharing revenue from advertisements that accompany ISIS-created videos. Pet. App. 45a-46a.

As those examples show, Section 230(c)(1) protects an online platform from claims premised on its dissemination of third-party speech, but the statute does not immunize a platform's other conduct, even if that conduct involves the solicitation or presentation of third-party content. The Ninth Circuit's *Roommates.com* decision illustrates the point in the context of a website offering a roommate-matching service. 521 F.3d at 1161. As a condition of using the service, *Roommates.com* "require[d] each subscriber to disclose his sex, sexual orientation and whether he would bring children to a household," and to "describe his preferences in roommates with respect to the same three criteria." *Ibid*. The plaintiffs alleged that asking those questions violated housing-discrimination laws, and the court of appeals agreed that Section 230(c)(1) did not shield Roommates.com from liability for its "own acts" of "posting the questionnaire and requiring answers to it." *Id*. at 1165.

Imposing liability in such circumstances does not treat online platforms as the publishers or speakers of content provided by others. Nor does it obligate them to monitor their platforms to detect objectionable postings, or compel them to choose between "suppressing controversial speech or sustaining prohibitive liability." *Zeran*, 129 F.3d at 333. Illustrating that distinction, the *Roommates.com* court held that although Section 230(c)(1) did not apply to the website's discriminatory questions, it did shield the website from liability for any discriminatory third-party content that users unilaterally chose to post on the site's "generic" "Additional Comments" section. 521 F.3d at 1174-1175.

c. In a statement respecting the denial of certiorari in *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020), Justice Thomas suggested a narrower interpretation of Section 230(c)(1)'s "publisher or speaker" element. Drawing on the provision's origin as a response to Stratton Oakmont, the statement suggested that Section 230(c)(1) may have had only one "modest" effect: to "indicate[] that an Internet provider does not become the publisher of a piece of third-party content—and thus subjected to strict liability—simply by hosting or distributing that content." *Id.* at 14-15. On that understanding, Section 230(c)(1) would shield a website operator from a cause of action that seeks to impose strict liability for third-party content, but not from allegations that the defendant acted with actual or constructive knowledge. *Ibid.*

Justice Thomas's Malwarebytes statement correctly noted two respects in which lower courts have extended Section 230(c)(1) beyond its proper bounds. First, some courts have misconstrued Section 230(c)(1) to confer immunity whenever an online service provider's allegedly unlawful conduct can be analogized to actions traditionally performed by a book or newspaper publisher. Malwarebytes, 141 S. Ct. at 16. Those decisions rest on the mistaken premise that the term "publisher" refers to companies whose business is publishing. *See* p. 14, supra. And courts have compounded that error by extending Section 230(c)(1)'s protections to activities beyond the "publication" of the third-party content itself. These courts have read Section 230(c)(1) to "protect[] the 'exercise of a publisher's traditional editorial functions,'" including even the alteration of content. Malwarebytes, 141 S. Ct. at 16 (quoting Zeran, 129 F.3d at 330).

Second, as Justice Thomas further explained, some lower courts have read Section 230(c)(1) to immunize website operators whose platforms are knowingly designed to facilitate their use for unlawful activity. In *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (2016), cert. denied, 137 S. Ct. 622 (2017), for example, the First Circuit considered a claim that a classifieds website had violated federal prohibitions on sex trafficking. The plaintiffs alleged that *Backpage.com*—which allowed users to post ads for "Escorts"—had "deliberately structured its website to facilitate illegal human trafficking" by, among other things, "accept[ing] anonymous payments, fail[ing] to verify e-mails, and stripp[ing] metadata from photographs to make crimes harder to track." Malwarebytes, 141 S. Ct. at 17. The First Circuit held that the website's actions were shielded by Section 230(c)(1) because they amounted to "choices about what content can appear on the website and in what form," and thus fell "within the purview of traditional publisher functions." *Backpage.com*, 817 F.3d at 21.

Under the principles articulated above, the *Backpage.com* decision was erroneous. The plaintiffs did not seek to treat *Backpage.com* as the publisher or speaker of the ads through which others carried out sex trafficking. Rather, they sought to hold the operator liable for its own policies and platform-design choices that facilitated sex trafficking. Where a website operator's conduct in furthering unlawful activities goes well beyond failing to block or remove objectionable third-party content from its platform, holding the operator liable does not "treat" it "as the publisher or speaker of " the third-party posts.[3]

Justice Thomas correctly identified ways in which some lower courts have unduly expanded Section 230(c)(1), and he rightly emphasized that the terms "publisher" and "speaker" should be construed in light of their common-law roots. But it does not follow that Section 230(c)(1) should be limited to claims based on strict-liability theories. As explained above, in defamation law, "publication" refers broadly to the communication of expressive material to another. *See* Restatement § 577; *see also* p. 14, supra. And although the common law set a different standard of liability for distributors and others "who perform a secondary role

[3] In 2018, Congress responded to *Backpage.com* by enacting the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, 132 Stat. 1253. FOSTA amended Section 230 to add new exceptions to Section 230(c)(1) for certain civil and criminal sex-trafficking and prostitution laws. See § 4(a), 132 Stat. 1254 (47 U.S.C. 230(e)(5)). FOSTA's "Sense of Congress" provision states that Section 230 "was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution" or "facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims." § 2(1), 132 Stat. 1253. Congress described the amendment as a "clarification" of the statute, not as a change to its original scope. § 2(3), 132 Stat. 1253.

in disseminating defamatory matter," Prosser and Keeton on the Law of Torts § 113, at 810-811 (W. Page Keeton ed., 5th ed. 1984) (Prosser), those entities likewise communicate content to others and therefore are "publishers." *See id*. at 799 ("[E]very one who takes part in the publication * * * is charged with publication."); *see also Dobbs* § 37.4, at 940 ("Anyone who participates in publication can be a publisher."); Zeran, 129 F.3d at 334. Accordingly, leading torts authorities refer to both kinds of actors as "publishers." *See* Prosser § 113, at 803-804 (referring to the original speaker and entities like newspapers as "primary publishers," and to entities like libraries and newsstands as "secondary publishers" and "disseminator publisher[s]"); *see also* Dobbs § 37.4, at 942 (distinguishing between "primary publishers" and other "publishers * * * called transmitters, distributors, or secondary publishers").

Thus, where a website operator's alleged wrongful act is the failure to block or remove objectionable third-party content from its site, imposing liability would "treat" the operator as "the publisher or speaker" within the meaning of Section 230(c)(1), even if the plaintiff alleges that the operator acted negligently, recklessly, or with actual or constructive knowledge.[4]

[4] Justice Thomas's Malwarebytes statement also stated that another CDA provision, 47 U.S.C. 223(d)(1)(B), "expressly imposed distributor liability" enforceable by a civil cause of action at 47 U.S.C. 207, and observed that it would be "odd" for Congress to have created such liability in one provision while eliminating it in another. 141 S. Ct. at 15. But it is not clear that Section 223(d)(1)(B) (which this Court held unconstitutional in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)) was civilly enforceable. Section 207 provides a cause of action for a person "claiming to be damaged by any common carrier," 47 U.S.C. 207, and Section 223(e)(6) states that "nothing in [Section 223] shall

3. The content must be provided by another information content provider

Section 230 defines "information content provider" to mean "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. 230(f)(3) (emphasis added). The italicized language makes clear that, when two (or more) entities are jointly responsible "for the creation or development of " particular online content, each is an "information content provider" with respect to that content. *See, e.g., FTC v. Accusearch Inc.,* 570 F.3d 1187, 1197 (10th Cir. 2009) (explaining that "there may be several information content providers with respect to a single item of information"). And by limiting the provision's application to claims based on "information provided by another information content provider," 47 U.S.C. 230(c)(1) (emphasis added), Section 230(c)(1) instructs that an online platform "remains liable for its own speech." *Lycos*, 478 F.3d at 419.

Determining what qualifies as "creation or development" of content under Section 230(f)(3) therefore can be integral to the Section 230(c)(1) analysis. The word "create" is straightforward: "to bring into existence" or "make out of nothing and for the first time." Webster's Third 532. But the meaning of "develop" in this context is less clear-cut. On the one hand, the transitive verb can be used as a close synonym of "create," though usually to refer to a drawn-out process. *See* Oxford English Dictionary Online (3d ed.,

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be construed to treat interactive computer services as common carriers," 47 U.S.C. 223(e)(6).

modified Sept. 2022) ("[t]o formulate or create by successive stages of improvement or advancement"). But the word can also mean to "cause to increase or improve," "promote the growth of," or "expand by a process of growth." Webster's Third 618; *see also* Oxford English Dictionary Online ("[t]o bring (something) to a fuller or more advanced state; to improve, extend"). In this sense, the word conceivably could encompass a website operator's efforts to augment third-party content generally, or to make it more readily available or viewable.

Contextual considerations indicate that Congress did not intend "development" to carry its broadest "definitional possibilities." *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011). Within Section 230(f)(3), "development" is paired with "creation," a term that unambiguously excludes measures platforms employ to make third-party information more available to users without altering its content. Section 230(f)(3) also refers to one who is "responsible " for the information's development. That term typically connotes more than being a but-for cause or making an incidental contribution to an end result. *See* Accusearch, 570 F.3d at 1199 ("We would not ordinarily say that one who builds a highway is 'responsible' for the use of that highway by a fleeing bank robber.").

Adjacent subsections likewise indicate that "development" does not include actions a website takes to better display preexisting third-party content or make it more usable. Section 230's definition of "interactive computer service" includes an "access software provider," 47 U.S.C. 230(f)(2), which the statute defines as a provider of "software" or "enabling tools" that "filter, screen, allow, or disallow content," "pick, choose, analyze, or digest content," or "transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." 47 U.S.C. 230(f)(4)(A), (B), and (C). It would make little sense for Congress to specifically include entities that provide "enabling tools" that "filter," "organize," and "reorganize" content as among those to which Section 230(c)(1) applies, only to categorically withdraw that protection through the definition of "information content provider." Rather, the statute's structure suggests that content development must go beyond the mere provision of basic organizational or display tools that Congress viewed as inherent in an interactive online service.

More fundamentally, deeming a website an "information content provider" whenever it enhances user access to third-party content would produce a "self-defeating" result. *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019). Interactive websites invariably provide tools that enable users to create, and other users to find and engage with, information. A chatroom might supply topic headings to organize posts; a photo-sharing site might offer a feature for users to signal that they like or dislike a post; a classifieds website might enable users to add photos or maps to their listings. If such features rendered the website a co-developer of all users' content, Section 230(c)(1) would be a dead letter.

By contrast, other actions may implicate website operators more deeply in objectionable content. If, for example, a website seeks out information from third parties and compiles that information into background-check reports, Section 230(c)(1) protection should not be available for the reports. Cf. Henderson, 53 F.4th at 128-129; but *see Dennis v. MyLife.Com, Inc.*, No. 20-

cv-954, 2021 WL 6049830, at *6 (D.N.J. Dec. 20, 2021) (holding that a background-check site could not face liability for a "reputation score" it generated, because the score was based on information originating from others). The same is true if a classifieds website solicits advertisements for illegal services and edits third-party postings to make their unlawful nature more difficult to detect. *See* H.R. Rep. No. 572, 115th Cong., 2d Sess. Pt. 1, at 5 (2018) (noting that *Backpage.com* had been "soliciting" sex-related content and "systematically editing" ads to "delete incriminating words"). Thus, when an online service provider substantially adds or otherwise contributes to a third party's information—such that the resulting content can fairly be deemed the joint product of the provider and that party—both may be viewed as "information content providers" with respect to that content, and both may be held accountable even on claims that would treat the platform as the "publisher or speaker" of that content.

B. The Judgment Of The Court Of Appeals Should Be Vacated

The court of appeals correctly held that Section 230(c)(1) bars plaintiffs' claims to the extent they allege that YouTube violated the ATA by publishing videos created by ISIS. But plaintiffs also allege that YouTube violated the ATA by providing targeted recommendations of ISIS content to others in a way that radicalized viewers or recruited them to ISIS's cause. That theory of liability does not seek to hold YouTube liable for hosting, or failing to remove, unlawful third-party content. Rather, it challenges YouTube's own conduct in designing and implementing recommendation algorithms that result in the communication of a distinct message from YouTube. Whatever its viability under the ATA, that theory does not implicate Section 230(c)(1) because it does not seek to hold YouTube liable as the "publisher or speaker" of ISIS content.

1. Section 230(c)(1) bars plaintiffs' claims to the extent they are premised on YouTube's failure to block or remove third-party content

Plaintiffs assert claims against Google, as the owner of YouTube, for direct and secondary liability under the ATA. They allege that YouTube—an undisputed provider of an interactive computer service, *see* Pet. App. 29a; *see also id.* at 193a n.8—provided resources to, and aided and abetted, ISIS and its terrorist activities. J.A. 176-183. The communication of content is not an essential element of an ATA violation. *See* 18 U.S.C. 2333(a) and (d). But many of the allegations in plaintiffs' operative complaint assert that the specific way YouTube assisted ISIS's terrorist activities was by disseminating ISIS content on its platform.

Plaintiffs allege that ISIS "openly maintained and used official YouTube accounts with little or no interference," J.A. 18, and thereby utilized the "YouTube platform and services to distribute high-production-quality videos, images, and recordings," J.A. 17. Plaintiffs further allege that ISIS used those videos "to issue terroristic threats, attract attention to its terror attacks and atrocities, instill and intensify fear from terror attacks, intimidate and coerce civilian populations, take credit for terror attacks," and "communicate its desired messages about the terror attacks." J.A. 64. In this manner, ISIS allegedly "use[d] YouTube to actually carry out essential communication components of ISIS's terror attacks," *ibid.*, and to recruit new adherents, J.A. 75-79. ATA claims based on this theory necessarily target YouTube's role as a publisher of harmful or otherwise objectionable third-party content.

Moreover, the videos themselves are "information provided by another information content provider." 47 U.S.C. 230(c)(1). Plaintiffs allege that ISIS and its affiliates filmed, edited, and posted the videos that appeared on their user channels. E.g., J.A. 17, 61, 69, 172. And plaintiffs do not allege that YouTube altered the videos. *See* J.A. 61 ("Google does not preview or edit content published by users to their own YouTube channels or accounts.").

By asserting ATA claims premised on such allegations, plaintiffs asked the district court to "treat[]" YouTube as a "publisher or speaker" by holding the platform liable for allowing (or failing to remove) unlawful content provided by "another information content provider." 47 U.S.C. 230(c)(1). The court of appeals correctly held that Section 230(c)(1) foreclosed those theories of ATA liability. *See* Pet. App. 29a-31a, 33a.

2. Section 230(c)(1) does not preclude plaintiffs' claims based on YouTube's targeted recommendations

a. In addition to alleging that YouTube has failed to remove ISIS-related content from its platform, plaintiffs allege that YouTube has violated the ATA by using "computer algorithms" and related features to "suggest[]" to particular users "YouTube videos and accounts" that are "similar" to videos and accounts those users have previously watched. J.A. 173; *see* J.A. 169. These "suggestions" are located on "the side margin of the user's YouTube page," and suggested videos "automatically load and play when a selected video ends," J.A. 173; the complaint includes a screenshot showing a sidebar entitled "Up next" with multiple videos listed, J.A. 170. Plaintiffs allege that, through this feature, YouTube has "recommended ISIS videos" to other users, J.A. 169, thereby enabling ISIS to "use[] YouTube as a tool to connect with others and promote its terrorist activity," J.A. 173. Plaintiffs' recommendation-based claims under the ATA would face obstacles on the merits. *See* p. 32 & n.5, infra. But Section 230(c)(1) does not shield YouTube from any liability it might otherwise face for recommending ISIS content.

The distinction between a recommendation and the recommended content is particularly clear when the recommendation is explicit. If YouTube had placed a selected ISIS video on a user's homepage alongside a message stating, "You should watch this," that message would fall outside Section 230(c)(1). Encouraging a user to watch a selected video is conduct distinct from the video's publication (i.e., hosting). And while YouTube would be the "publisher" of the recommendation message itself, that message would not be "information provided by another information content provider." 47 U.S.C. 230(c)(1).

Here, plaintiffs do not contend that YouTube's recommendations take that explicit form. Rather, plaintiffs allege that YouTube "has recommended ISIS videos" by causing ISIS-affiliated content to appear on a user's "Up next" sidebar. J.A. 169-170. But the effect of YouTube's algorithms is still to communicate a message from YouTube that is distinct from the messages conveyed by the videos themselves. When YouTube presents a user with a video she did not ask to see, it implicitly tells the user that she "will be interested in" that content "based on the video and account information and characteristics." J.A. 173. The appearance of a video in a user's queue thus communicates the implicit message that YouTube "thinks you, the [user]—you, specifically—will like this content." Force, 934 F.3d at 82 (Katzmann, C.J., concurring in part and dissenting in part). And because YouTube created the algorithms that determine which videos will be recommended to which users, the recommendations are bound up with YouTube's own platform-design choices.

A claim premised on YouTube's use of its recommendation algorithms thus falls outside of Section 230(c)(1) because it seeks to hold YouTube liable for its own conduct and its own communications, above and beyond its failure to block ISIS videos or remove them from the site. *See* pp. 16-17, supra. To be sure, those algorithms operate in conjunction with YouTube's display of third-party content. But as explained above, Section 230(c)(1) does not immunize providers from all claims in which third-party content plays a role. *See* pp. 15-16, supra. If a third party unaffiliated with YouTube recommended ISIS videos posted on YouTube, Section 230(c)(1) would not insulate that party from any liability those recommendations otherwise might create. *See Force*, 934 F.3d at 82 (Katzmann, C.J., concurring in part and dissenting in part). Section 230(c)(1) would be likewise inapplicable if YouTube recommended ISIS content posted on a different media platform. Cf. Pet. Br. 30. So too here: a claim premised on YouTube's recommendations, even for content posted on its own platform, does not "seek to punish [YouTube] for the content others post" or "for deciding whether to publish third parties' content." Force, 934 F.3d at 77 (Katzmann, C.J., concurring in part and dissenting in part).

b. The court of appeals analyzed the issue differently. The court considered whether, by recommending ISIS videos through the "Up next" feature, YouTube became a creator or developer (and thus an information content provider) of the videos it suggested. Pet. App. 31a-39a. If that were so, Section 230(c)(1) would not protect YouTube from liability even for allowing the videos to remain on the site. The court held that YouTube's recommendation feature does not have that effect, reasoning that the "Up next" algorithm is analogous to a "more sophisticated" search engine. *Id*. at 38a.

The court of appeals was correct in holding that YouTube is not an "information content provider" of any ISIS videos it recommends. That term encompasses persons who participate in the "creation or development of " online "information." 47 U.S.C. 230(f)(3). YouTube's algorithms direct content to particular users only after that content has been created, developed, and posted (by third parties) on YouTube's platform. And the larger statutory context reinforces the conclusion that a website's choices about the organization and presentation of user-generated content do not constitute the "creation or development" of that material. *See* pp. 22-23, supra.

For essentially the same reason, courts of appeals have consistently recognized that a website does not act as an information content provider by offering a method to search or filter third-party content. *See Marshall's Locksmith*, 925 F.3d at 1269; *O'Kroley v. Fastcase, Inc.,* 831 F.3d 352, 354-355 (6th Cir. 2016), cert. denied, 137 S. Ct. 639 (2017); *Getachew v. Google, Inc*., 491 Fed. Appx. 923, 925-926 (10th Cir. 2012); *Roommates.com*, 521 F.3d at 1175. To be sure, YouTube's algorithms operate differently from many search engines in that they generate targeted recommendations without specific user queries. But in determining whether YouTube is an "information content provider" of the videos it recommends, the salient point is that the algorithms simply direct to particular users videos that were created and developed without YouTube's involvement.

Thus, YouTube's use of recommendation algorithms does not make it an "information content provider" of the videos it recommends. A court determining YouTube's ATA liability therefore could give no weight to YouTube's hosting of the videos. It does not follow, however, that Section 230(c)(1) shields YouTube from possible ATA liability for making the targeted recommendations themselves. Even if YouTube plays no role in the videos' creation or development, it remains potentially liable for its own conduct and its own communications, to the extent those go beyond allowing third-party content to appear on the site. Such claims fall outside Section 230(c)(1) because they do not seek to hold YouTube liable as a "publisher or speaker." *See* pp. 1619, supra.

c. An online platform's potential liability in these circumstances is subject to important limitations. Three related limits are especially significant.

First, as this case illustrates, determining Section 230(c)(1)'s application to a particular case is not an all-or-nothing choice. Section 230(c)(1) generally does not shield a website operator from liability for its own communications or other conduct. But despite YouTube's use of allegedly unlawful revenue-sharing and targeted-recommendation features, Section 230(c)(1) continues to protect YouTube from liability for failing to remove third-party content, including the content it has recommended. *See* pp. 25-26, 29-30, supra; *see also Force*, 934 F.3d at 85 (Katzmann, C.J., concurring in part and dissenting in part).

Second, for purposes of determining whether YouTube can be held liable for the targeted recommendations at issue here, Section 230(c)(1) precludes the court from giving weight to the fact that the recommended videos appear on YouTube's own site. As suggested above (see p. 28, supra), the court instead should analyze plaintiffs' claims as it would if YouTube had recommended ISIS videos posted on other sites. In particular, in determining whether plaintiffs have adequately alleged an ATA claim, the court can consider the alleged content of the recommended videos, as it would if YouTube's recommendations of videos on another platform were alleged to constitute prohibited assistance to ISIS. But Section 230(c)(1) would still preclude the court from considering, as a possible form of assistance giving rise to ATA liability, either YouTube's provision of a platform for the posting of the videos or YouTube's failure to block or remove them.

Third, the court of appeals concluded that Section 230(c)(1) precludes liability based on YouTube's targeted recommendations because YouTube is not alleged to give any preference or priority to ISIS content, Pet. App. 37a, but instead "matches what it knows about users based on their historical actions and sends third-party content to users that [YouTube] anticipates they will prefer," *id*. at 38a. That understanding of Section 230(c)(1) was flawed, because the recommendations' status as YouTube's own conduct does not depend on the criteria YouTube considers in directing particular videos to particular users. Those criteria may be directly relevant, however, in determining YouTube's liability under specific causes of action, including whether plaintiffs have plausibly alleged the elements of aiding-and-abetting liability under the ATA. *See* U.S. Br. at 17-26, *Twitter, Inc. v. Taamneh, cert. granted*, No. 21-1496 (Oct. 3, 2022).

d. Because the court of appeals held that Section 230(c)(1) precluded any ATA claim based on a non-revenue-sharing theory, it did not examine whether plaintiffs could state a claim based on YouTube's recommendation function. Because this Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Court should vacate the judgment below and remand the case to allow the court of appeals to conduct that analysis in the first instance, informed by the Court's decision in Taamneh.[5]

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[5] Because the two cases were dismissed on different grounds, Pet. App. 4a, 17a-18a, the court of appeals evaluated the allegations against the Taamneh defendants (including Google) without considering whether Section 230 narrowed the potential theories of ATA liability, *see id*. at 68a-75a. As explained in the government's amicus brief in that case, *see* U.S. Br. at 13-30, Taamneh, supra (No. 21-1496), even when Section 230 is put to the side and all of the allegations against the Taamneh defendants are considered, those allegations are insufficient to state a claim for secondary liability under the ATA. Unlike this case, however, Taamneh does not present a direct-liability claim.

3. Plaintiffs' alternative theories lack merit

Plaintiffs offer additional rationales for concluding that their recommendation-based ATA claims fall outside Section 230(c)(1). Those theories are unpersuasive.

a. In the courts below, plaintiffs did not dispute that YouTube is a provider of an interactive computer service. *See* p. 25, supra. But in this Court, plaintiffs argue that YouTube does not act as such a provider when it recommends content to others. Specifically, plaintiffs argue (Br. 44) that YouTube "provides or enables" a user's "access" to a "server," 47 U.S.C. 230(f)(2), only when a user makes a "specific request" to the server, such as by clicking on a video link. And they contend that YouTube is no longer "acting as" a provider of an interactive computer service when it "sends a user third-party material which the recipient had not requested." Br. 43-44.

That argument reflects a misunderstanding of what the statute requires. When a user directs her browser to the *youtube.com* website, or opens the YouTube app on an Internet-enabled smartphone, YouTube has provided the user with access to its server. And plaintiffs allege that YouTube provides the recommendations at issue on its online platform. *See* J.A. 169-170, 173.

b. Plaintiffs also argue (Br. 34-39) that YouTube acts as a content creator—and therefore an information content provider—because it generates URLs for user videos and embeds those URLs in hyperlinks and hyperimages. But the creation of navigational hyperlinks is inherent in the provision of an online platform; a URL is an address where content can be located. *See Reno*, 521 U.S. at 852. A website does not act as an information content provider by taking the technical steps necessary to render user-generated online content visible to others.

A related federal statute enacted a year after the CDA reflects this commonsense understanding. *See* Child Online Protection Act, Pub. L. No. 105-277, Div. C, Tit. XIV, § 1403, 112 Stat. 2681-736 (1998) (47 U.S.C. 231). Section 231 criminalizes certain "communication[s]" of obscene material "by means of the World

Wide Web." 47 U.S.C. 231(a)(1). The statute specifies that providing "an Internet information location tool"—defined to include "hypertext links" that "refer[] or link[] users to an online location"—does not constitute a "communication." 47 U.S.C. 231(b)(3) and (e)(5). Similarly here, YouTube's creation of location tools does not render it a creator or developer of the linked speech.

c. Plaintiffs also suggest (Br. 34) that a platform becomes a content creator by "notifying a user that something new is available on the website." Although plaintiffs do not specify a YouTube feature they have in mind, their complaint alleges that YouTube automatically "distribute[s]" new videos posted on a channel to that channel's subscribers. J.A. 172. But that mechanism simply implements the user's decision to subscribe to a particular channel and thus to request material from that channel as it becomes available in the future. Such a feature is no different from YouTube hosting the channel in the first place—an act that plaintiffs appear to agree is protected by Section 230. *See* Br. 26, 42; *see also* Pet. 2.

CONCLUSION

The judgment of the court of appeals should be vacated.

Respectfully submitted.

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* The Solicitor General is recused in this case.

BRIEF OF U.S. SENATOR TED CRUZ, CONGRESSMAN MIKE JOHNSON, AND FIFTEEN OTHER MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY IN *GONZALEZ, ET AL. v. GOOGLE LLC* (DECEMBER 7, 2022)

IN THE SUPREME COURT OF THE UNITED STATES

REYNALDO GONZALEZ, ET AL.,

Petitioners,

v.

GOOGLE LLC,

Respondent.

No. 21-1333

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

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are seventeen members of the United States Senate and House of Representatives: Senators Ted Cruz, Mike Braun, Joni Ernst, Lindsey O. Graham, Charles E. Grassley, Bill Hagerty, James Lankford, Mike Lee, Cynthia M. Lummis, Marco Rubio, and Roger F. Wicker; and Representatives Mike Johnson, Jodey C. Arrington, Scott Fitzgerald, Doug Lamborn, Victoria Spartz, and Tom Tiffany.

Amici have a strong interest in the proper interpretation of § 230. Several *amici* sit on Committees that oversee matters related to Section 230 of the Communications Decency Act, including the Senate

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1 No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket-consent letters.

Committee on the Judiciary; the Senate Committee on Commerce, Science, and Transportation; and the House Committee on the Judiciary.

Several *amici* have also proposed their own legislation to revise or repeal § 230, but all agree that the lower courts' interpretation of the current § 230 has strayed far from its text. These misguided decisions have conferred near-absolute immunity on Big Tech companies to alter and push harmful content, while simultaneously censoring conservative viewpoints on important political and social matters. *Amici* are united by their interest in seeing courts construe § 230 according to its clear but narrow text, rather than based on the courts' policy judgments.

SUMMARY OF THE ARGUMENT

The internet and social media are "the most important places . . . for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). But that marketplace of ideas has been under assault by Big Tech companies that selectively censor and remove opposing viewpoints on a wide range of important political and social matters—all without the slightest fear of legal liability, and in defiance of Congress's mandate that the "Internet and other interactive computer services offer a forum for a true diversity of political discourse." 47 U.S.C. § 230(a)(3).

This state of affairs is largely the result of lower courts' erroneous interpretations of two provisions of § 230(c) of the Communications Decency Act of 1996. *See* 47 U.S.C. § 230(c); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133, 138 (1996). This Court should correct those flawed interpretations and remand this case so the lower courts can reevaluate Petitioners' claims under the proper framework.

First, § 230(c)(1) states that internet service providers cannot be deemed the "publisher" or "speaker" of third-party content on their platforms. Like many lower courts, Petitioners' Question Presented erroneously assumes this provision "immunizes" certain conduct, including "traditional editorial functions," Pet. i, but that is doubly wrong. Section 230(c)(1) is merely definitional—it does not provide immunity. And it applies only to those liability regimes like defamation whose elements turn on whether the defendant is a mere "distributor" of others' speech, or instead is the publisher or speaker itself. Historically, publishers and speakers faced different liability regimes than distributors, although neither group was considered "immune" from liability. For such causes of action, all § 230(c)(1) does is preclude courts from treating internet service providers as the speaker or publisher of third-party content on their websites. *See* Part I, *infra*.

Second, § 230(c)(2)(A) does expressly provide immunity, but only where platforms "in good faith" remove or restrict access to third-party content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A). Under standard canons of interpretation, the "otherwise objectionable" language refers only to material in the same league as the terms preceding it—*i.e.*, especially egregious telecommunications content over which Congress was understood to have regulatory authority, consistent with the First Amendment. *See* Part II, *infra*.

Despite the narrow textual scope of these provisions, lower courts have persistently held that

§ 230(c) provides internet platforms with immunity from almost *all* suits that pertain in any way to online content.

For example, the decisions below held that § "230(c)(1) precludes liability" in almost all suits about "material posted on the website by someone else," Pet.App.19a, 29a, because such suits effectively treat the platforms as "publishers" and challenge their "editorial decisions" or "traditional editorial functions" in deciding which content to keep or remove, Pet.App.31a, 38a, 39a, 41a, 244a.

That analysis is wrong at every step. Section 230(c)(1) does not directly "preclude[] liability" at all, let alone based on whether the platform is exercising "traditional editorial functions," a term that appears nowhere in the statute. Because almost any decision about preserving, removing, or altering content can be described as an "editorial function," the lower courts' misinterpretation of § 230(c)(1) has led to a broad grant of immunity completely untethered from the text of the statute, and it has also rendered entirely superfluous the limited grant of immunity in § 230(c)(2) for removal of especially egregious content.

As a result of this warped view of § 230(c)(1), platforms have been found immune from suits far outside the narrow scope of immunity Congress actually authorized in § 230(c)(2), which has been largely eviscerated. Confident in their ability to dodge liability, platforms have not been shy about restricting access and removing content based on the politics of the speaker, an issue that has persistently arisen as Big Tech companies censor and remove content espousing conservative political views, despite the lack of immunity for such actions in the text of § 230(c).

This Court should return § 230(c) to its textual scope and make clear that beyond that realm, the statute is silent. Because the lower courts' erroneous interpretation of § 230(c) so infected their analysis in this case, this Court should remand for those courts to apply the corrected framework to Petitioners' claims in the first instance. *See* Part III, *infra*.

Under that framework, § 230(c)(1) does not directly provide any immunity for Google. At most, it requires that Google not be deemed the publisher or speaker of certain content, but that determination is relevant only if the elements of Petitioners' claims under the Anti-Terrorism Act turn on whether Google itself is the publisher or speaker of the challenged content—an issue on which *amici* take no position. Even if Google is deemed not to be the speaker or publisher of the challenged content, that does not mean Google necessarily receives immunity, as § 230(c)(1) itself does not provide immunity at all. Nor does § 230(c)(2) provide immunity here, as Google's challenged actions do not fall within the narrow scope of that provision, which does not grant *carte blanche* for social media companies to invoke immunity for removing content that any eggshell-psyche user might possibly deem offensive.

ARGUMENT

I. Section 230(c)(1) Does Not Provide Immunity and Is Relevant Only to Claims Whose Elements Require Treating a Platform As the Publisher or Speaker.

Lower courts have consistently held that § 230(c)(1) precludes liability for a wide swath of claims against internet service providers. But both aspects of that approach are wrong.

Section 230(c)(1) does not provide any immunity. Rather, it states a definition: no internet service provider "shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C § 230(c)(1). Although this requirement can *indirectly* affect liability, it (1) does not directly confer immunity, and (2) applies only in limited circumstances where the elements of a claim turn on treating an internet platform as the speaker or publisher of others' words. Outside of this limited realm, § 230(c)(1) plays no role whatsoever, and the lower courts—including the Ninth Circuit below—have erred by turning § 230(c)(1) into a super-immunity provision.

A. The Correct Scope and Effect of § 230 (c)(1).

"To see how far we have strayed from the path on which Congress set us out, we must consider where that path began." *Force v. Facebook, Inc.*, 934 F.3d 53, 77 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part) (arguing that courts have drastically misinterpreted § 230(c)).

Justice Thomas has explained how § 230(c)(1)'s text—in particular its reference to "publisher or speaker"—invokes the terminology of traditional common-law liability, which should guide courts' interpretation of § 230(c)(1) today. "Traditionally, laws governing illegal content distinguished between publishers or speakers (like newspapers) and distributors (like newsstands and libraries)." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., respecting denial of certiorari). Publishers "could be strictly liable for transmitting illegal content" "because they exercised editorial control" over the publication of that content. *Id.* Distributors, on the other hand, were liable "only when they knew (or constructively knew) that content was illegal" because they "acted as a mere conduit without exercising editorial control." *Id.* Accordingly, even when not labeled as the publisher or speaker, a defendant was not given immunity, although the plaintiff's burden was higher.

Congress was aware of this distinction when it enacted § 230(c)(1) in response to the New York state trial court decision in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), which had likewise "use[d] the same terms"—*i.e.*, "publisher" and "distributor"—in the context of libel claims against an online platform, *Malwarebytes*, 141 S. Ct. at 15–16 (Thomas, J., respecting denial of certiorari) (citation omitted).

Section 230(c)(1), then, has a narrow scope. It targets only those causes of action that "include, in their elements, treating the . . . platform . . . as a publisher or speaker of another's words." Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 147 (2021); *see Force*, 934 F.3d at 81 (Katzmann, C.J., concurring in part and dissenting in part) ("The question is . . . whether to establish the claim the court must necessarily view the defendant, not as a publisher in the abstract, but rather as *the* publisher of that third-party information."). The "classic example is defamation," Candeub, *Reading Section 230 as Written*, *supra*, 1 J. FREE SPEECH L. at 147, although § 230(c)(1) is not limited to defamation claims.

And § 230(c)(1) also has a narrow effect for any qualifying causes of action: the court is merely barred from treating the online platform as the publisher or speaker of another's content. In the context of defamation, for example, § 230(c)(1) provides that platforms can be held liable for third-party content only if the defendant would be culpable under the higher standard for "distributor" liability. *See Malwarebytes*, 141 S. Ct. at 14 (Thomas, J., respecting denial of certiorari). Although this provides platforms with a strong litigation advantage, it does not mean they are entitled to *immunity*.

Statutory context confirms this interpretation of § 230(c)(1). If Congress had intended to fully immunize internet service providers from distributor liability, it could have done so using the same language it did in the very next subsection, which provides that "[n]o provider or user of an interactive computer service shall be held liable" in certain specified circumstances. 47 U.S.C. § 230(c)(2). Indeed, courts' erroneously broad interpretation of § 230(c)(1) has rendered entirely superfluous the narrower § 230(c)(2) immunity. *See* Part II, *infra*.

Further, Congress elsewhere indicated that it was not providing immunity for distributors. "Congress expressly imposed distributor liability in the very same Act that included § 230" by making it a crime to "'knowingly . . . display' obscene material to children, even if a third party created that content." *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., respecting denial of certiorari) (citing 47 U.S.C. § 223(d)).

B. Lower Courts Have Dramatically Misinterpreted § 230(c)(1).

Despite its clear text, lower courts have warped § 230(c)(1) beyond all recognition, holding that it provides broad immunity against a wide range of claims involving online content even while openly acknowledging that the statutory text itself says no such thing. *See, e.g.*, *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014) ("Although § 230(c)(1) does not explicitly mention immunity or a synonym thereof, this and other circuits have recognized the provision to protect internet service providers for the display of content created by someone else.") (collecting authorities); *see also* Pet.App.29a–31a; *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18–19 (1st Cir. 2016); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014).

1. *Zeran:* The Original Flawed Decision.

Almost every erroneous § 230(c)(1) decision can trace its roots back to *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), which held that § 230(c)(1) provides immunity whenever a suit seeks "to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Id*. at 330.

The immunity conferred by *Zeran* is expansive because most claims involving online content can be framed as a challenge to removing, keeping, or altering content. *See Force*, 934 F. 3d. at 81 (Katzmann, C.J., concurring in part and dissenting in part) (rejecting the view that § 230(c)(1) covers "the full range of activities in which [entities subject to § 230(c)(1)] might engage").

Zeran rests on several errors. *First*, it mistakenly collapsed the publisher/distributor distinction. The court believed that distributor liability "is merely a subset, or a species, of publisher liability" because "distributors are considered to be publishers" in many scenarios. 129 F.3d at 332. The court pointed to examples like "the negligent communication of a defamatory statement" and argued that in such scenarios, distributors "may also be regarded as participating to such an extent . . . as to be regarded as publishers." *Id*.

Rather than acknowledge that sometimes it may be difficult to determine whether a party is acting as a publisher or as a distributor, *see Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., respecting denial of certiorari), the Fourth Circuit instead held that distributors of online content *necessarily* act as publishers of that same content.

But not every act of distribution "constitute[s] publication." *Zeran*, 129 F.3d at 332. In many circumstances, even online, it is easy to distinguish the two because a distributor acts only as a conduit that "delivers or transmits matter *published by a third person*." Restatement (Second) of Torts § 581 (1977) (emphasis added). There is also a distinction in how an entity can react to allegedly illegal material. *See* William E. Buelow III, *Re-Establishing Distributor Liability on the Internet*, 116 W. VA. L. REV. 313, 345 (2013). A platform generally acts like a publisher if it can directly edit or alter the specific offending material, but it acts like a distributor if all it can do is remove the post or video in its entirety. *See id.*

More importantly, Congress itself distinguished between publisher and distributor liability, and courts cannot subsequently interpret that distinction into oblivion. As noted above, "Congress enacted the [Communications Decency Act] in response to" *Stratton Oakmont,* which itself expressly distinguished between publisher and distributor liability based on *who* was responsible for publication, *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009). On the way to holding that the defendant internet service provider was a "publisher rather than a distributor," the court in *Stratton Oakmont* contrasted liability where the provider "republishes . . . as if he had originally published" (*i.e.*, "publisher"-based liability), with distributor liability. *Stratton Oakmont*, 1995 WL 323710, at *3 ("In contrast [to the liability of republishers], distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue.").

It was error for *Zeran* to disregard the finely tuned distinction that both Congress and *Stratton Oakmont* had employed. *See Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., respecting denial of certiorari).

Second, having vastly expanded the scope of conduct covered by § 230(c)(1), *Zeran* committed another error by granting immunity for that broad group. As explained above, § 230(c)(1) does not immunize any conduct at all. It simply directs that certain conduct be treated as falling into one of two different liability regimes, neither of which necessarily results in immunity for the defendant.

This judicially imposed immunity was premised largely on non-textual statutory "purposes" and on the

"Internet context." 129 F.3d at 333. "If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice" of illegal third-party content on their platform. *Id*. While it "might be feasible for the traditional print publisher" or distributor to handle the management of such potentially illegal content, the court reasoned, "the sheer number of postings on interactive computer services would create an impossible burden in the Internet context." *Id*. "Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes," the court concluded that Congress did not "intend[]" to leave platforms exposed to distributor liability in § 230(c)(1). *Id*.

The Fourth Circuit seems to have believed that the text of § 230(c)(1) was not strong enough, and that Congress must have meant to go further and provide immunity—despite the notable omission of any such language in the statutory text and the fact that Congress did expressly provide immunity for a narrow set of conduct in the very next subsection. But as this Court has recognized in other contexts, "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012).

Third, *Zeran* asserted that providers would be entitled to immunity even for content they had "alter[ed]." 129 F.3d at 330. But that conflicts with another provision in the Communications Decency Act, which states that an "information content provider" includes anyone "responsible, in whole or *in part*, for the creation or development" of the content, 47 U.S.C.

§ 230(f)(3) (emphasis added), and "[n]owhere does [§ 230(c)(1)] protect a company that is itself the information content provider," *Malwarebytes*, 141 S. Ct at 16 (Thomas, J., respecting denial of certiorari). Stated another way, content created by a platform is not third-party content at all, and thus § 230(c)(1) does not apply, contrary to *Zeran*. *See* Candeub, *Reading Section 230 as Written*, *supra*, 1 J. FREE SPEECH L. at 151–52.

2. *Zeran*'s Flawed Analysis Has Led to the Widespread Erroneous Conferral of Immunity.

Numerous circuits, including the Ninth Circuit as recognized in the decision below, have readily adopted *Zeran*'s flawed logic, and the results confirm just how far those courts have strayed from the text of § 230(c)(1).

Courts have invoked § 230(c)(1) to find immunity from a wide variety of causes of action that pertain in any way to online content, under the doubly erroneous view that all such claims treat platforms as publishers and that any publication activities are entitled to immunity. This includes claims that online providers engaged in or encouraged housing discrimination, *see Chi. Law. Comm. for Civil Rts. Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008); negligence, *see Green v. Am. Online (AOL)*, 318 F.3d 465, 470–71 (3d Cir. 2003); securities fraud and cyberstalking, *see Universal Comm. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420–22 (1st Cir. 2007); and sex trafficking, *see Jane Doe*, 817 F.3d at 16–21. The Ninth Circuit has even provided immunity for content that the service provider itself had altered, which is not covered by § 230(c)(1) at all. *See Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

A recent case demonstrates just how expansively courts continue to interpret § 230(c)(1) to provide Big Tech platforms with almost unquestioned immunity. In *Anderson v. TikTok, Inc.*, No. 22-cv-1849, 2022 WL 14742788 (E.D. Pa. Oct. 25, 2022), the district court relied on Third Circuit precedent to hold that the video-sharing platform TikTok was immune under § 230(c)(1) for distributing videos of teenagers engaged in the "Blackout Challenge," where "users strangle themselves with household items and then encourage others to do the same." *TikTok*, 2022 WL 14742788, at *2. The plaintiff argued that her claims—for design defects and failure to warn—properly treated TikTok as a distributor (not a publisher) in accordance with § 230(c)(1), but the court held that the claims actually required treating TikTok as a publisher because the case "involves decisions related to the . . . distribution of [third-party] content." *Id.* at *7.

Invoking *Zeran*, the court erroneously conflated publication and distribution to the point that it covered almost anything an internet service provider does (or does not do) with respect to content. *Id* at *4. And then, also invoking *Zeran*, the court compounded that error by holding that § 230(c)(1) grants immunity against any claims falling within that overbroad scope of "publication." *See id*. at *4–7.

* * *

Some courts have justified their expansive misreading of § 230(c)(1) on the premise that "section 230 should not be construed grudgingly." *Jane Doe*, 817 F.3d at 18. But a statute should be construed according to its "ordinary, contemporary, common meaning"—neither "grudgingly" nor expansively. *Sw. Airlines Co. v. Saxon,* 142 S. Ct. 1783, 1788 *(2022)*. Anything beyond that common meaning is a policy decision for Congress, not the courts. *See Malwarebytes*, 141 S. Ct. at 18 (Thomas, J., respecting the denial of certiorari) (stating that courts have "filter[ed] their decisions through the policy argument that Section 230(c)(1) should be construed broadly") (internal quotation marks omitted).

This Court should hold that the ordinary, contemporary, common, and natural reading of § 230(c)(1) provides only a definitional statement for a limited set of cases, rather than the "nearly impenetrable super-First Amendment" that the lower courts have construed it to mean. JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 95 (2019).

II. Restoring § 230(c)(1)'s Proper Scope Will Reinvigorate § 230(c)(2)(A), Which Provides Immunity in Limited Circumstances.

As noted above, one of the strongest arguments supporting the view that § 230(c)(1)'s definitional statement does not provide immunity is that Congress expressly provided immunity in the very next subsection, § 230(c)(2), which precludes liability where internet service providers "in good faith" remove material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A).

But few courts have had to interpret § 230(c)(2) because it has been rendered irrelevant by their erroneous transformation of § 230(c)(1) into a super-immunity provision. *See* Josh Hawley, the Tyranny of

Big Tech 128 (2021) ("[W]hen the dust had cleared from this strenuous bout of judicial renovation, Section 230 had been completely rewritten."). For example, when an organization for Sikhs alleged that Facebook used race to determine who could access the group's Facebook page, the district and circuit courts both analyzed the claim under § 230(c)(1), rather than § 230(c)(2), even though the latter directly addresses restriction of access to content. *See Sikhs for Just., Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094–95 (N.D. Cal. 2015), *aff'd*, 697 F. App'x 526 (9th Cir. 2017). Given the courts' longstanding erroneous interpretation of § 230(c)(1), they unsurprisingly granted immunity, even though restricting access to a Facebook page on the basis of race is in no way a "good faith" restriction of content on par with removing obscenity, as § 230(c)(2) would require before a court could confer immunity.

Restoring § 230(c)(1) to its proper scope would revitalize § 230(c)(2)'s narrow grant of immunity, where "Congress expected that tech companies would carry others' speech without favor to any specific viewpoint, and would keep defamatory and other unlawful speech off their platforms." Senator Ted Cruz, Letter to Ambassador Robert Lighthizer, United States Trade Representative, Nov. 1, 2019, *available at* https://tinyurl.com/2kuhrrpx. But because of courts' erroneous expansion of § 230(c)(1), large platforms currently enjoy immunity even for censoring content with which they simply disagree on political grounds.

And Big Tech companies have not been shy about "routinely censor[ing] lawful—overwhelmingly conservative—speech with which they disagree. From Twitter locking the account of Senate Majority Leader Mitch

McConnell's campaign to YouTube demonetizing a conservative comedian's account following pressure from the left, the examples of censorship are as disturbing as they are numerous." Press Release, Senator Ted Cruz, *Sen. Cruz Calls on USTR to Eliminate Inclusion of Special Protections for Big Tech in U.S. Trade Deals* (Nov. 1, 2019).[2]

But removing or restricting content because of the politics of the user is not "good faith" and thus not entitled to immunity under § 230(c)(2). As scholars have argued, "a pattern of dishonest explanation of the basis for removal—for instance, referring to facially

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[2] *See also, e.g.*, Chuck Grassley, Opinion, *'Big Tech' Is Censoring Conservatives*, THE GAZETTE (Feb. 28, 2022), https://tinyurl.com/2sesc4vb ("I was surprised to learn that Facebook recently flagged a news article I posted on one of my Facebook pages as 'false information.'"); Mike Lee, Opinion, *Big Tech Companies Falsely Claim No Bias Against Conservatives—They May Be Violating Law*, FOX NEWS (Oct. 29, 2020), https://tinyurl.com/2e7u7sx5; Diana Glebova, *Zuckerberg Admits Facebook Suppressed Hunter Biden Laptop Story Ahead of 2020 Election*, NAT'L REVIEW (Aug. 26, 2022), https://tinyurl.com/z5v9mwjz; Matt Schlapp, Opinion, *Big Tech Keeps Trying to Silence Conservatives and It Won't Stop Until We Stop Them*, FOX NEWS (Mar. 30, 2022), https://tinyurl.com/2tr4rnnx (discussing YouTube banning videos of Donald Trump's speech at the 2022 Conservative Political Action Conference); Felicia Somnez & Amy B. Wang, *YouTube Suspends Ron Johnson for a Week After GOP Senator Touts Questionable Drugs to Fight COVID-19*, WASH. POST (June 11, 2021), https://tinyurl.com/ms44ckzz; Avi Selk, *Facebook Told Two Women Their Pro-Trump Videos Were 'Unsafe'*, WASH. POST (Apr. 10, 2018), https: //tinyurl.com/2fyshj46; Erik Schelzig, *Twitter Shuts Down Blackburn Campaign Announcement Video*, AP NEWS (Oct. 9, 2017), https://tinyurl.com/2rv3v577; Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016), https://tinyurl.com/4xjdhbnz.

neutral terms of service while covertly applying them in a viewpoint-discriminatory way—might be inconsistent with 'good faith,' which is often defined as requiring an honest explanation of one's position." Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175, 177 (2021).

Moreover, conservative viewpoints on social and political matters do not rise to the level of being "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," § 230(c)(2)(A), and thus removal of such content is not eligible for immunity at all. Platforms sometimes invoke the catch-all "otherwise objectionable," but the canon of *ejusdem generis* squarely rejects that view. That canon provides that "[w]here general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 574 U.S. 528, 545 (2015) (cleaned up).

Accordingly, § 230(c)(2)'s "otherwise objectionable" phrase must mean material that is in the same league as "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing" material. 47 U.S.C. § 230(c)(2)(A). Those examples largely track categories of especially egregious telecommunications speech that were commonly believed to be regulable by the government. *See* Candeub & Volokh, *supra*, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. at 180–83. But so-called misinformation, "'disinformation,' 'hate speech,' 'misgendering,' [and] 'religious hatred'" do not rise to that level—and thus removal or restriction of such content does not qualify for immunity under

§ 230(c)(2). Candeub, *Reading Section 230 as Written*, *supra*, 1 J. FREE SPEECH L. at 143.

One court has gotten it right, however. In upholding Texas's social media law H.B. 20, which generally bars social media platforms from removing posts made by users in Texas based on their viewpoints, the Fifth Circuit confirmed that "read in context, § 230(c)(2) neither confers nor contemplates a freestanding right to censor," but rather "only considers the removal of limited categories of content, like obscene, excessively violent, and similarly objectionable expression"—and thus "says nothing about viewpoint-based or geography-based censorship." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 468 (5th Cir. 2022).

Finally, online platforms' own behavior confirms the inapplicability of § 230(c)(2) to censoring conservative viewpoints. Platforms often remove certain material when posted by conservatives, while consciously leaving the same type of material online when posted by liberals or others.[3] Content-removal decisions that turn on the identity of the speaker, rather than the nature of the content, are not covered

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[3] *See, e.g.*, Marco Rubio, Opinion, *We Must Stop Silicon Valley-Democrat Collusion Before Conservatives Are Silenced for Good*, FOX NEWS (July 28, 2021), https://tinyurl.com/yc8d3nap (noting the "hypocrisy" of social media companies censoring Covid-19 vaccine skepticism when "President Biden himself cast suspicion on the efficacy of the vaccines . . . [and] Vice President Kamala Harris . . . declar[ed] that '[i]f Donald Trump tells us that we should take it, I'm not taking it.'"); Michael Rubin, *Why Does Big Tech Censor Conservatives and Not Terrorists*, AM. ENTERPRISE INST. (Mar. 3, 2021), https://tinyurl.com/wx9wm968; Brian Flood, *Twitter, Facebook Have Censored Trump 65 Times Compared to Zero for Biden, Study Says*, FOX NEWS (Oct. 19, 2020), https://tinyurl.com/3u3yd4us.

by § 230(c)(2) at all and also confirm that platforms do not view the content as on par with obscenity and excessive violence.

Once the Court restores the proper interpretation of § 230(c)(1), the important but narrow immunity that Congress conferred in § 230(c)(2) will regain its place of prominence in suits about online service providers' removal and restriction of content.

III. The Court Should Correct the Ninth Circuit's Flawed Interpretation of § 230(c) and Remand for Reevaluation of Petitioners' Claims.

The courts below relied on the misguided *Zeran* line of cases to hold that Google is immunized from Petitioners' claims under the Anti-Terrorism Act because § 230(c)(1) allegedly precludes liability for any challenge to a platform's "editorial decisions" or "traditional editorial functions." Pet.App.39a, 244a.

The lower courts' analysis was so thoroughly infected by their erroneous precedent on § 230(c) that this Court should pronounce the correct view of § 230(c) and then remand for the lower courts to reevaluate Petitioners' claims under the proper framework. *See Force*, 934 F.3d at 84 (Katzmann, C.J., concurring in part and dissenting in part) (arguing the case should be remanded for reevaluation under the correct interpretation of § 230(c)).

In particular, this Court should hold that § 230(c)(1) does not directly provide immunity at all, and it applies only to claims whose elements turn on treating Google as the publisher or speaker of other parties' content. Even for such claims, § 230(c)(1) does not necessarily confer immunity but instead only precludes a court from treating Google as the speaker or publisher of third-party content. Whether that ultimately affects or precludes liability will turn on Petitioners' specific causes of action. But § 230(c)(1) itself does nothing more, nor has Google sought immunity pursuant to the narrow confines of § 230(c)(2).

Amici take no position on whether Petitioners ultimately should prevail, nor on whether algorithms pushing ISIS videos constitute Google's own content or instead remain third-party content. *Amici* contend that those issues would be best addressed afresh by the lower courts after this Court has scraped away the layers of erroneous § 230(c) precedent on which the decisions below relied.

CONCLUSION

The Court should remand so the lower courts can reevaluate Petitioners' claims under the correct interpretation of § 230(c) as pronounced by this Court.

Respectfully submitted,

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December 7, 2022

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE SUGGESTING REVERSAL IN *GONZALEZ, ET AL. v. GOOGLE LLC* (DECEMBER 7, 2022)

IN THE SUPREME COURT OF THE UNITED STATES

REYNALDO GONZALEZ, ET AL.,

Petitioners,

v.

GOOGLE LLC.

No. 21-1333

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

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INTEREST OF AMICUS CURIAE[1]

The State of Texas has an interest in the proper interpretation of Section 230 of the Communications Decency Act. Like other States, Texas asks this Court to correct the lower courts' misapplication of Section 230 in a way that prevents injured citizens from obtaining relief for wrongs committed through the Internet. *See* Br. of Tennessee. Those lower-court decisions generally serve to protect bad actors from the consequences of their actions—not to promote the free exchange of ideas on the Internet.

But Texas also has a more specific interest: Internet platforms are relying on Section 230 in other litigation that is likely to come before the Court to defeat a Texas law that protects free speech on the Internet. That litigation presents important questions, and the Court's decision in this case may affect it.

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than the State of Texas contributed monetarily to its preparation or submission. Counsel of record for all parties received notice of amicus's intention to file this brief. The State of Texas takes no position on whether petitioners will prevail on the merits of their claims.

SUMMARY OF ARGUMENT

I. Section 230 directs courts not to treat the provider of an interactive computer service as "the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). That rule of construction is irrelevant here, where petitioners allege that Google's *own* recommendations aided and abetted the acts of terror perpetrated by ISIS. Neither those recommendations nor the algorithms that produced them were provided by "another" party. Google went beyond passively hosting content. It actively promoted certain videos over others. Section 230 does not shield it from liability for doing so.

Section 230's statutory history confirms that it is inapplicable here. Congress enacted Section 230 as part of a broader statutory scheme to limit children's access to Internet pornography. Section 230 does that by allowing Internet platforms to remove pornography (and similar content) without risk of being called to account for the content they *fail* to remove. In that way, Section 230 reflects a deliberate choice by Congress to treat Internet platforms like telephone companies, which have long had a warrant to remove certain content without becoming liable for everything else that occurs on their platforms. But Section 230's historical context does not suggest that Congress intended the statute to provide a blanket immunity for any claim tangentially related to third-party content.

II. Overbroad judicial interpretations of Section 230 have harmed States and their citizens in two ways. *First*, a court infringes state sovereignty whenever it incorrectly holds that Section 230 prevents a State from enforcing its laws. *Second*, a court harms a State's citizens whenever it misapplies Section 230 and improperly prevents those citizens from obtaining redress for wrongs committed online. This Court should stem the tide of those harms by faithfully interpreting Section 230.

III.Social-media giants and their advocates often prognosticate that any restriction on Section 230's reach would result in the end of the digital world as we know it. Those concerns are hyperbolic. A lack of Section 230 protection by no means guarantees liability. Plaintiffs, including petitioners, must still prove their claims. Allowing petitioners' claims here to proceed would not make Google liable for the content of every video it recommends. Rather, Google faces potential liability only if petitioners can demonstrate that recommendations *themselves* amount to "aiding and abetting" terrorism. And even if correctly interpreting Section 230 requires companies like Google to adjust their business models, that does not foretell disaster. Indeed, given rampant online evils like human trafficking and child pornography, such an adjustment may well prove salutary. But if Internet platforms believe the social value of their businesses justifies an immunity broader than that conferred by Section 230's text, that is a trade-off that Congress, rather than the courts, should make.

ARGUMENT

I. Section 230 Does Not Shield Google from Liability for the Recommendations It Provides.

Section 230 prevents a court from treating a provider of "an interactive computer service" (an Internet platform) as the publisher or speaker of information provided by "another information content provider" (an unaffiliated content producer). 47 U.S.C. § 230(c)(1). And it protects a provider that makes a good-faith effort to restrict access to pornography and other content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" from liability for content that it does not restrict. *Id.* § 230(c)(2)(A). But it does not confer broad immunity on a provider merely because a claim involves third-party content.

Here, petitioners do not allege that Google is directly liable for what the *terrorists* did, but for what *Google* did. According to petitioners, Google actively aided and abetted terrorism by recommending ISIS videos to YouTube users. J.A. 169–70, 173. Because petitioners' claims do not seek to hold Google liable for information provided by another information content provider, Section 230(c)(1) provides Google no protection.

The precedent on which Google relies is conspicuously flawed. It rests principally on a single circuit decision from Section 230's infancy that deviated from that statute's text in a policy-driven and misguided effort to protect then-nascent Internet service providers. That precedent also ignores Section 230's historical context, which shows that Section 230 was enacted to allow web-site operators to remove pornography without risking strict liability for content they do not censor—not to provide operators with a shield so expansive that it approaches the protections of sovereign immunity. Judicial decisions expanding Section 230's protections beyond its text have instead improperly immunized online businesses from liability for facilitating such heinous acts as child sex trafficking and international terrorism, as well as invidiously discriminating among who may use their services.

As a matter of first impression, this Court should recognize the scope of the statute's plain language, backed up by the context that framed its enactment. That is the only way to honor the delicate balance that Congress struck between fostering the Internet's growth and ensuring that growth does not jeopardize the most vulnerable and impressionable Americans.

A. Section 230's text provides no protection for Google's recommendations.

Entitled "Protection for private blocking and screening of offensive material," Section 230 limits the liability of providers of an interactive computer service in targeted ways. Its centerpiece is subsection (c), "Protection for 'Good Samaritan' blocking and screening of offensive material." Subsection (c)(1) 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." "[I]nformation content provider" is defined by subsection (f)(3) as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Google argues that Section 230(c)(1) bars petitioners' claims. *E.g.*, Br. in Opp. 20. It does not.

Petitioners allege that Google repeatedly and knowingly recommended ISIS videos to YouTube users. J.A. 169, 173. According to petitioners, those recommendations were made because the ISIS videos were selected by automated algorithms created by Google. J.A. 173. Petitioners seek damages under a federal law that creates liability "as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed" an act of international terrorism. 18 U.S.C. § 2333(d)(2); *see* J.A. 176–78. Petitioners thus seek to hold Google liable for taking affirmative acts—aiding and abetting terrorists—by recommending terrorist videos based on algorithms that Google created. Because those recommendations are not "information provided by another information content provider," Section 230(c)(1) offers Google no protection.

A recent decision of the Supreme Court of Texas, *In re Facebook, Inc.*, 625 S.W.3d 80 (Tex. 2021) (orig. proceeding), is instructive. In that case, human-trafficking survivors brought claims for "negligence, negligent undertaking, gross negligence, and products liability based on Facebook's alleged failure to warn of, or take adequate measures to prevent, sex trafficking on its internet platforms." *Id.* at 83. The plaintiffs also brought claims "under a Texas statute creating a civil cause of action against those who intentionally or knowingly benefit from participation in a sex-trafficking venture." *Id.* The court (largely relying on federal circuit authority that it recognized as dubious) held that Section 230 barred the plaintiffs' common-law claims. *Id.* at 93–96. But the court also held that the plaintiffs' statutory claims could proceed. *Id.* at 96–101. The court reasoned that the statutory claims did not "treat Facebook as [someone] who bears responsibility for the words or actions of third-party content providers," but instead treated Facebook "like any other party who bears responsibility for its *own* wrongful acts." *Id.* at 98. And the court found it "highly unlikely that Congress . . . sought to immunize those companies from *all* liability for the way they run their platforms, even liability for their own knowing or intentional acts as opposed to those of their users." *Id.*

Like the statutory claims in *Facebook*, but unlike the claims at issue in many cases in which courts have held that Section 230 barred relief, petitioners' claims do not seek to hold Google liable for "information provided by another information content provider." 47 U.S.C. § 230(c)(1). That is, petitioners' claims do not seek to hold Google liable merely for harm caused by third-party information. *Cf., e.g.*, *Bennett v. Google, LLC*, 882 F.3d 1163, 1164 (D.C. Cir. 2018) (plaintiff's claim was based on an allegedly defamatory message posted by a third party); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (same). Instead, the harm alleged by petitioners is death resulting from an act of international terrorism. J.A. 155, 178, 181. Federal law creates primary liability for the attack. 18 U.S.C. § 2333(a). And it creates secondary liability for aiding and abetting it. *Id.* § 2333(d)(2).

Petitioners' claims, therefore, are two steps removed from any third-party posts. They seek to hold Google secondarily liable for a terrorist act. And their theory is that Google aided and abetted the terrorists by actively and voluntarily recommending ISIS videos. Those recommendations were provided by Google, not by ISIS or any other information content provider. Petitioners thus allege that Google's own acts—the recommendations it provided—make it secondarily liable for physical actions that the terrorists took, not for posting information online. Whether that theory entitles petitioners to relief remains to be seen. But regardless of whether petitioners can link the video recommendations and the murder on the merits, Section 230 plays no role here.

Of course, Google's liability under petitioners' theory does, in a limited respect, depend on third-party content. If ISIS videos did not exist on its platform, Google could not face potential aiding-and-abetting liability for recommending those videos. But Section 230 does not preempt petitioners' claims merely because third-party content is somehow involved. "[Section 230(c)(1)] does not insulate a company from liability for all conduct that happens to be transmitted through the internet. Instead, protection under § 230(c)(1) extends only to bar certain claims, in specific circumstances, against particular types of parties." *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 129 (4th Cir. 2022); *see Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016) (noting that Section 230 "does not provide a general immunity against all claims derived from third-party content").

The court of appeals rejected petitioners' argument that "Google does more than merely republish content created by third parties." Pet. App. 31a. It did so by applying a "material contribution" test, according to which a website operator "creat[es] or develop[s]" third-party content when it alters the content in a way that materially contributes "*to its alleged unlawfulness*." Pet. App. 32a (quoting *Fair Hous. Council of*

San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008) (en banc)). But this Court need not address the propriety of the material-contribution test for determining whether the alteration of third-party content makes a defendant an information content provider under Section 230(f)(3), because Google's recommendations were solely its own acts. It is those recommendations, not Google's hosting or alteration of ISIS's videos, that are at issue here.

The court of appeals also erred in concluding that Google's conduct here is not outside of Section 230's scope because Google's "algorithms do not treat ISIS-created content differently than any other third-party created content." Pet. App. 37a. That is a *merits* determination. And that reasoning is flawed because a recommendation, by its very nature, treats some content differently from other content. There are a vast number of videos on YouTube. Google's algorithms sort through them and select a handful of videos to recommend to a given user at a given time. That is the *opposite* of treating all content the same. And Section 230(c)(1) does not shield Google's decision to go beyond merely hosting content and to instead promote certain videos over others.

B. Section 230's history confirms that it does not shield Internet platforms from the consequences of their own conduct.

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. Supplementing legislation that criminalized the sharing of pornography, Section 230 gave Internet companies telephone-like liability protections, which allowed them to voluntarily remove pornography even as they carried countless other forms of content. This was necessary because an early-Internet judicial decision concluded that online platforms that remove *any* content become liable for *all* of it. Cases decided shortly after Section 230's enactment, however, badly distorted this statutory framework, requiring this Court's intervention.

1. Section 230 was enacted as part of the Telecommunications Act of 1996, the "major components of [which] have nothing to do with the Internet." *Reno v. ACLU*, 521 U.S. 844, 857 (1997). The exception was "Title V—known as the 'Communications Decency Act of 1996.'" *Id.* at 858. That Act, in turn, provided two independent but overlapping legislative solutions for how to limit children's access to Internet pornography.

First, Senator Jim Exon's proposal, ultimately enacted as Section 502 of the Telecommunications Act, 47 U.S.C. § 223(a), (d), took a heavy-handed approach to what was then considered a severe problem of pornography on the Internet. Time Magazine "pour[ed] fuel" on this incendiary issue when it incorrectly reported that over 80% of images available on early Internet platforms were pornographic. 141 Cong. Rec. S9019 (daily ed. June 26, 1995) (statement of Rep. Grassley) (reprinted version of the story). That story was introduced in Congress. *Id.* And "[t]he study became the source of endless articles and editorials." Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 54 (1996). In order "to protect minors from 'indecent' and 'patently offensive' communications on the Internet," *Reno*, 521 U.S. at 849, Senator Exon's legislation imposed criminal penalties on persons who send such images to minors or who "knowingly permit[] any telecommunications facility under his control to be used" for such activity "with the intent that it be used for such" activity, *id.* at 859–60; *see* Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, § 502.

Second, some representatives likewise recognized the need to protect children from pornography but favored a lighter legislative touch. They proposed what became Section 509 of the Telecommunications Act, and later Section 230, "as a substitute for the Exon" approach. *Reno*, 521 U.S. at 858 n.24. Instead of being coercive, Section 230 more gently encouraged Internet platforms to be "Good Samaritans" by voluntarily removing pornography. 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox, one of the bill's sponsors). To do that, it provided legal *protection* to Internet platforms that opted to remove such content. That protection was important in the light of a state-court decision from New York that threatened to expose Internet platforms that remove content to tremendous legal liability for what they did *not* remove. *Id.*

2. The New York case—*Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995)—misapplied "specific background legal principles" about how Internet platforms should be liable for their users' speech. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., statement respecting denial of certiorari). Specifically, the court applied *newspaper*-type

liability to an Internet platform's decisions about what to transmit, even though Internet platforms generally bear no resemblance to newspapers. The bill that became Section 230 represented Congress's rejection of that misapplication, providing critical context for how Section 230 operates.

Tort law has long applied different liability standards to speech intermediaries. The classic example is defamation: newspapers and other comparable publishers are generally deemed to be the speakers of any third-party content they carry and are held liable to the same extent as the underlying authors. *See, e.g.*, *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 60–61 (2d Cir. 1980) (explaining that such publishers are "subject to liability just as if [they] had published [the libelous content] originally"). A newspaper, therefore, cannot defend against a defamation action on the ground that some unaffiliated party was the author of the defamation it printed.

Other entities are liable for third-party content they carry only in limited contexts. A telegraph company, for example, could be held liable only in the "rare case[]" in which it "happened to know that the message" it transmitted "was [tortious] or that the sender was acting, not in the protection of any legitimate interest, but in bad faith and for the purpose of traducing another." *O'Brien v. W. U. Tel. Co.*, 113 F.2d 539, 543 (1st Cir. 1940). Telephone companies, meanwhile, are generally regarded as completely immune from liability for the third-party content they carry. *See* Adam Candeub, *Reading Section 230 as*

Written, 1 J. FREE SPEECH L. 139, 146 n.26 (2021) (collecting authorities).[2]

The *Stratton Oakmont* court botched the application of these established liability frameworks to the new Internet medium.[3] In that case, "[a]n early Internet company was sued for failing to take down defamatory content posted by an unidentified commenter on a message board." *Malwarebytes*, 141 S. Ct. at 14 (Thomas, J.). The *Stratton Oakmont* court accepted that Internet platforms generally were "conduit[s]" not legally responsible for their users' speech. 1995 WL 323710, at *3. But it concluded that liability was appropriate there because "the company . . . held itself out as a family-friendly service provider that moderated and took down offensive content." *Malwarebytes*, 141 S. Ct. at 14 (Thomas, J.). In the court's view, the practice of taking down *some* content made the Internet platform liable, just like a newspaper, for all the content it allowed to remain available. *Stratton Oakmont*, 1995 WL 323710, at *3, *4.

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[2] There is some authority for the proposition that telephone companies may be held liable for the "*knowing* transmission" of tortious third-party content. Candeub, *supra*, at 146 n.26. But, because telephone companies (unlike telegraph companies) seldom have the opportunity to review speech *before* it is transmitted, this category of liability, if it exists at all, is exceedingly narrow.

[3] Indeed, after Section 230 was enacted, New York's high court overruled *Stratton Oakmont* because it concluded—consistent with what was by then the prevailing view—that an Internet platform is more analogous to a "telephone company" than a newspaper. *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 542 (N.Y. 1999).

"Congressmen on both sides of the debate"—Senator Exon's side, and those who favored the light-touch approach—"found *Stratton* objectionable." Cannon, *supra*, at 62. That is because the case essentially "create[d] a 'Hobson's choice'" for Internet platforms: they could either "creat[e] 'child safe' areas that expose" their companies to "liability as . . . editor[s], monitor[s], or publisher[s]" of *everything* on their platforms, or they could "do[] nothing," allowing pornography to blight their spaces, "in order to protect [themselves] from liability." *Id.* As a result, "[e]arly platforms . . . claimed they could not offer porn-free environments because of *Stratton Oakmont*." Candeub, *supra*, at 142.

3. "One of the specific purposes of" what became Section 230 was "to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions." H. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) (cleaned up). *Stratton Oakmont*'s Hobson's choice blocked Congress's goal of limiting Internet pornography. Its reasoning also made little practical sense because telephone companies, the closest analogue to Internet companies, had long been allowed to remove certain content without jeopardizing their immunity from liability for other content passing through their wires. *See, e.g*, *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1292 (9th Cir. 1987) (pre-recorded pornographic messages). Likewise for telegraph companies: "If . . . the message is expressed in indecent, obscene or filthy language, then, in our opinion, the telegraph company will be excused from the [obligatory] transmission of any such message." *W. Union Tel. Co. v. Ferguson*, 57 Ind. 495, 498–99 (1877) (stating the common law rule). Section 230 attempted to solve

the Hobson's choice problem by largely adopting the same liability framework for the Internet. *See, e.g.*, Candeub, *supra*, at 146.

For many reasons, prevailing sentiment at the time aptly supported the equivalence between telephones and the Internet. For one, Internet service was generally delivered "through a modem that uses a telephone line to connect to the Internet." *See* Mississippi State University Extension, *Types of Internet Connections*, https://tinyurl.com/dialupconnection (noting that a "dial-up" connection "was the first widely used type of Internet connection").[4]

Additionally, instantaneous communication on Internet platforms most nearly resembled and was regarded as "analogous to a telephone party line, using a computer and keyboard rather than a telephone." *ACLU v. Reno*, 929 F. Supp. 824, 835 (E.D. Pa. 1996) (three-judge panel's findings of fact), *aff'd*, 521 U.S. 844 (1997). That is "because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online." *Id.* at 851–52; *see Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (Easterbrook, J.) ("A web host, like a delivery service or phone company, is an intermediary."). And, after all, Section 230 was enacted as part of the "Telecommunications Act" of 1996—an Act that in most relevant part modified federal law that applied to telephones.

Section 230 codified the telephone-style liability scheme for Internet platforms in two ways. *First*, it provided that "[n]o provider or user of an interactive

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[4] All websites were last accessed on December 7, 2022.

computer service"—*i.e.*, an Internet platform—"shall be treated as the publisher or speaker of any information provided by *another*." 47 U.S.C. § 230(c)(1) (emphasis added). *Second*, it established that this default rule is not displaced if the Internet platform takes action "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." *Id*. § 230(c)(2). That way, a message board like the one at issue in *Stratton Oakmont* could remove pornography without becoming responsible for other potentially tortious material it did *not* remove. Importantly, however, Section 230 offered no protection to "information content providers"—meaning persons or entities "responsible, in whole or in part, for the creation or development of information." *Id.* § 230 (f)(3).

4. Although Section 230 was originally offered as a "substitute" for Senator Exon's legislation, it was (as already noted) ultimately "enacted as an *additional* section of the Act." *Reno*, 521 U.S. at 858 n.24 (emphasis added). Indeed, it provided that nothing in it should "be construed to impair the enforcement of" Exon's language. 47 U.S.C. § 230(e)(1). "As a result, the [two components] were described as fitting together 'like a hand in a glove.'" Cannon, *supra*, at 68. Exon's component criminalized acts of sharing pornography. 47 U.S.C. § 223(a), (d). And Section 230 protected "Good Samaritan[s]" who take it down. *Id.* § 230(c).

5. Two early court decisions had an outsized impact on the interpretation of the Communications Decency Act and continue to have significant distorting effects on how lower courts apply Section 230.

First, in *Reno*, this Court held that Exon's approach ran afoul of the First Amendment because it "effectively suppresse[d] a large amount of speech that adults ha[d] a constitutional right to receive and to address to one another." 521 U.S. at 874. That took the Exon glove off the Section 230 hand.

Second, in *Zeran v. America Online*, 129 F.3d 327, the Fourth Circuit adopted an atextual test for determining when Section 230's protection applies. Specifically, it concluded that "lawsuits seeking to hold an [Internet platform] liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone *or alter* content—are barred." *Id.* at 330 (emphasis added). This ruling ran directly afoul of the provision of Section 230 that expressly maintained liability for those "responsible, in whole or in part, for the creation or development of information." 47 U.S.C. § 230(f)(3). Nevertheless, *Zeran* started a cascade of authority whereby other circuits and state courts adopted the Fourth Circuit's decision, treating it as akin to a decision of *this* Court. *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019) (*Zeran* was a "seminal" decision); Candeub, *supra*, at 154–55 ("with perhaps one exception," the lower courts all follow *Zeran*).

Zeran's capacious conception of Section 230 protection has wrongly immunized Internet platforms from liability in a range of situations, including for their *own* conduct. *See Malwarebytes*, 141 S. Ct. at 16 (Thomas, J.). But Section 230 does not, and was not designed to, protect Internet platforms from the consequences of their own actions. An Internet platform, after all, can remove pornography without committing its own unlawful acts. And the telephone companies to which Internet platforms were compared have historically been liable for their *own* acts and omissions—notwithstanding the absence of liability for their *users*' speech. *See, e.g.*, *Mountain States Tel. & Tel. Co. v. Hinchcliffe*, 204 F.2d 381, 382 (10th Cir. 1953) ("where a telephone company negligently fails to furnish proper telephone facilities"); *Cain v. Chesapeake & Potomac Tel. Co.*, 3 App. D.C. 546, 553 (D.C. Cir. 1894) (holding that a telephone company can be held liable for misleading callers about a subscriber's availability); *Emery v. Rochester Tel. Corp.*, 3 N.E.2d 434, 437 (N.Y. 1936) ("unexplained failure to give any service"); *Chesapeake & Potomac Tel. Co. of Va. v. Carless*, 102 S.E. 569, 570 (Va. 1920) (negligently disconnecting subscribers).

* * *

Far from suggesting that the Court should depart from Section 230's plain text, the statute's history confirms that it means what it says: Section 230 provides targeted protections for platforms that want to censor pornography and other harmful content without being exposed to liability for all third-party content that is not removed. But Section 230 does not "create a lawless no-man's-land on the Internet." *Roommates.com*, 521 F.3d at 1164. And just as acts that aid and abet terrorists "are unlawful when [done] face-to-face or by telephone, they don't magically become lawful when [done] electronically online." *Id.*

II. Judicial Expansion of Section 230 Causes Real-World Harm.

The proper interpretation of Section 230 is no mere academic exercise. By going beyond Section

230's text, courts have harmed States and their citizens in two ways.

First, state sovereignty is infringed when courts improperly hold that Section 230 preempts state law. Section 230(e)(3) provides 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." The stakes for States are therefore high.

For example, Texas recently enacted "a ground-breaking . . . law that addresses the power of dominant social media corporations to shape public discussion of the important issues of the day." *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting from grant of application to vacate stay). That law seeks to preserve free speech on the Internet by preventing the biggest social-media platforms from censoring users based on viewpoint. *Id.*

Trade associations representing the platforms sued the Texas Attorney General, arguing primarily that the law violates the First Amendment. *Id.* In the alternative, the trade organizations, whose members include Google and YouTube, *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1103 (W.D. Tex. 2021), *vacated and remanded sub nom. NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022), have also argued that Texas's law "is preempted" by Section 230, *id.* at 1101. If Section 230 is given an overbroad interpretation, Texas may be unable to enforce its carefully structured scheme for protecting free speech in the digital public square. It would be remarkable for Section 230 to preempt a law like Texas's which, after all, dovetails with one of Section 230's own stated values—free speech. 47 U.S.C. § 230(a)(3). And Texas's law in no way frustrates Section 230's safe harbor for the removal of pornography. It does not impose *any* liability on the Internet platforms for content they fail to remove. And it allows them to continue removing pornography in multiple ways. First, removing pornography will generally (and perhaps always) not constitute "viewpoint" discrimination, and so will not fall within the law's proscription. *NetChoice*, 49 F.4th at 445–46. Second, the law gives Internet platforms an explicit permit to remove unlawful content or content they are "specifically authorized to censor by federal law," even if it would constitute "viewpoint" discrimination. *Id.* at 446. In all events, the Court should not interpret Section 230 in a way here that pre-determines the answer to the questions posed in that case.

Second, courts have prevented the citizens of Texas and other States from obtaining redress for their injuries. Courts have strayed so far from the statute's text that they now extend immunity to online platforms even when the plaintiff is not "trying to hold the defendants liable 'as the publisher or speaker' of third-party content" but only for "the defendant's own misconduct." *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J.).

For example, in *Jane Doe No. 1 v. Backpage.com, LLC*, victims of sex trafficking alleged "that Backpage, with an eye to maximizing its profits, engaged in a course of conduct designed to facilitate sex traffickers' efforts to advertise their victims on the website." 817 F.3d 12, 16 (1st Cir. 2016). The plaintiffs further alleged that "Backpage's expansion strategy involved the deliberate structuring of its website to facilitate sex trafficking," that "Backpage selectively removed certain postings made in the 'Escorts' section (such as postings made by victim support organizations and law enforcement 'sting' advertisements) and tailored its posting requirements to make sex trafficking easier," and that Backpage removed metadata from uploaded photographs to protect traffickers. *Id.* at 16–17.

As a result of being trafficked through Backpage, one plaintiff was allegedly raped over 1,000 times. *Id.* at 17. Yet the court embraced a "broad construction" of Section 230 and an admittedly "capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party." *Id.* at 19. The court focused on "but-for" causation—that is, there would have been no harm "but for the content of the postings," *id.* at 20—and held that each decision Backpage made, even if intended to facilitate sex trafficking, was undertaken as a "publisher" and therefore entitled to protection under Section 230, *id.* at 20–21.

The attorneys general of 44 States, the District of Columbia, and two Territories have pointed out to Congress that courts have interpreted Section 230 too broadly and reached "the perverse result" of protecting those who knowingly profit from illegal activity. Letter from Nat'l Ass'n of Att'ys Gen. to Cong. Leaders (May 23, 2019), https://tinyurl.com/naagletter2019. For these reasons, it is critical that the Court faithfully construe Section 230 and avoid the interpretive errors made by many lower courts. *See* Br. of Tennessee.

III. Faithfully Interpreting Section 230 Will Neither Render It a Nullity nor Threaten the Internet.

Google insists that a holding from this Court that Section 230 does not bar petitioners' claims would make Section 230 "a dead letter" and "would threaten the basic organizational decisions of the modern internet." Br. in Opp. 22. Google is wrong.

First, neither petitioners nor the State of Texas suggest that Section 230 offers Google and other online platforms no protections. It certainly does. Section 230 shields Google from claims seeking to hold it liable as though it had spoken or published the myriad videos it hosts, and it allows Google to maintain that shield even when it chooses to censor pornography and similar offensive content. Section 230's protections would still fully honor Congress's decision that Internet platforms *not* be treated like newspapers, for example.

Second, as petitioners recognize, recommending content does not make a platform liable for the recommended content, but only for the recommendation. *See* Pet. Br. 28–29. That distinction is subtle but significant because it could affect—among other things—questions of causation and the extent of liability. Here, recommending ISIS videos potentially exposes Google to aiding-and-abetting liability because *the recommendations themselves* are allegedly unlawful. And petitioners must show that the *recommendations themselves* caused their alleged harm. By contrast, if the alleged offense—or the act that proximately caused petitioners' harm—were creating and posting terrorist recruiting videos, Google would not be liable. Similarly, Google would not become liable for defamation by recommending a defamatory video. Holding Google liable for the contents of a third-party video would violate Section 230(c)(1)'s prohibition on treating Google "as the publisher or speaker of any information provided by another information content provider." Holding Google liable for its own recommendations does not.

Third, a lack of protection from Section 230 does not mean that Google will be liable for these or any other recommendations. "Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place." *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J.). Plaintiffs must still prove their cases. *See id.* Here, for example, it may be that recommending ISIS videos does not constitute aiding and abetting the terrorists "by knowingly providing substantial assistance." 18 U.S.C. § 2333 (d)(2). A lack of Section 230 protection just means that a court can consider that question. Honoring Congress's enacted language will result in a new status quo that gives platforms and consumers alike ample protections from liability and abuse.

More fundamentally, Google assumes that "the basic organizational decisions of the modern internet"—which were enabled only by an overbroad interpretation of Section 230—are desirable. Br. in Opp. 22. But it is highly debatable that "the 'Internet as we know it' is . . . what we want it to be, particularly when it comes to sex trafficking, pornography, child sex-abuse images, and exploitation." Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL'Y 553, 554 (2018). "It is clear that, whatever § 230 did for the legitimate digital economy, it also did for the illicit digital economy." *Id.* And Section 230's overbroad interpretation has left victims of this illicit behavior unable to obtain adequate redress. If that trade-off is worthwhile, it is one for Congress to make—not for Google to obtain through textually unjustifiable interpretations of Section 230.

CONCLUSION

The Court should reverse the court of appeals' judgment and remand the case for further proceedings.

Respectfully submitted.

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December 2022

REPLY IN SUPPORT OF FACEBOOK'S MOTION TO DISMISS, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA [DE 31] (DECEMBER 28, 2018)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:18-CV-05159-JSW

Date: April 5, 2018
Time: 9:00 a.m.
Dept.: Courtroom 5

Date Filed: August 22, 2018
Trial Date: Not set

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

[TOC & TOA Excluded]

I. Introduction and Summary of Argument

Plaintiff's "conformed" opposition brief is an exercise in misdirection. It fails to effectively rebut the two principal reasons why this lawsuit should be dismissed.

First, the claims are barred by CDA Section 230(c)(1) immunity. Plaintiff's principal argument is that Section 230(c)(1) immunity does not apply when a plaintiff asserts claims that his own content was removed from a platform. No so. Plaintiff fails to cite a single case that actually holds as much because that is not the law. Courts, including those in this District, repeatedly dismiss claims against interactive computer service providers like Facebook when they are sued by users who complain about their own content being taken down. *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088 (N.D. Cal. 2015); *Lancaster v. Alphabet, Inc.*, 2016 WL 3648608, at *3 (N.D. Cal. July 8, 2016).

Second, putting aside the immunity afforded under the CDA, Plaintiff's individual causes of action suffer from their own defects, all of which require dismissal. Plaintiff has failed to address Facebook's arguments (or the relevant case law), but instead urges the Court to accept his bald assurances, supported by unexplained string citations, that the Complaint is "replete with detailed allegations." *See, e.g.*, Opp. at 13, 14. Plaintiff's inability to explain in any coherent way how his "detailed allegations" state any valid claim for relief simply confirms that his claims are legally baseless.

For the reasons set forth below and in Facebook's opening brief, the Court should dismiss the Complaint in its entirety without leave to amend.

II. Argument

A. Section 230(c)(1) Bars Plaintiff's Complaint in its Entirety

1. Facebook's Communications Decency Act defense is properly considered on a motion to dismiss

As a preliminary matter, Plaintiff improperly suggests that Facebook's CDA Section 230 defense requires discovery and is properly considered only on a motion for summary judgment. Opp. at 2-3. But courts routinely hold that if the elements of a defense are apparent from the face of a complaint, then resolution of the defense on a motion to dismiss is proper.[1] And as explained in Facebook's opening papers and further below, each of the requirements needed to trigger the protections under the CDA *is* apparent on the face of Plaintiff's Complaint, namely that (i) Facebook is an interactive computer service provider; (ii) the content at issue came from a third party; and (iii) Plaintiff's

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[1] *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1103-04 (N.D. Cal. 2011) ("[t]he assertion of an affirmative defense properly may be considered on a Rule 12(b)(6) motion where the defense is apparent from the face of the [c]omplaint") (citing *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1200 n. 5 (N.D. Cal. 2009) (internal citation omitted); *Jones v. Bock*, 549 U.S. 199, 215 (2007) (finding "[w]hether a particular ground for opposing a claim may be the basis for dismissal for [a 12(b)(6) motion] depends on whether the allegations in the complaint suffice to establish that ground. . . . ").

claims all seek to treat Facebook as the publisher of various content. Courts in the Ninth Circuit and this District routinely dismiss lawsuits against interactive computer service providers given the protections afforded under the CDA.[2] This is especially so given that Congress enacted the CDA not just to afford protections to service providers but to ensure that those protections guard against protracted litigation.[3] In short, resolution of the CDA Section 230 defense is appropriate at the pleading stage and, given what Plaintiff has pled, requires dismissal of Plaintiff's Complaint now.

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[2] *See* Mot. at 4; *Igbonwa v. Facebook, Inc.*, 2018 WL 4907632 (N.D. Cal. Oct. 9, 2018) (granting motion to dismiss under Section 230(c)(1)); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888 (N.D. Cal. 2017) (same); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016) (same) *Sikhs for Justice, Inc.*, 144 F. Supp. at 1094–96 (same); *Levitt v. Yelp! Inc.* ("*Levitt I*"), 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011) (same); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016) (affirming grant of motion to dismiss based on CDA Section 230(c)(1)); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009) (same).

[3] "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) (emphasis in original) (internal quotes and citations omitted). Courts "aim to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from ultimate liability, but also from having to fight costly and protracted legal battles." *Id.* (internal quotations and citations omitted).

2. Each element of the Section 230(c)(1) defense is satisfied

a. Plaintiff concedes that Facebook is an interactive service provider

Plaintiff does not dispute that Facebook is an interactive computer service provider. *See* Opp. at 1, 4. Accordingly, the first requirement for Section 230(c)(1) immunity is satisfied.

b. Plaintiff concedes that the content at issue was provided by someone other than Facebook

The second requirement for Section 230(c)(1) immunity is that the content at issue must come from someone other than Facebook. *See, e.g., Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119, 1125 (9th Cir. 2003) (Section 230(c)(1) "precludes treatment as a publisher or speaker for '*any* information provided by *another* information content provider.'" (emphasis in original) (quoting 47 U.S.C. § 230(c)(1)). Plaintiff repeatedly concedes that he (not Facebook) is the provider of the content at issue. He asserts that "this lawsuit is about the 'content provider' (Fyk) pursuing an 'interactive computer service' (Facebook)." Opp. at 1; *see also id.* at 4 ("This case is about the content of a first-party (Fyk) being wrongfully destroyed by an 'interactive computer service' (Facebook)."); Summary of Argument (Facebook is not immunized from "liability concerning content published or spoken by <u>the</u> 'content provider' (Fyk)") (emphasis in original). Accordingly, the second requirement is satisfied as a matter of law.

Plaintiff advances two arguments in response. First, he contends that Section 230(c)(1) applies only when the content at issue was provided by someone other than the plaintiff. Opp. at 3-6. Second, he urges the Court to deny Facebook's motion on the basis that *Facebook* is itself an "information content provider." *Id*. at 6-7. Each of these arguments fails as a matter of law and should be rejected.

(i) Section 230(c)(1) immunity applies to content provided by Plaintiff

Nothing in the statute or the caselaw supports Plaintiff's flawed argument that Section 230(c)(1) applies only when the content at issue was provided by someone other than the plaintiff. Indeed, this Court has held otherwise. In *Sikhs for Justice, Inc.,* for example, the court held that Section 230(c)(1) barred the plaintiff's Title II claim alleging that Facebook had engaged in "blatant discriminatory conduct by blocking *Plaintiff's content* in the entire India." 144 F. Supp. at 1094–96 (emphasis added). In affirming that ruling, the Ninth Circuit explained that because [the plaintiff], not Facebook, is the party solely responsible for creating and developing the content on [its] webpage, "Facebook cannot be deemed an 'information content provider,' and it is therefore entitled to the immunity conferred under § 230." *See Sikhs for Justice, Inc. v. Facebook, Inc*., 697 F. App'x 526 (9th Cir. 2017) (noting also that the plaintiff sought "to hold Facebook liable as a publisher for hosting, and later blocking, [the plaintiff's] online content)"). Likewise, in *Lancaster v. Alphabet Inc*., this Court held that "§ 230(c)(1) of the CDA precludes as a matter of law any claims arising from Defendants' removal of *Plaintiff's [YouTube] videos*." 2016 WL 3648608, at *3 (emphasis added).[4]

And none of Plaintiff's cases supports his novel proposition that Section 230(c)(1) immunity cannot apply when the content at issue was provided by the plaintiff.

- *Song Fi, Inc. v. Google, Inc.*, 108 F. Supp. 3d 876 (N.D. Cal. 2015): The court did not even mention Section 230(c)(1). Rather, it based its decision entirely on Section 230(c)(2). *Id.* at 882-84.
- *Atlantic Recording Corporation v. Project Playlist, Inc.,* 603 F. Supp. 2d 690 (S.D.N.Y. 2009): The court declined to dismiss the complaint under Section 230(c)(1) only because the claims at issue fell within the carveout for claims based on intellectual property. *Id.* at 702-03 (citing Section 230(e)(2)). There was no suggestion that Section 230(c)(1) immunity is unavailable when plaintiff's own content has been removed.
- *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC,* 521 F.3d 1157 (9th Cir. 2008) There, the Ninth Circuit held that

[4] *See also, e.g., Riggs v. MySpace, Inc.,* 444 Fed. Appx. 986, 987 (9th Cir. 2011) (Section 230(c)(1) immunizes "decisions to delete [plaintiff's] user profiles"); *Mezey v. Twitter, Inc.*, 2018 WL 5306769, at *1 (S.D. Fla. July 19, 2018) (holding that Section 230(c)(1) immunized Twitter from liability for blocking the plaintiff's content; noting that "Plaintiff is the information content provider" of the content at issue "as he created the relevant content associated with his Twitter account").

> Section 230(c)(1) did not apply because *the defendant* was an "information content provider" for the content at issue. 521 F.3d at 1166.[5] Contrary to Plaintiff's contention, the court did *not* hold that Section 230(c)(1) immunity cannot apply when claims are predicated on content provided by the plaintiff.[6]

(ii) Facebook is not an "information content provider" for the content at issue

The Court should likewise reject Plaintiff's argument that Section 230(c)(1) does not apply because Facebook purportedly is an "information content provider." *See* Opp. at 6-7. First, as noted above, it is undisputed that Plaintiff (not Facebook) created the content at issue in this case.

Notwithstanding that concession, Plaintiff contends that Facebook somehow became the "informa-

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[5] In particular, the court explained that "[b]y requiring subscribers to provide the [discriminatory] information as a condition of accessing its service, and by providing a limited set of pre-populated answers, [the defendant] becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information." *Fair Housing Council*, 521 F.3d at 1166; *see also id*. at 1167.

[6] In *e-ventures Worldwide, LLC v. Google, Inc*., 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017), the court specifically noted that courts in the Ninth Circuit "have found that CDA immunity [can] attach[] when the content involved was created by the plaintiff." *Id*. at *3 (citing *Sikhs for Justice*, 144 F. Supp. 3d at 1093). To the extent the *e-ventures Worldwide* court applied a different understanding, its decision is contrary to the plain language of the statute and inconsistent with reasoned decisions by courts in this District and elsewhere.

tion content provider" because, after Plaintiff sold his Facebook pages to a competitor, Facebook purportedly "published*" the same content*. Opp. at 7. Not so. An interactive service provider does not become an "information content provider," for purposes of the CDA, when it publishes content created by third parties—indeed, Section 230(c)(1) was intended to provided immunity in this precise scenario. *See, e.g.*, *Jurin v. Google Inc.,* 481 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010) ("The CDA provides complete immunity to any 'provider or user of an interactive computer service' from liability premised on 'information provided by another 'information content provider.'").

Not surprisingly, Plaintiff's cases all involve the fundamentally different situation in which *the defendant* allegedly had created and/or developed the content at issue. In *Fraley v. Facebook, Inc*., for instance, the plaintiffs accused Facebook of "*creating and developing commercial content* that violates their statutory right of publicity" through its "Sponsored Story" feature. 830 F. Supp. 2d 785, 801 (N.D. Cal. 2011) (emphasis added). Specifically, the plaintiffs alleged that Facebook "creates content" by translating "members' actions, such as clicking on the 'Like' button on a company's page, into the words 'Plaintiff likes [Brand],'" and further combining that text with Plaintiff's photograph, the company's logo, and the label "Sponsored Story." *Id*. at 802. The court held that Facebook could be considered an "information content provider" under those particular circumstances because it allegedly had taken users' names, photographs and likenesses "to *create new content* that it publishes as endorsements of third-party products or services." *Id*. at 801 (emphasis added); *see also id*. at 802. Here, in contrast, the Complaint does not allege any injury based on the Sponsored Story feature, nor does Plaintiff allege that Facebook created any content whatsoever.

In *Perkins v. LinkedIn Corporation*, on which Plaintiff also relies, the court held that LinkedIn was not immune from suit under Section 230(c)(1) because it allegedly was "*solely responsible for the creation and development*" of the content at issue. 53 F. Supp. 3d 1222, 1247 (N.D. Cal. 2014) (emphasis added) (noting also that each reminder email at issue allegedly "was new, original, and unique content created and developed in whole or in part by LinkedIn").

In *Fair Housing Council*, as noted above, the court held that Section 230(c)(1) immunity did not apply because the defendant had developed the content at issue. Here, in contrast to *Fair Housing Council, Fraley*, and *Perkins*, there is no comparable allegation that Facebook created or developed *any* of the content at issue. To the contrary, Plaintiff has repeatedly confirmed that "[t]his case is about the content of a first party (Fyk)." Opp. at 4.

Moreover, to the extent Plaintiff contends that Facebook's alleged placement of sponsored advertisements in News Feed makes Facebook an "information content provider" (*see* Opp. at 7-8), that contention has no basis in law or fact. Plaintiff does not allege that Facebook created or developed any content for those advertisements. Moreover, courts have consistently held that interactive service providers, like Facebook, do not become "information content providers" simply by placing advertisements, or rearranging content, created by others. *See Pennie,* 281 F. Supp. 3d at 890–91 (rejecting Plaintiff's contention that the defendants (including Facebook) "c[ould] be held liable as creators of content, rather than merely interactive service providers, because [they] select advertisements to pair with content on their services . . . based on what is known about the viewer and what the viewer is looking at"); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1167–68 (N.D. Cal. 2017) (holding that Google could not be held liable as an "information content provider" by allegedly selecting advertisements "to be displayed alongside user content based on information it gathers about the viewer and the posting"; noting that plaintiff's "theory finds no support in the case law"); *see also, e.g., Levitt I*, 2011 WL 5079526, at *6; *Jurin*, 695 F. Supp. 2d at 1122-23.

c. Plaintiff concedes that the Complaint seeks to hold Facebook liable for exercising traditional editorial functions

The final requirement for Section 230(c)(1) immunity—that the Complaint seeks to hold Facebook liable for exercising traditional editorial functions—is also satisfied. Plaintiff does not dispute, and therefore concedes, that all of his claims seek to hold Facebook liable for its decisions regarding whether or not to publish third-party content—including, in particular, content provided by Plaintiff. Mot. at 6-8. Nor does he dispute that these sorts of decisions fall squarely within the traditional editorial function. *Id.*; *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

To the extent Plaintiff contends that Section 230(c)(1) does not apply here because Facebook is an alleged competitor whose decisions purportedly were financially motivated (*see* Opp. at 7), Plaintiff is wrong. As explained in Facebook's opening brief, courts in the Ninth Circuit have repeatedly confirmed that there is no intent-based exception to Section 230(c)(1) immunity and have applied the immunity in cases where the defendant was alleged to have acted for competitive or even discriminatory reasons. *See, e.g, Levitt I,* 2011 WL 5079526, at *7 (decision allegedly motived by improper business reasons); *Sikhs for Justice*, 144 F. Supp. 3d at 1095 (decision allegedly motivated by discrimination).

For instance, in *Levitt I*, which Plaintiff studiously ignores, the court held that Yelp was entitled to Section 230(c)(1) immunity despite allegations that it had pressured the plaintiffs into paying for advertising by threatening to manipulate, and actually manipulating, third-party content on the site to hurt the plaintiffs and/or help their competitors who agreed to pay for advertising. Mot. at 7; *Levitt I,* 2011 WL 5079526, at *7. The court specifically rejected the plaintiffs' argument that Section 230(c)(1) includes an intent requirement, explaining that "traditional editorial functions often include subjective judgments informed by . . . financial considerations," and "[d]etermining what motives are permissible and what are not could prove problematic" and undermine the purpose of Section 230(c)(1). *Levitt* I, 2011 WL 5079526, at *7-8. The court also noted that "the text of the two subsections of § 230(c) indicates that (c)(1)'s immunity applies regardless of whether the publisher acts in good faith." *Id*. at *7.

Here, just as in *Levitt I*, Plaintiff's claims are predicated on allegations that Facebook improperly exercised its editorial function to advance its own financial interests. And just as in *Levitt I*, those claims are barred by Section 230(c)(1).

In sum, all three requirements for Section 230(c)(1) immunity are satisfied. Accordingly, each of Plaintiffs claims fails as a matter of law and must be dismissed.

B. Plaintiff's Argument that Facebook Should Be Estopped from Asserting Section 230(c)(1) Immunity Is Baseless

Plaintiff identifies no authority for the unprecedented proposition that a party is estopped from asserting arguments in litigation that it did not specifically identify in pre-filing communications with the plaintiff. Once again, Plaintiff is simply asking the Court to make radical new law without any legal or logical basis.

The so-called "mend and hold" doctrine, upon which Plaintiff relies, "provides that a contract party is not permitted to change is position on the meaning of a contract in the middle of litigation over it." *Hartford Fire Ins. Co. v. Gandy Dancer, LLC*, 864 F. Supp. 2d 1157, 1170 n. 9 (D.N.M. 2012) (citing *First Bank & Trust Co. of Illinois v. Cimerring*, 365 Fed. Appx. 5, 8 (7th Cir. 2010)). That doctrine has no application here, among other reasons, because this case does not involve the meaning of a contract. In any event, Facebook has not changed its position in this litigation; it asserted Section 230(c)(1) immunity in its first response to Plaintiff's Complaint, while "reserve[ing] the right to assert Section 230(c)(2) immunity at a later stage." Mot. at 4, n. 1.

Accordingly, the Court can and should apply Section 230(c)(1) to dismiss this case, even though, for the sake of judicial economy, Facebook chose not to assert Section 230(c)(2) immunity at this time.

C. Plaintiff Has Failed to Sufficiently Allege any Claim for Relief

1. The Complaint fails to state a claim for civil extortion

Plaintiff concedes that, to state a valid claim for civil extortion against Facebook, he is required to allege (among other things) that Facebook wrongfully threatened to withhold from him something that he has a right to possess. *See* Mot. at 8; *Levitt v. Yelp! Inc.* (*Levitt II*), 765 F.3d 1123, 1135 (9th Cir. 2014).

Nevertheless, Plaintiff asserts that Congressional testimony by Facebook's CEO, Mark Zuckerberg, somehow creates a legally enforceable obligation supporting his civil extortion claim. Opp. at 13. Plaintiff is wrong. Not only does the Complaint fail even to mention this supposed testimony, Plaintiff fails to explain how the testimony confers a legally cognizable right, nor does he identify the nature of that right, or otherwise explain how it purportedly relates to his civil conspiracy claim.

Plaintiff also cites Facebook's terms of service to support the notion that he purportedly "owns" the content on his Facebook page. Opp. at 13 (citing n. 6). Putting aside the issue that Plaintiff's Complaint never once mentions the terms of service as the source of any legal obligation on the part of Facebook, the provision to which Plaintiff refers simply provides permission to share content posted on Facebook with others. Nothing in Facebook's terms of service gives Plaintiff the unfettered right to maintain content on

Facebook or to prevent Facebook from featuring advertising on its platform—and Plaintiff does not contend otherwise. Rather, consistent with the Ninth Circuit's opinion in *Levitt II* (which Plaintiff disregards entirely), the benefit that Facebook allegedly withheld from Plaintiff is "a benefit that [Facebook] makes possible and maintains." 765 F.3d at 1132-33; Mot. at 9-10. Because Plaintiff has no "preexisting right to be free from the threatened harm," his claim for civil extortion fails as a matter of law. *Levitt II,* 765 F.3d at 1132-33.[7]

2. The Complaint fails to state a claim for unfair competition

Plaintiff does not dispute that, to state a valid claim for unfair competition under the "unfair" prong, he must sufficiently allege "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Levitt II*, 765 F.3d at 1136; Mot. at 10.[8] But in his opposition brief, Plaintiff fails to identify

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[7] Moreover, as noted in Facebook's opening brief, the only purported "threat" identified in the Complaint at all is an alleged remark by an unnamed executive allegedly advising Plaintiff that "one has to pay Facebook in order to play with Facebook." Mot. at 9. This vague, barebones allegation is insufficient to state a claim for civil extortion under the "stringent standard" announced by the Ninth Circuit in *Levitt II*. *See* 765 F.3d at 1133.

[8] Nor can he. The Ninth Circuit held in *Levitt II* that this standard applies in business-competitor cases, 765 F.3d at 1136, and Plaintiff has argued that "Facebook is a direct competitor." Opp. at 7.

any factual allegations in the Complaint that could plausibly satisfy this standard.

Plaintiff asserts, for instance, that Facebook has given preferential treatment to a competitor of Plaintiff who paid Facebook more money, thereby injuring Plaintiff. Opp. at 13. But that allegation is virtually identical to the business owners' allegation in *Levitt* that "Yelp's conduct 'harms competition by favoring businesses that submit to Yelp's manipulative conduct and purchase advertising to the detriment of competing businesses that decline to purchase advertising." *Levitt II*, 765 F.3d at 1137. As the Ninth Circuit has already held, that sort of "very general allegation does not satisfy *Cel–Tech's* requirement that the effect of [Facebook's] conduct amounts to a violation of antitrust laws 'or otherwise significantly threatens or harms competition.'" *Id.*

Plaintiff's argument also assumes erroneously that an alleged competitive impact on him personally is sufficient to state a claim under the "unfair" prong. Not so. Courts have consistently held that "the harms alleged must be 'significant' and have impacts on 'competition,' *not merely on a competitor*." *DirecTV, LLC v. E&E Enters. Glob., Inc.*, 2018 WL 707964, at *5 (C.D. Cal. Feb. 5, 2018) (emphasis added). In *DirectTV*, for instance, the court dismissed a UCL claim because the "specific harms alleged in the [Complaint] chiefly impact [Plaintiff] as DirecTV's competitor rather than 'significantly threaten[ing] or harm[ing] competition.'" *Id.*; *see also, e.g., Glob. Plastic Sheeting v. Raven Indus.*, 2018 WL 3078724, at *6 (S.D. Cal. Mar. 14, 2018) (granting motion to dismiss UCL claim under the "unfair" prong where Plaintiff's allegations "merely indicate Defendant's conduct resulted in harm to its commercial interests rather than harm to competition").

So too here. Because Plaintiff alleges that Facebook's alleged conduct has injured him personally, not that Facebook's conduct has threatened or harmed competition generally, the Complaint fails as a matter of law to state a plausible claim for relief under the UCL's "unfair" prong.

Plaintiff relies heavily on *Fraley* (*see* Opp. at 13-14), but that case is readily distinguishable. There, the court found that the plaintiffs had sufficiently pled a claim for misappropriation under California Civil Code § 3344 based on alleged nonconsensual use of their names, photographs, and likenesses. 830 F. Supp. 2d at 803. Based on that predicate cause of action, the court went on to find that the plaintiffs also had alleged an unlawful commercial practice under the UCL's "unlawful" prong, and a violation of a "statutorily declared public policy" under the "unfair" prong. *Id*. at 812, 813. Here, in contrast, Plaintiff has not sufficiently alleged any predicate UCL violation, nor has Plaintiff alleged that Facebook has violated any "statutorily declared public policy" other than the prohibitions on extortion, discussed above.

Moreover, to the extent Plaintiff contends that the Complaint sufficiently pleads a UCL violation under the "fraudulent" prong, he is wrong. A claim under the fraudulent prong of the UCL is governed by the "reasonable consumer" standard, which requires the plaintiff to "show that members of the public are likely to be deceived." *Williams v. Gerber Prods. Co.,* 552 F.3d 934, 938 (9th Cir. 2008) (citation and internal quotation marks omitted). In addition, the plaintiff must "allege actual reliance, that the defendant's misrepresentation or nondisclosure was an immediate cause of the plaintiff's injury-producing conduct . . . [such that] in its absence the plaintiff in all reasonable probability would not have engaged in the injury-producing conduct[.]" *Block v. eBay, Inc.*, 747 F.3d 1135, 1140 (9th Cir. 2014) (internal quotation marks and citations omitted). Here, Plaintiff has failed to allege any of the required elements, much less with the specificity required by Rule 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (when a UCL claim rests on allegations of fraud, it must satisfy Rule 9(b)).

Accordingly, Plaintiff's unfair competition claim must be dismissed.

3. The Complaint fails to state a claim for fraud/misrepresentation

As explained in Facebook's opening brief, the Complaint fails to allege any actionable misrepresentation, nor does the Complaint plead any of the other essential elements of a fraud claim under Rule 9's heightened pleading standard. Mot. 12-13. Plaintiff's response fails to address any of Facebook's arguments, but instead posits that "just about everything said about Facebook and what it has done to Fyk has a fraud/intentional misrepresentation undercurrent." Opp. at 14.

It is undisputed that the Complaint fails to provide "the who, what, when, where, and how" needed to plead a fraud claim under Rule 9(b). *See Kearns*, 567 F.3d at 1126. Thus, this claim must be dismissed.

4. The Complaint fails to state a claim for intentional interference with prospective economic relations

Plaintiff does not dispute that his claim for intellectual interference with prospective economic relations rises and falls with his other three claims. Opp. at 15. Because Plaintiff has failed to sufficiently plead any of those three claims, as explained above, Plaintiff's derivative claim for intentional interference must be dismissed as well. Mot. at 13; *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1134 (9th Cir. 2015).

D. Leave to Amend Should be Denied

Given the robust immunities afforded under the CDA, courts in this district have previously denied leave to amend complaints asserting claims against internet service providers like Facebook that are predicated on content provided by third parties. *See, e.g., Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1067 (N.D. Cal. 2016) ("Because Plaintiff's claims against Facebook are barred as a matter of law by § 230(c), the court finds that allowing for their amendment would be futile."); *Sikhs for Justice*, 144 F. Supp. 3d. at 1095-96 (same). Moreover, Plaintiff has not explained how he could possibly cure by amendment the other deficiencies identified in Facebook's motion to dismiss. Because amendment would be futile, Plaintiff's Complaint should be dismissed with prejudice.

III. Conclusion

For the foregoing reasons, as well as those set forth in Facebook's opening brief, the Court should grant Facebook's motion to dismiss without leave to amend.

Respectfully submitted,

KEKER, VAN NEST & PETERS LLP

By: /s/ William S Hicks
Matan Shacham
William S. Hicks

Attorneys for Defendant
FACEBOOK, INC.

Dated: December 28, 2018

FYK RESPONSE IN OPPOSITION TO DEFENDANT'S NOVEMBER 1, 2018, MOTION TO DISMISS [DE 27] (DECEMBER 14, 2018)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:18-CV-05159-JSW

HEARING: FEB. 1, 2019, 9:00 A.M.

LOCATION: OAKLAND, CT. 5, FL. 2

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

[TOC & TOA Excluded]

ADDITIONAL ONE PAGE SUMMARY OF ARGUMENT

Facebook's Motion to Dismiss ("M2D") is based on an untenable theory that its actions are entitled to blanket, unbridled "just because" immunity under 47 U.S.C. § 230(c)(1) ("CDA"). But the express language of the CDA (and case law, *see* Section C, citing *Nemet,* *Barnes, Levitt, Jurin, Perfect 10, Carafano, Song Fi, e-ventures, Atl. Recording Corp., Fraley, Fair Hous. Council, Batzel, Perkins)* makes clear that Subsection (c)(1) only immunizes a "provider . . . of an interactive computer service" (Facebook) from <u>third-party</u> liability concerning information (*i.e.,* content) published or spoken by *"<u>another</u>* information content provider" on the "interactive computer service['s]" platform. 47 U.S.C. § 230(c)(1) (emphasis added). This is not a third-party case where (1) someone else is suing Facebook over Fyk publications or speeches found on the Facebook platform, or (2) Fyk is suing Facebook over something someone else published or spoke. Subsection (c)(1) (and case law) says that Facebook is not liable for "information provided by another information content provider" simply because "another" publishes or speaks on the Facebook platform because, again, the language of Subsection (c)(1) does not classify Facebook as the *per se* publisher or speaker of "another's" content. Subsection (c)(1) <u>does not,</u> however, immunize Facebook from <u>first-party</u> liability concerning content published or spoken by the "content provider" (Fyk)—this case is first-party.

And Facebook is estopped from advancing and/or has waived its ability to advance its wayward Subsection (c)(1) theory given the sole pre-suit "basis" for its destruction of Fyk's businesses/pages was Subsection (c)(2)(A); i.*e.,* Facebook "Community Standards" or "terms." *See* Section D.[1] *See* [D.E. 20] at n.

[1] The nature of "information provided"/content is what Subsection (c)(2)(A) pertains to. Facebook's suggestion that there was something "filthy" about Fyk's businesses/pages *via* its glancing reference to a takeapissfunny page, *see* [D.E. 20] at 1, is misplaced, in accurate, and out-of-context; *i.e.,* is not "good faith."

1. To allow such a shift would work an injustice/ inequity. Moreover, the Court should deny the Subsection (c)(1) aspect of the M2D (1) pursuant to Rules 12(c) and 12(d) *(see* Section B), and (2) since a lot of what is said in the M2D is false, misrepresentative, misleading, and/or incoherent *(see* Section E).

As for the Rule 12(b)(6) aspect of the M2D, there are plenty of supportive averments in the Complaint *(see* Section F). *See, e.g.,* [D.E. 1] at ¶¶ 1-2, 14-16, 18, 20, 22-23, 25-34, 42-47, 49-57 (1st Claim for Relief); ¶¶ 6, 14, 18, 20, 35-41, 43-45, 47, 58-66 (2d Claim for Relief); ¶¶ 14, 18-20, 37-40, 67-71 (3d Claim for Relief); ¶¶ 4-7, 14, 17-18, 20-21, 23-24, 30, 35-40, 45-47, 72-78 (4th Claim for Relief).

STATEMENT OF RELEVANT FACTS

On August 23, Fyk filed his Verified Complaint (the "Complaint"), [D.E. 1], detailing Facebook's brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent practices that caused the destruction of his multi-million dollar business with over 25,000,000 followers. *Id.* at ¶ 1. Facebook's November 1 Motion to Dismiss ("M2D"), [D.E. 20], is disingenuous and inapposite because this lawsuit is about the "content provider" (Fyk) pursuing an "interactive computer service" (Facebook) in a <u>first-party</u> posture for destruction of his livelihood. On December 7, Fyk filed his M2D Response [D.E. 25], inadvertently tracking Local Rule rather than Standing Order page limitations; thus, this conformed brief

Fyk's businesses/pages at their height were generating him hundreds of thousands of dollars a month, and his growth potential was limitless. *See, e.g.,* [D.E. 1] at ¶¶ 1-2, 15-16, n. 2 and n. 8. Competitors who Facebook did not cripple, as it did Fyk, are now valued in the hundreds of millions to billions of dollars range. *See, e.g.,* [D.E. 1] at ¶ 5. The M2D argues that Facebook is immune under Subsection (c)(1) of the CDA, omitting that such immunity is available when *another* "content provider" sues Facebook in a third-party posture *(e.g.,* car manufacturer suing a consumer website, Consumer Affairs, for hosting third-party consumer reviews about their car)."[1,2] Again,

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[1] Legislative intent is critical for understanding Facebook's misuse of the CDA. The CDA was enacted in 1996 to regulate internet pornography. *See, e.g.,* 141 Cong. Reg. 88088 (1995) (" . . . the heart and soul of the [CDA] is to provide much-needed protection for families and children"); 66 N.Y.U. Ann. Surv. Am. L. 371, 379 (2010) (same); 35 Hastings Comm. & Ent. L.J. 455, 456 (2013) (same, adding that "Section 230 was added to support and encourage the proliferation of information on the Internet"). At Mr. Zuckerberg's April 10, 2018, Congressional Testimony, Senator Ted Cruz acutely and accurately pointed out to Mr. Zuckerberg that "the predicate for Section 230 immunity under the CDA is that you are a neutral public forum." But Facebook is anything but neutral—Facebook's Tessa Lyons, for example, publicly states the polar opposite of Senator Cruz's correct statement, yet further evidencing Facebook's misunderstanding, misapplication, and/or systemic abuse of the CDA: "And we approach integrity in really three ways. The first thing that we would do is we remove anything that violates our Community Standards," which such Facebook "Community Standards" are found nowhere in the express language of the CDA, which such legislation Facebook conflates with its own de-neutralizing business decisions aimed at re-distributing the hard-earned money of others (like Fyk) to Facebook and/or Fyk competitors who pay Facebook a lot more money than Fyk *(see* [D.E. 1] and below). A "neutral" thing is not something to wield against others in a non-neutral "immunity" fashion (as here).

[2] This third-party understanding of Subsection (c)(1) immunity is so elementary that it finds its way into Wikipedia. *See* https://en.wikipedia.org/.wiki/.Communications_Decency_Act.

Fyk is suing in a first-party posture over Facebook's own extensive wrongdoing. The M2D's CDA nonsense is flawed procedurally (Section B), legally (Section C), equitably (Section D), and factually (Section E). Facebook's Rule 12(b)(6) nonsense is legally, procedurally, and factually flawed (Section F). The M2D must be denied.

STATEMENT OF ISSUES TO BE DECIDED

Legally, equitably, procedurally, and/or factually speaking, can Facebook somehow enjoy the limited third-party immunity prescribed by Subsection 230(c)(1) of the CDA in this first-party action? And has Fyk somehow "fail[ed] to state a claim upon which relief can be granted" pursuant to Rule 12(b)(6)?

MEMORANDUM OF LAW

A. Legal Standards

Federal Rule of Civil Procedure 12(b) provides, in pertinent part, that " . . . a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted . . . ." *Id.; see also Finkelstein, M.D. v. AXA Equitable Life Ins. Co.,* 325 F. Supp. 3d 1061 (N.D. Cal. 2018); *Cunningham v. Mahoney,* No. C 10-03211 JSW, 2010 WL 11575083 (N.D. Cal. Dec. 7, 2010). A Rule 12(b)(6) motion tests the formal sufficiency of a claim, it is not for resolving a fact/merit contest between the parties. *See, e.g.,* 5B Wright & Miller, *Fed. Prac. & Proc. 3d §* 1356, 354. For brevity's sake, the CDA is attached as Exhibit A and incorporated herein.

B. Facebook's M2D is a Thinly Veiled Pre-Discovery Motion for Summary Judgment (Fed. R. Civ. P. 12(c) and 12(d))

We assume the procedural underpinning of Facebook's Subsection (c)(1) dismissal effort is Rule 12(c), which brings Rule 12(d) into play. In stark contrast to a Subsection (c)(1) third-party posture, Fyk ("information content provider") is suing Facebook ("interactive computer service") in a first-party posture based on Facebook's wrongful destruction (actionable under all four claims for relief) of Fyk's businesses/ pages *(i.e.,* destruction of Fyk's past and future publications or speeches) *via* banning, ads account blocking, domain blocking, unpublishing, and/or deleting of Fyk's businesses/pages, silencing his voice and/or eliminating his reach and distribution. Facebook's destruction of Fyk's businesses/pages was based on a pre-suit contention that Fyk's content violated "Community Standards" or "terms;" *i.e.,* violated Subsection (c)(2)(A).[3] *See* [D.E. 1] at ¶ 23. Because

[3] Attached as Exhibit B (incorporated herein) is a representative sampling of screenshots of the written representations Fyk received from Facebook pre-suit in relation to its crippling of his businesses/pages. Exhibit B evidences that Facebook's "justification" for the crippling of the businesses/pages was that the content of same purportedly violated Facebook's "Community Standards"/"terms," which, if anything, implicates Subsection (c)(2)(A). There is no hint in Exhibit B that Facebook's crippling of Fyk's businesses/pages was based on Facebook being pursued by other third-parties based on the content of Fyk's businesses/ pages. Facebook plainly cannot pull that off because, among other things, it re-established the (virtually) identical content of Fyk's businesses/pages for the new owner of same after Fyk's Facebook-induced fire sale of same to a competitor who Facebook apparently liked better at the time. *See, e.g.,* [D.E. 1] at ¶ 45. "At

Facebook's novel Subsection (c)(1) argument is a "matter outside the pleadings," the Court should "exclude[]" the Subsection (c)(1) argument or treat the argument "as one for summary judgment under Rule 56 [and allow] [a]ll parties . . . a reasonable opportunity *[i.e.,* discovery] to present all material that is pertinent to the motion [for summary judgment]." Fed. R. Civ. P. 12(d).[4]

C. Facebook's Interpretation/Application of Subsection (c)(1) "Immunity" Is Legally Amiss

The legal untenableness of Facebook's novel Subsection (c)(1) twist is twofold. First, it is readily apparent from even just Wikipedia (citing the *Harvard Journal of Law & Technology), see* n. 2, *supra,* that Subsection (c)(1) affords third-party immunity under some circumstances, but by no means first-party immunity. Second, Subsection (c)(1) does not immunize folks from themselves.

1. Subsection (c)(1) Of The CDA Affords Some Third-Party Immunity, Not First-Party

Subsection (c)(1) and the well-settled case interpretation of same in no way immunizes Facebook from its destructive acts here. Subsection (c)(1) immunity is

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the time" because, since this suit, Facebook is now making things very difficult for the new owner.

4 *See also, e.g., Spy Phone Labs, LLC v. Google, Inc.,* No. 15-cv-03756-KAW, 2016 WL 6025469, at *8 (N.D. Cal. Oct. 14, 2016) (a CDA immunity defense, at least as to Subsection (c)(2)(A), "cannot be determined at the pleading stage[,]" but may be raised "at a later stage, such as summary judgment").

afforded to Facebook where (as not here) it is being pursued by someone else for Fyk's publications or speeches *(i.e.,* content/"information provided") or by Fyk for someone else's publications or speeches *(i.e.,* content/"information provided").

The cases cited in the M2D are inapposite or misconstrued by Facebook. In *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.,* 591 F.3d 250 (4th Cir. 2009), cited at page four of the M2D, Nemet Chevrolet, Ltd. was suing Consumeraffairs.com over consumer reviews that others had posted on the Consumeraffairs.com platform about Nemet Chevrolet, Ltd. Consistent with Fyk's interpretation of Subsection (c)(1), the district court in *Nemet Chevrolet, Ltd.* concluded (and the Fourth Circuit affirmed) that "the allegations contained in the Amended Complaint [d]o not sufficiently set forth a claim asserting that [Consumeraffairs.com] authored the content at issue." *Id.* at 253. In affirming, the Fourth Circuit held, in pertinent part, that Consumeraffairs.com was an "'information content provider' under § 230(0(3) of the CDA," and, most critically, that "interactive computer service providers [are not] legally responsible for information created and developed by *third parties." Id.* at 254 (emphasis added) (citing *Fair Hous. Council v. Roommates.com, LLC,* 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc)). Instructively, the Fourth Circuit also held that "Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them." *Id.* at 254 (citing *Universal Commc'n Sys., Inc. v. Lycos, Inc.,* 478 F.3d 413, 419 (1st Cir. 2007)). *Nemet Chevrolet, Ltd.* further confirms reality—that Subsection (c)(1) immunity pertains to third-party liability. The case *sub judice is* a first-party case.

Same with *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096 (9th Cir. 2009), cited at pages one, five, and seven of the M2D. In *Barnes,* the plaintiff sued over defendant's alleged failure to remove indecent posts of (or pertaining to) her made by her ex-boyfriend on the Yahoo!, Inc. platform. Barnes sought to remove Yahoo!, Inc. from Subsection (c)(1) immunity based on her arguments that Yahoo!, Inc. served as a "publisher" in relation to the subject indecent posts, which such removal is doable under certain circumstances (discussed below). The *Barnes* court concluded, however, that the "publisher" of the indecent posts was the third-party ex-boyfriend, thereby finding that Subsection (c)(1)'s third-party liability immunity applied to Yahoo!, Inc. Again, the case *sub judice* is a first-party case involving Facebook's wrongful destruction of Fyk's businesses/pages, not a third-party case against Facebook over some notion that someone else's post about Fyk on the Facebook platform was indecent and Facebook should have taken the third-party's post down.

This remains true for *Levitt v. Yelp! Inc.,* Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011), *Jurin v. Google, Inc.,* 695 F. Supp. 2d 1117 (E.D. Cal. 2010), *Perfect 10, Inc. v. CCBill, LLC,* 481 F.3d 751 (9th Cir. 2007)/*Perfect 10, Inc. v. CCBill, LLC,* 488 F.3d 1102 (9th Cir. 2007), and *Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119 (9th Cir. 2003). This case is about the content of a first-party (Fyk) being wrongly destroyed by an "interactive computer service" (Facebook).

And there is more case law supportive of Fyk's position that Subsection (c)(1) is inapplicable here. For example, in *Song Fi, Inc. v. Google, Inc.,* 108 F. Supp. 3d 876 (N.D. Cal. 2015), the Court determined that YouTube was not immune under the CDA. In *Song Fi,* action was brought against operators of video-sharing website, alleging that the operators' decision to remove plaintiffs' music video from the publicly-accessible section of the website was inappropriate. The *Song Fi* court found that the phrase "otherwise objectionable" as used in Subsection (c)(2) did not extend so far as to make operators of video-sharing website immune from suit based on California-law tortious interference with business relations claims by users in relation to operators' decision to remove users' music video from publicly accessible section of website. The *Song Fi* court went on to find that the "obscene, lewd, lascivious, filthy, excessively violent [and] harassing" material suggested lack of congressional intent to immunize operators from removing materials from a website simply because materials posed a "problem" for operators. Though Facebook viewed Fyk as some sort of "problem," that does not mean he violated the CDA.[5]

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[5] Facebook's goal is to eliminate businesses and competition by labeling them as "problems." Ms. Lyons has publicly said so: "The second area is reducing the spread of problematic content, and if we can reduce the spread of those links we reduce the number of people who click through and we reduce the economic incentive that they have to create that content in the first place." Reducing the economic advantage of folks like Fyk is what the First Claim for Relief is all about. More on the point of Facebook's strategy to interfere with the economic advantage of the approximate 70,000,000 businesses on Facebook that Mr. Zuckerberg disingenuously says he wishes to promote (*see* n. *7, infra),* Ms.

Then there is *e-ventures Worldwide, LLC v. Google, Inc.,* 214CV646FTMPAMCM, 2017 WL 2210029, at *1 (M.D. Fla. Feb. 8, 2017) as another example, where, accepting as true e-ventures' allegations that Google's investigation and removal of e-ventures' content was motivated not by a concern over web spam, but by Google's concern that e-ventures was cutting into Google's revenues, the Court found Subsection (c)(1) did not immunize Google's actions. Then there is *Fair Housing Council,* 521 F.3d 1157 as another example, where Section 230 of the CDA was found inapplicable because Roomates.Com's own acts (posting surveys and requiring answers) were entirely Roomates.Com's doing. Then there is *Atl. Recording Corp. v. Project Playlist, Inc.,* 603 F. Supp. 2d 690 (S.D.N.Y. 2009), as another example, where it was found that where the interactive computer service was not acting as the information content provider and suit was based on state law claims of unfair business practices, the situation falls under the immunity carve out set forth in Subsection 230(e) of the CDA. *See* Ex. A.

As discussed in Section D and in the Complaint (and depicted in Exhibit B), the Subsection (c)(2) underpinning of *Song Fi* was the only pretext professed by Facebook when crippling Fyk's businesses/pages. Facebook's Subsection (c)(1) *carte blanche* blanket

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Lyons has publicly stated as follows: "So going after the instances of actors who repeatedly share this kind of content and reducing their distribution, removing their ability to monetize, removing their ability to advertise is part of our strategy." And Mr. Zuckerberg hypocritically shares that sentiment, stating at his April 10, 2018, Congressional Testimony that " . . . advertisers and developers will never take priority . . . as long as I'm running Facebook." "Hypocritically" when compared to that set forth in footnote seven below.

immunity about-face from Subsection (c)(2)(A) contravenes the CDA's content "proliferation" intent, *see* n. 1, *supra,* and Subsection (c)(1)'s well-settled application as a limited third-party immunity tool. Subsection (c)(1)'s limited third-party immunity is inapplicable in this pure first-party case. The M2D must be denied as a matter of law.

2. Subsection (c)(1) Was Not Meant To Immunize A Party From Itself When The Party Was Acting, In Whole Or In Part, As The "Information Content Provider"

The legislature certainly did not enact Subsection (c)(1) to immunize bad actors from themselves. More specifically and for example, Facebook deleted some of Fyk's businesses/pages, which is different from Facebook's unpublishings, bannings, ads account blocking, domain blocking, for examples. For example, Facebook deleted (without explanation) the She Ratchet business/page, which was a business/page that consisted of approximately 1,980,000 viewers/followers at the time of Facebook's foul play. *See* [D.E. 1] at ¶¶ 20-24. Facebook's deletion cut Fyk off from the business/page but preserved his page content on its own and for itself (as evidenced by Facebook's later publishing the same She Ratchet content for the Los Angeles competitor to whom Fyk's Facebook-induced fire sale was made). Then the following occurred: (1) The competitor to whom Fyk would eventually fire sell the She Ratchet business/page to (along with other businesses/pages, as detailed in the Complaint, *see, e.g.,* [D.E. 1] at ¶¶ 22, 42-45) requested Facebook's assurance of recovering the business/page following the fire sale; and (2) Facebook restored the value of the deleted She Ratchet business/page by publishing (yes, publishing) same for the Fyk competitor around the time the Facebook-induced fire sale of same went through, with the page content being (virtually) identical to that which it was when under Fyk's ownership. *See, e.g.,* [D.E. 1] at ¶ 45.

At the time of SheRatchet deletion, Facebook illegally acquired "ownership" of Fyk's content *(i.e.,* "information provided" by Fyk on the Facebook "interactive computer service" platform).[6] When Facebook published She Ratchet for the Fyk competitor to whom the Facebook-induced fire sale was made, Facebook became the independent "publisher"/"information content provider" of the same content it had stolen from Fyk. Facebook's theft and re-publishing of the (virtually) identical content Fyk had published was motivated by Facebook's desire to enrich Fyk's competition, thereby enriching Facebook as it enjoyed a far more lucrative relationship with that competitor than with Fyk . . . that competitor has paid Facebook millions whereas Fyk paid Facebook approximately $43,000.00. *See, e.g.,* [D.E. 1] at ¶¶ 19, 46, 52.[7]

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[6] Facebook publicly recognizes Fyk as the "owner" of his content/ "information provided." *See, e.g.,* https://www.facebook.com/ communitystandards ("[y]ou own all of the content and information you post").

[7] These actions are in stark contrast to what Facebook's professed mission (or "social contract") supposedly is: "Our mission is all about embracing diverse views. We err on the side of allowing content, even when some find it objectionable, unless removing the content can prevent a specific harm. Moreover, at times we allow content that might otherwise violate our standards if we *feel* it is newsworthy, significant, or important to the public interest." *See* Facebook's public domain "Community Standards," https://www.facebook.com/communitystandards (emphasis added); *see also* Mr. Mark Zuckerberg's April 10, 2018,

Moreover, in addition to indirectly interfering and competing with Fyk, Facebook is a direct competitor that is not entitled to CDA immunity. In addition to serving as an "interactive computer service" for which CDA immunity may apply (though not in this context), Facebook also serves as an "information content provider" (defined in CDA Subsection (f)(3), *see* Ex. A) at least with respect to its Sponsored Story Advertising News Feed scheme, and accordingly enjoys no CDA immunity. *See, e.g., Fraley,* 830 F. Supp. 2d at 802-803. In this vein, Facebook directly interferes with the economic advantage of others who are doing nothing wrong (First Claim for Relief) in an unfairly and deceptively competitive manner (Second and Fourth Claims for Relief) directly for its own benefit. Mr. Zuckerberg stated in his April 10, 2018, Congressional Testimony that "what we allow is for advertisers to tell us who they want to reach and *then we do the placement."* (emphasis added). For context on Facebook's "placement," Fyk has blocked on his personal News Feed, for example, sites called NowThis and UNILAD, and yet Facebook keeps forcing those sites into Fyk's personal News Feed, further evidencing that the user has no control of the user's News Feed (contrary to Facebook's pronouncements about user control) and Facebook jams its sponsored unsolicited material *(i.e.,* "spam") into the user's News Feed anyway to make Facebook money (NowThis and UNILAD doubtless pay Facebook money). Judge Koh

Congressional Testimony ("I am very committed to making sure that Facebook is a platform for all ideas, that is a very important founding principle of what we do"); *id.* ("For most of our existence, we focused on . . . and for building communities and businesses").

recognized or acknowledged as much too: “Although Facebook’s Statement of Rights and Responsibilities provides that members may alter their privacy settings to ‘limit how your name and [Facebook] profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us,’ members are unable to opt out of the Sponsored Stories service altogether.” *Id.* at 792.

The “placement,” in one form, is Facebook’s steering/displacing of businesses that do not pay Facebook as much money (like Fyk’s businesses/pages) to competitors who pay Facebook millions (like the Fyk competitor out of Los Angeles who was the benefactor in the Facebook-induced fire sale of Fyk’s businesses). The “placement,” in another form, is Facebook’s manipulation of the News Feed to bring its sponsored posts *(i.e.,* posts in which Facebook is the money-making partner) to the top and shove other News Feed posts down where users are less likely to see same despite the News Feed supposedly being something wherein the user is allowed to read what he/she chooses . . . in Facebook’s words:

> It is helpful to think about [News Feed] for what it is, which is a ranking algorithm . . . and the problem that the News Feed ranking algorithm is solving is what order should I show your stories in News Feed. The News Feed ranking algorithm prioritizes them . . . now we do this whole process for every story in your inventory . . . inventory is the collection of stories from the people that you friend and the pages that you follow . . . You’re a lot more likely to see a story that’s in the first spot on your News Feed

than the one that's in the 3000th spot.

Ms. Lyons' public speech, uploaded on April 13, 2018. In that same public speech, Ms. Lyons elaborates on Facebook's direct competition mindset: "If [a News Feed post] says sponsored that means that someone spent money in order to increase its distribution." One of the benefactors of a sponsored News Feed post is the introducer/supporter/partner of the post (in many cases, Facebook), as Judge Koh recognized. *See Fraley,* 830 F. Supp. 2d at 790 ("Facebook generates its revenue through the sale of advertising [*i.e.,* sponsored ads with Facebook as the paid sponsor/ partner] targeted at its users").

Facebook's unilateral placement of its "spam" News Feed material (from which Facebook profits) to the top of a user's News Feed, *see, e.g.,* [D.E. 1] at ¶¶ 35-40, and burying the News Feed material users' want/solicit (like Fyk's material) in the "3000th spot" (as Facebook's Tessa Lyons admits in the commentary cited above) is the epitome of the Second Claim for Relief (Unfair Competition) and quite deceitful in the vein of the Fourth Claim for Relief (fraud/intentional misrepresentation), tying in directly to the destruction of economic advantage (the First Claim for Relief) of folks (like Fyk) who earn ad and web-trafficking monies through posts that users actually want to see . . . entitling Facebook to no immunity. *See, e.g., Fraley* and *Fair Hous. Council.*

Subsection (c)(1) immunity is only afforded to an "interactive computer service" under some situations, not to the "publisher" *(i.e.,* "information content provider"). But Facebook's conduct as to the She Ratchet business/page and Sponsored Stories advertisements News Feed scheme, for examples, took it outside the shoes of an "interactive computer service" and inside the shoes of "information content provider," in whole or in part; thus, Facebook is not Subsection (c)(1) immune. *See, e.g., Fair Hous. Council,* 521 F.3d at 1165 ("the party responsible for putting information online may be subject to liability, even if the information originated with a user," citing *Batzel v. Smith,* 333 F.3d 1018, 1033 (9th Cir. 2003)); *Fraley,* 830 F. Supp. 2d 785 (denying the CDA motion to dismiss, as Facebook's being both an "interactive computer service" and an "information content provider" went beyond a publisher's traditional editorial functions when it allegedly took members' information without their consent and used same to create new content published as endorsements of third-party products or services); *Perkins v. Linkedln Corp.,* 53 F. Supp. 3d 1222, 1247 (N.D. Cal. 2014) (denying the CDA motion to dismiss wherein Linkedln sought immunity as an interactive computer service, with the court endorsing, at least at the dismissal stage, plaintiffs' claim that LinkedIn provided no means by which a user could edit or otherwise select the language included in reminder emails and that true authorship of the reminder emails laid with Linkedln); *Jurin,* 695 F. Supp. 2d at 1122 (holding, in part, that "[u]nder the CDA an interactive computer service qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue," citing *Carafano,* 339 F.3d at 1123). Facebook's attempt to distance itself from the "information content provider" role in have its cake and eat it too fashion translates to: "Accuse your enemy of what you are doing. As you are doing it to create confusion."—Karl Marx. The M2D must be denied as a matter of law.

D. Facebook's Subsection (c)(1) Litigation Arguments Must Be Estopped and/or Have Been Waived

Facebook is estopped from enjoying (or has waived) Subsection (c)(1) immunity. The United States Supreme Court counsels against allowing the kind of "bait and switch" that is Facebook's seismic shift from Subsection (c)(2)(A) to (c)(1), albeit within the phrase of art that is "Mend the Hold," which is legalese for estoppel and, to some extent, waiver.[8] *See, e.g., Railway Co. v. McCarthy,* 96 U.S. 258, 6 Otto 258, 24 L.Ed. 693 (1877). *See also Harbor Ins. Co. v. Continental Bank Corp.,* 922 F.2d 357, 363 (a party's "hok[ing] up a phony defense . . . and then when that defense fails (at some expense to the other party) tr[ying] on another defense for size, can properly be said to be acting in bad faith"); *Tonopah & T.R. Co. v. Commissioner of Internal Revenue,* 112 F.2d 970, 972 (9th Cir. 1940); *Connally v. Medlie,* 58 F.2d 629 (2d Cir. 1932).

As Exhibit B illustrates, Facebook's professed "basis" to Fyk for destroying his businesses/pages was that the content of same purportedly violated Facebook's "Community Standards" or "terms," *see, e.g.,* [D.E. 1] at ¶ 23, which sounds in Subsection (c)(2)(A) (content-oriented). Fyk heavily relied, to his detriment in time and money, on Facebook's professed "basis" for

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[8] Glaringly applicable forms of estoppel include "estoppel," *see* Bryan A. Garner, *Black's Law Dictionary* 247 (2001 2d pocket ed.) (defining same), "equitable estoppel," *see id.* (defining same), "quasi-estoppel," *see id.* (defining same), and "estoppel by silence," *see id.* (defining same).

its businesses/pages crippling,[9] which, again, such "basis" was content-oriented or intentionally nebulous so as to keep Fyk guessing as to why Facebook was destroying his livelihood. It would be improper to allow Facebook to cripple Fyk's businesses/pages on one ground (purported violation of "Community Standards"/"terms," implicating Subsection (c)(2)(A)) and try to avoid liability on different grounds (Subsection (c)(1)) when that ground is challenged (this suit).

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[9] As to "reliance," we point to the sale of the subject businesses/pages to a competitor, this lawsuit, and/or a pre-suit letter writing campaign with defense counsel, as examples. As to "monetary detriment," Facebook's Motion scoffs at our classification of the approximate $1,000,000.00 being "relatively nominal." *See, e.g.,* [D.E. 20] at 1-2. The "relatively nominal" nature of the monies recovered by Fyk in relation to his Facebook-induced fire sale of the subject businesses/pages, however, is very serious and real. There was no letup in sight of Fyk's impressive growth curve, *see, e.g.,* [D.E. 1] at n. 2, but for Facebook's unlawful destruction of his businesses/pages. The competitor who reaped the benefits of the Facebook-induced fire sale of the subject businesses/pages was smaller than/less successful than Fyk at the time of Facebook's destruction of the subject businesses/pages. It is believed that that competitor grew to a worth of $100,000,000.00. *See* [D.E. 1] at ¶¶ 5, 15. As another example, it is believed that another Fyk competitor (BuzzFeed) who Facebook did not mess with like it did with Fyk and who Fyk was once bigger than/more successful than is presently valued at—$1,700,000,000.00. *See* [D.E. 1] at ¶¶ 5, 15. The range of Fyk's value (and, thus, some of his damages in this case) but for Facebook's wrongful destruction of his businesses/pages was between $100,000,000.00 and $1,700,000,000.00 (maybe more). So, put in proper perspective *(see, e.g.,* [D.E. 1] at ¶¶ 5, 42), the approximate $1,000,000.00 relating to Fyk's Facebook-induced fire sale (when Facebook had rendered the subject businesses/pages valueless) was, in fact, "relatively nominal."

Moreover, Facebook's inequitable recast from Subsection (c)(2)(A) to (c)(1) would still fail under ordinary statutory construction principles. If Facebook's interpretation of Subsection (c)(1) was correct (which it is not), Subsection (c)(1) and Subsection (c)(2)(A) would be the exact same thing under these circumstances (or perhaps altogether). The legislature would not put redundant law on the books; *i.e.,* our interpretation/application of Subsection (c)(1) (and related case law) is correct.

E. Facebook's M2D is Replete With Skewed Statements

Here is a sampling of things said by Facebook in its M2D that are wrong:

Facebook's Representations

Facebook falsely suggests that the Complaint takes issue with Facebook not treating "similar" content of others (like Fyk competitors) the way it treated Fyk. *See, e.g.,* [D.E. 20] at p. 1, ln. 27; p. 3, ln. 6; p. 6, ln. 10.

The Truth

Actually, the Complaint speaks of Facebook not interfering with the content of others that was "identical" to Fyk's content; *i.e.,* wrongly discriminating against or singling out Fyk. *See, e.g.,* [D.E. 1] at p. 8, lns. 10-12; n. 8, p. 16, lns. 24-28-n. 8, p. 17, lns. 21-23; p. 16, lns. 3-8.

Facebook's Representations

Facebook implies Facebook is not a direct competitor, so as to try to capture this case in the CDA net it has cast in the entirely wrong direction. [D.E. 20] at p. 6, ln. 13 (calling itself, intentionally so, the "unidentified advertiser"); p. 6, ln. 23 (misrepresenting that Facebook did not create content).

The Truth

Actually, Facebook has acted as a direct competitor (or "information content provider"), and the Complaint says plenty about that reality. *See, e.g.,* [D.E. 1] at 18, ln. 23-p. 19, ln. 11; p. 9, ln. 13-p. 13, ln. 1 (discussing Facebook's "claim jumping" scheme); p. 13, ln. 2-p. 14, ln. 20 (discussing Facebook's Sponsored Story advertisement News Feed scheme); p. 15, ln. 1-p. 17, ln. 6 (discussing Facebook's stealing and re-distributing of Fyk's businesses to a Los Angeles competitor who paid Facebook more money than Fyk); p. 20, lns. 10-19; p. 21, ln. 25-p. 23, ln. 7 (punctuating Facebook's direct competition schemes).

Facebook's Representations

Facebook misleads / downplays what it did to Fyk's content by calling itself a mere "moderator." [D.E. 20] at p. 4, ln. 7.

The Truth

Actually, Facebook did not just "moderate" Fyk's content, it destroyed/devalued, stole, and/or re-distributed his content. *See, e.g.,* [D.E. 1] at p. 1, lns. 6-7; p. 1, lns. 23-26; p. 2, lns. 4-7, 15-16; p. 3, lns. 16-20; p. 5, ln. 21-p. 6, ln. 2; p. 6, lns. 3-22; p. 7, lns. 11-16; p. 7, ln. 17-p. 9, ln. 12; p. 10, ln. 24-p. 11, ln. 7; p. 11, lns. 10-13-p. 12, ln. 3; p. 13, lns. 2-6, 16-19; p. 14, lns. 1-3, 9-20 and n. 7; p. 15, ln. 8-p. 17, ln. 12.

Facebook's Representations

Facebook misrepresents that Facebook "delet[ed] content from [Fyk's] page," so as to downplay its destruction of Fyk. [D.E. 20] at p. 7, lns. 16-17.

The Truth

Actually, Facebook did not just delete some Fyk content on his businesses/pages, it crushed all of Fyk's businesses/pages. *See, e.g.,* [D.E. 1] at p. 7, ln. 17-p. 8, ln. 4; p. 15, ln. 8-p. 17, ln. 6

Facebook's Representations

Facebook misrepresents that Fyk's Facebook-induced fire sale of the subject businesses/ pages was "voluntar[y]." [D.E. 20] at p. 11, ln. 19.

The Truth

Actually, the Complaint says what the M2D says a few sentences later, that Facebook left Fyk "with no reasonable alternative" other than to fire sell the subject businesses /pages that Facebook's wrongdoing had rendered valueless (for Fyk at least, but not for the Los Angeles competitor in Facebook's good graces at the time). *See, e.g.,* [D.E. 1] atp. 5, lns. 20-21; p. 9, lns. 7-12; p. 15, lns. 8-17; p. 16, lns. 8-14; p. 21, lns. 25-27; p. 26, lns. 1-4.

Facebook's Representations

> Facebook misrepresents part of the fraud/intentional misrepresentation that the Complaint takes issues with, trying to take the sting out of the Fourth Claim for Relief by contending that Facebook never represented to Fyk that his participation in the Facebook paid for reach program extended into "perpetuity." *See* [D.E. 20] at p. *e.g.*, [D.E. 1] at p. 5, ln. 19; p. 6, lns. 7, 27; p. 7, lns. 4-5; p. 15, lns. 5-13, lns. 6-10.

The Truth

> Actually, the fraud/intentional misrepresentation concerning the Facebook paid for reach program was, for examples, (1) the sham worthlessness (*i.e.,* fraud) of same, *see, e.g.,* [D.E. 1] at p. 18, lns. 12-17; p. 24, lns. 3-11; (2) the supposed optional nature of the not-so-optional paid for reach program, *see, e.g.,* [D.E. 1] at p. 5, lns. 2-9; p. 5, n. 3, (3) Facebook's never telling Fyk (*i.e.,* misrepresentation) that it could at any time completely shut him out of his ads account, thereby disallowing his participation in the paid for reach program, and/or (4) never providing Fyk with an explanation (*i.e.,* misrepresentation) as to why he was shut out of his ads account, *see*, *e.g.*, [D.E. 1] at p. 5, ln. 19; p. 6, lns. 7, 27; p. 7, lns. 4-5; p. 15, lns. 5-7; p. 23, ln. 16.

It would be unjust (at minimum) to afford any relief to an untruthful, misrepresentative, misleading, and/or incoherent movant. The M2D must be denied as a matter of fact.

F. The Complaint's Averments Sufficiently Support Each Claim For Relief (Fed. R. Civ. P. 12(b)(6))

Preliminarily, it is important to note that the elements for each of the four claims for relief set forth in the Complaint are taken from the California Civil Jury Instructions and/or California Code.[10] There are a wealth of supportive averments for each claim for relief in the Complaint, especially when viewed in a light most favorable to the complainant (which is the law). And there is far more Facebook wrongdoing; but, even amidst a *Twombly* backdrop, we did our best to adhere to Federal Rule of Civil Procedure 8(a)(2)—"a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* Per this Court's recitation of *Twombly* in *Cunningham* and *Finkelstein, MD. (see* Section A, *supra),* Fyk pleaded plenty "factual content t[o] allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Cunningham,* 2010 WL 11575083 at *2.

All of Facebook's <u>arguments</u> set forth in the M2D (at pages eight through fourteen) are the epitome of premature, unsubstantiated red-herrings. Facebook can someday try to persuade the Court that the facts of this case are analogous to whatever facts were present in the 12(b)(6) case law cited in the M2D; but, on a legal sufficiency motion, that time is not now. For

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[10] As to elements of the First Claim For Relief, *see, e.g.,* Cal. Civ. Jury Inst. 2202; Second Claim for Relief, *see, e.g.,* Cal. Code §§ 17200-17210; Third Claim for Relief, *see, e.g.,* Cal. Penal Code §§ 518-519 (also applies to civil extortion); Fourth Claim for Relief, *see, e.g.,* Cal. Civ. Jury Inst. §§ 1900-1902.

now, *Twombly* is the measure, and the incredibly detailed Complaint has plainly stated causes of action upon which relief can someday be granted. But, to be safe, we now address the cause of action elements the M2D glossily claims are missing.

1. Civil Extortion (Pages 8-10 Of The M2D)

Facebook claims that Fyk fails to state a Civil Extortion claim "because he does not and cannot allege that Facebook wrongly threatened to withhold from him anything that he had a right to possess." [D.E. 20 at 8]. Onward in this vein, Facebook misrepresents that "the Complaint does not identify any contractual provision or any law giving him the right to maintain content on Facebook or to prevent Facebook from promoting the content of other Facebook users or advertisers." *Id.* at 9. Wrong—Facebook publicly admits Fyk's "ownership" of his content. *See* n. 6 *supra; see also* Mr. Zuckerberg's April 10, 2018 Congressional Testimony.[11] Facebook's own words (footnote six above and Mr. Zuckerberg's Congressional Testimony) would create a contract (at best) or work an estoppel (at worst), but, either way, Facebook cannot legitimately disclaim its own words in order to throw this lawsuit out.

Then, Facebook tries to delegitimize Fyk's "fear" and its "threat" by misrepresenting to the Court that the Complaint only contains a "vague allegation" about representations made to Fyk by a "high ranking

[11] Senator Hatch: "Now, Mr. Zuckerberg, I remember well your first visit to Capitol Hill, back in 2010. You spoke to Senate Republican High-Tech Task Force, which I chair. You said back then that Facebook would always be free. Is that still your objective?" Mr. Zuckerberg: "Senator, yes."

Facebook executive." First, that is enough at the 12(b)(6) stage and the fact that we were respectful enough not to include that individual's name in the Complaint by no means renders that individual's critical statement to Fyk "vague." Second, the Complaint is replete with detailed allegations of "fear" and "threat." *See, e.g.,* [D.E. 1] at ¶¶ 18-19, 25-35, 47, 67-71.[12] This 12(b)(6) aspect of the M2D must be denied.

2. Unfair Competition (Pages 10-12 Of The M2D)

Perhaps the most instructive case to look at (not cited in the M2D) is *Fraley*. There, as discussed above, the unfair competition was in the form of Facebook's Sponsored Story advertisement News Feed scheme, and the *Fraley* court denied Facebook's attempt to dismiss the unfair competition aspect of that complaint. Here, the Complaint is replete with allegations as to that scheme and how that scheme crippled Fyk's ad and web-trafficking money-making abilities with Facebook burying his posts underneath its own

[12] ¶ 18 (discussing Facebook's unilateral implementation of a not-so-optional "paid for reach program," creating Fyk's "[f]ear (analogized in averments twenty-five through thirty-five, *infra,* to 'claim jumping') that if Fyk did not engage in Facebook's new 'optional' paid for reach program, he would be blacklisted in the form of having his businesses heavily curtailed or altogether eliminated . . . "); ¶ 19 (discussing that Fyk's very real fear induced him into relenting to Facebook's extortion; *i.e.,* investing $43,000.00 into the worthless paid for reach program); ¶¶ 25-35 (discussing the very real fear/threat of Facebook's jumping Fyk's claim; *i.e.,* hijacking his businesses/pages); ¶ 47 (discussing Fyk's fear of or the threat of Facebook's singling him out); *id.* at n. 3 (discussing how Facebook aimed to put folks on "hospice" who did not work with/pay Facebook—putting one on "hospice" equals fear); ¶¶ 67-71 (summary/punctuation).

sponsored posts contrary to and in disregard for users' preferences. *See, e.g.,* [D.E. 1] at ¶¶ 35-40. But, here, there is more to Facebook's unfair competition than that which was present in *Fraley*. Here, for example, the Complaint thoroughly avers that Facebook steered Fyk's businesses/pages to a Los Angeles competitor who paid Facebook more money. *See, e.g.,* [D.E. 1] at ¶¶ 6, 41-46. Then Paragraphs 58-66 of the Complaint thoroughly sum up or punctuate Facebook's unfair competition.

Oddly, the M2D tries to conflate the Second Claim for Relief (unfair competition, cognizable under California Business & Professions Code Sections 17200-17210) with anti-trust. The Complaint's Second Claim for Relief is not an anti-trust action. The *Fraley* court points out what an unfair competition cause of action is (which is not an anti-trust action):

> [The] UCL . . . does not prohibit specific activities but instead broadly prescribes 'any unfair competition, which means any unlawful, unfair or fraudulent business practice or act. The UCL is designed to ensure 'fair business competition' and governs both anti-competitive business practices and consumer injuries. Its scope is 'sweeping,' and its standard for wrongful business conduct is 'intentionally broad' . . . . Each of the three UCL prongs provides a 'separate and distinct theory of liability' and an independent basis for relief.

Fraley, 830 F. Supp. 2d at 810 (internal citations, which include Ninth Circuit cases, omitted and emphasis added). Even the case cited by Facebook in its M2D *(Levitt II)* says that there can be an anti-trust undertone to a UCL claim, but that a UCL claim also (as here) deals with things that "otherwise significantly threaten[] or harm[] competition." [D.E. 20] at 10.[13] And then the M2D inappositely states that a UCL claim has to be tied to some sort of legislative policy. Wrong—Facebook's own case *(Levitt II)* states, a UCL claim can also emanate from "actual or threatened impact on competition," which, again, is what the Second Claim for Relief of the Complaint is about. There being plenty of supportive averments in the Complaint for the UCL claim, the UCL being intentionally broad, and Facebook's twisting its case law in the wrong direction, this 12(b)(6) aspect of the M2D must be denied.

3. Fraud/Intentional Misrepresentation (Pages 12-13 Of The M2D)

The M2D sparsely tries to focus the Court in on a small percentage of Complaint averments to create the misimpression that the Complaint is not specific enough. So, then, we show the Court how many averments support the Fourth Claim for Relief, though just about everything said about Facebook and what it has done to Fyk has a fraud/intentional misrepresentation undercurrent.[14] *See, e.g.,* [D.E. 1] at ¶¶ 14, 17, 19, ¶¶ 20-24, 30, 35-40, 42-45, 72-78 n. 4-5.[15] This 12(b)(6) aspect of the M2D must be denied.

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[13] And it is not just us talking about Facebook's unfair direct competitive tactics. *See* Exhibit C.

[14] And it is not just us talking about Facebook's fraudulent/misrepresentative ways. *See* Exhibit D.

[15] ¶¶ 14, 17 (going to the purported "free" nature of Facebook, which such freeness was false); ¶ 19 (discussing Fyk's approxim-

4. Intentional Interference With Prospectiye Economic Advantage/Relations (Pages 13-14 Of The M2D)

The M2D sparsely states that because the Complaint's other three claims for relief fail (which they plainly do not), the "derivative" First Claim for Relief cannot stand. The Complaint is very detailed as to how Facebook has destroyed Fyk's economic advantage/relations (both actual and prospective). Whether Facebook's destruction of Fyk's economic advantage/relations was underlain by Facebook's civil extortion, unfair competition,[16] and/or fraud/intentional misrepresentation, the First Claim for Relief must stand. The

ate $43,000.00 investment in a Facebook product, the paid for reach program, which was supposed to increase Fyk's reach and distribution, which proved false); ¶¶ 20-24 (discussing Facebook's Subsection (c)(2)(a) "justification" for crippling Fyk's businesses/pages, which such "justification" was the epitome of fraud and/or intentional misrepresentation because there was nothing Subsection (c)(2)(A) violative about Fyk's content); n. 4 (discussing Facebook's lies about the safe and welcoming nature of the disgusting content on other pages compared to Facebook's intentionally misrepresentative disproportionate treatment of Fyk's content); ¶ 30 and n. 5 (discussing Mr. Zuckerberg's misrepresentations about what Facebook supposedly is, whereas it was nothing of the sort when it came to Facebook's treatment of Fyk); ¶¶ 35-40 (discussing the purported misrepresentative "free" nature of Facebook, whereas the truth is that Facebook uses the platform to shift the hard-earned wealth of others into its pocket through myriad illegal methods or "strategies" as Facebook would call it); ¶¶ 42-45 (discussing Facebook's lies to Fyk that his content was supposedly CDA violative—"lies" because Facebook republished the (virtually) identical content); ¶¶ 72-78 (summary/punctuation).

[16] For more on the First and Second Claims for Relief squaring, *see* footnotes five and nine.

M2D does not quarrel with the fact that Facebook destroyed Fyk's economic advantage/relations—reason being, Facebook cannot genuinely do so . . . it undeniably destroyed Fyk's economic advantage/relations.[17] Rather, the M2D simply says "well, we think the other three claims for relief fail, though we are not going to provide detail as to how that is so, so the First Claim for Relief has gotta go." Such does not rise to the level of colorable argument, and it is pure argument nevertheless—no case (let alone one as serious as this) should be thrown out based on naked lawyer argument. This 12(b)(6) aspect of the M2D must be denied.

WHEREFORE, Plaintiff, Jason Fyk, respectfully requests entry of an order (1) denying the M2D [D.E. 20] filed by Defendant, Facebook, Inc., on November 1, 2018,[18] and (2) awarding any other relief to Fyk that the Court deems equitable, just, or proper.

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[17] Facebook's intentional interference with Fyk's prospective economic advantage continues to this day—Facebook has stolen/converted/embezzled two successful Instagram accounts (Instagram Account Nos. 522601519 and 2817831134, and Facebook owns Instagram in which Fyk is a partner and re-distributed them to a person named Sommer Ray Beaty (who is making millions because of Facebook's re-distribution), then telling Fyk that action would not be taken "without a valid court order."

[18] To the extent the Court somehow finds that there are insufficient facts to support his claims for relief, Fyk respectfully requests leave to amend his Complaint pursuant to Federal Rule of Civil Procedure 15.

Respectfully submitted,

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Dated: December 14, 2018

EXHIBIT A – RELEVANT STATUTORY PROVISION

47 U.S.C. § 230 – Protection for private blocking and screening of offensive material

(a) Findings The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) 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).[1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of

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[1] So in original. Probably should be "subparagraph (A)."

this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means 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 and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

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 interactive computer service.

(4) Access software provider

The term “access software provider“ means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(5) No Effect on Sex Trafficking Law

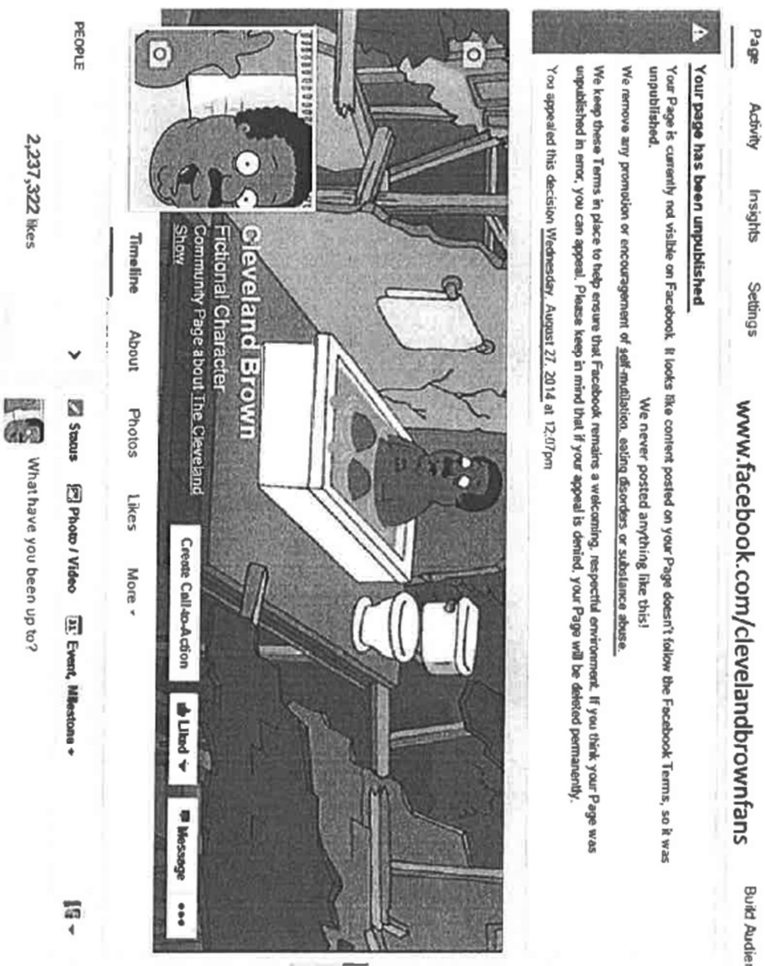
Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit-

(A) any claim in a civil action brought under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

EXHIBIT B(1) – CLEVELAND BROWN FACEBOOK PROFILE



{Transcription}

Page Activity Insights Settings

www.facebook.com/clevelandbrownfans

Build Audier

Your page has been unpublished

Your page is currently not visible on Facebook. It looks like content on your Page doesn't follow the Facebook Terms, so it was unpublished.

We never posted anything like this!

We remove any promotion or encouragement of self-mutilation, eating disorders or substances abuse.

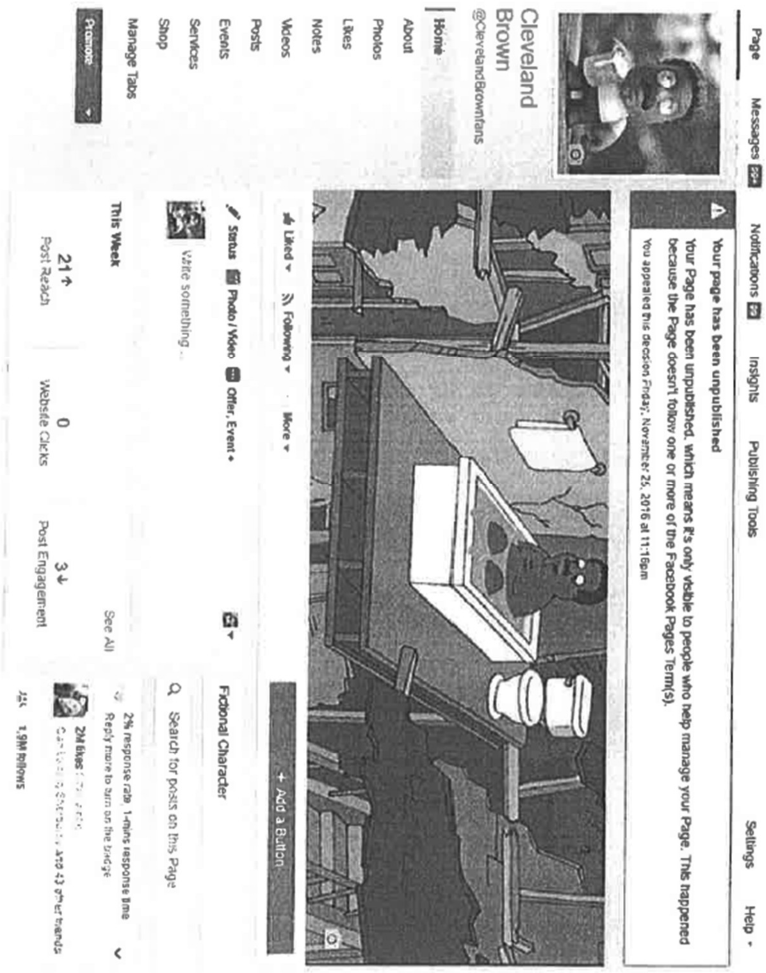
We keep these Terms in place to help ensure that Facebook remains a welcoming, respectful environment. If you think your page was unpublished in error, you can appeal. Please keep in mind that if your appeal is denied. Your Page will be deleted permanently.

Your appealed this decision Wednesday, August 27, 2014 at 12:07pm

[Image] Cleveland Brown
Fictional Character
Community Page about The Cleveland Show

[. . .]

EXHIBIT B(2) – CLEVELAND BROWN FACEBOOK PROFILE



{Translation}

Your page has been unpublished

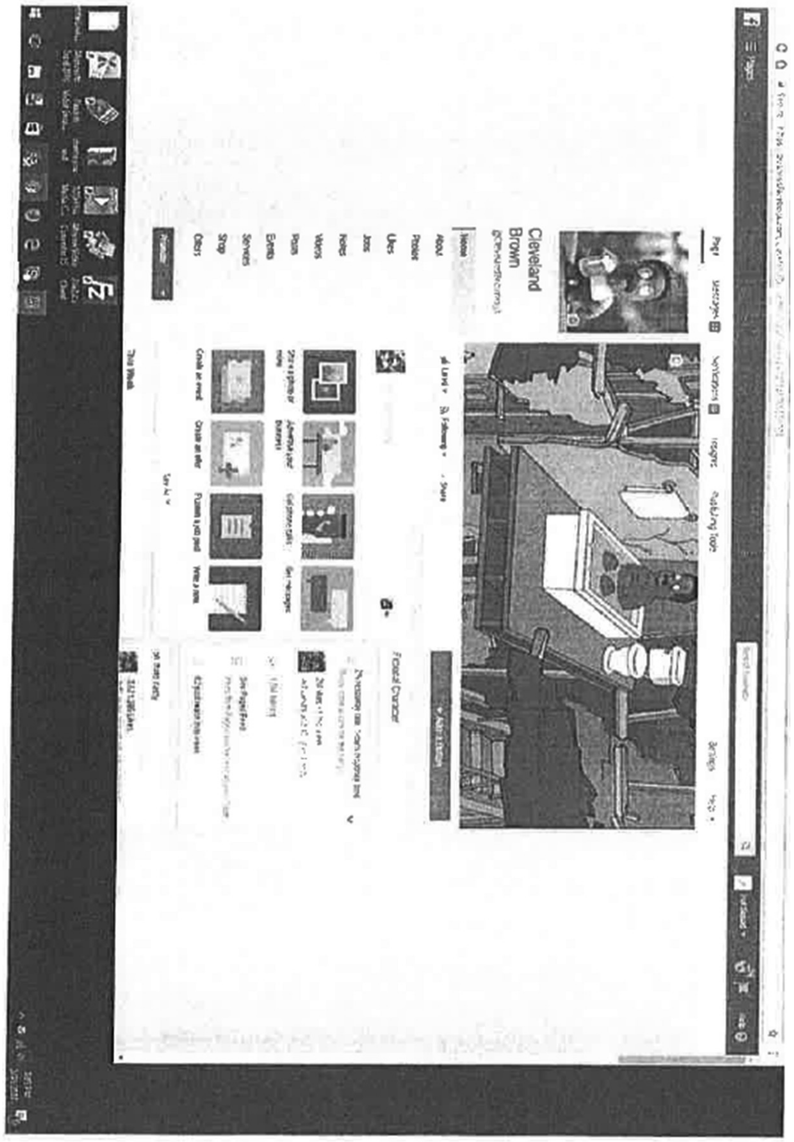
Your page has been unpublished. Which means it's only visible to people who help manage your Page. This happened because the Page doesn't follow one or more of the Facebook Pages Terms(s).

You appealed decision Friday, November 25, 2016 at 11:16pm

[Image] Cleveland Brown
@ClevelandBrownfans

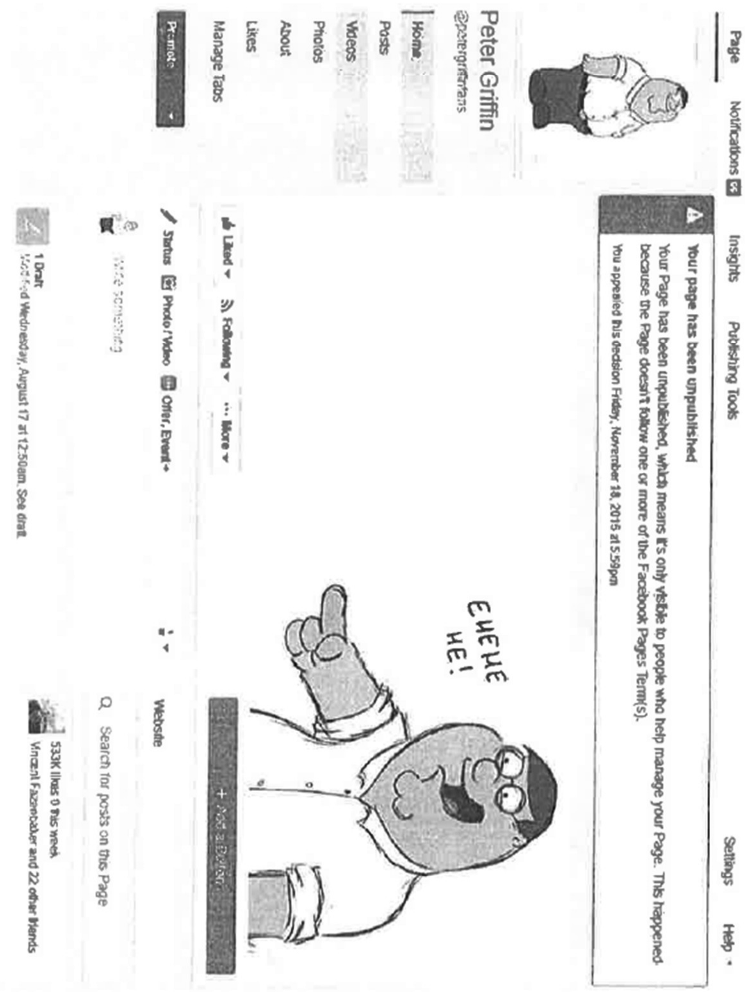
[. . .]

EXHIBIT B(3) – CLEVELAND BROWN FACEBOOK PROFILE



[text not legible]

EXHIBIT B(4) – PETER GRIFFIN FACEBOOK PROFILE



{Translation}

Your page has been unpublished

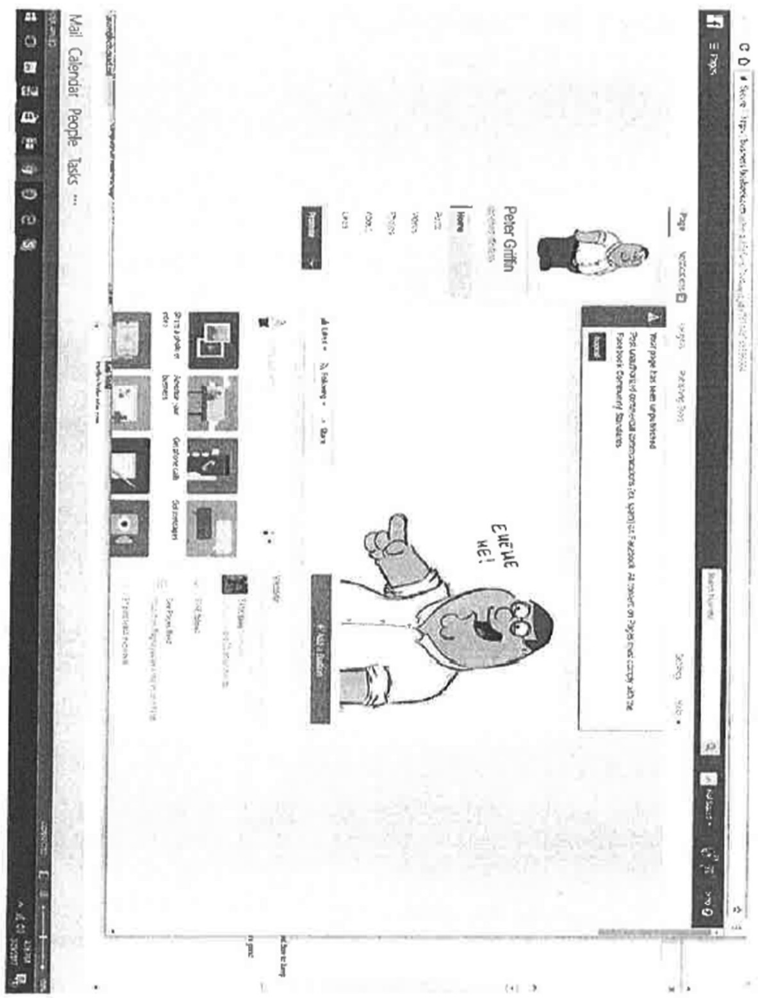
Your page has been unpublished. Which means it's only visible to people who help manage your Page. This happened because the Page doesn't follow one or more of the Facebook Pages Terms(s).

You appealed decision Friday, November 18, 2015 at 5:59pm

[Image] Peter Griffin
@PeterGriffinfans

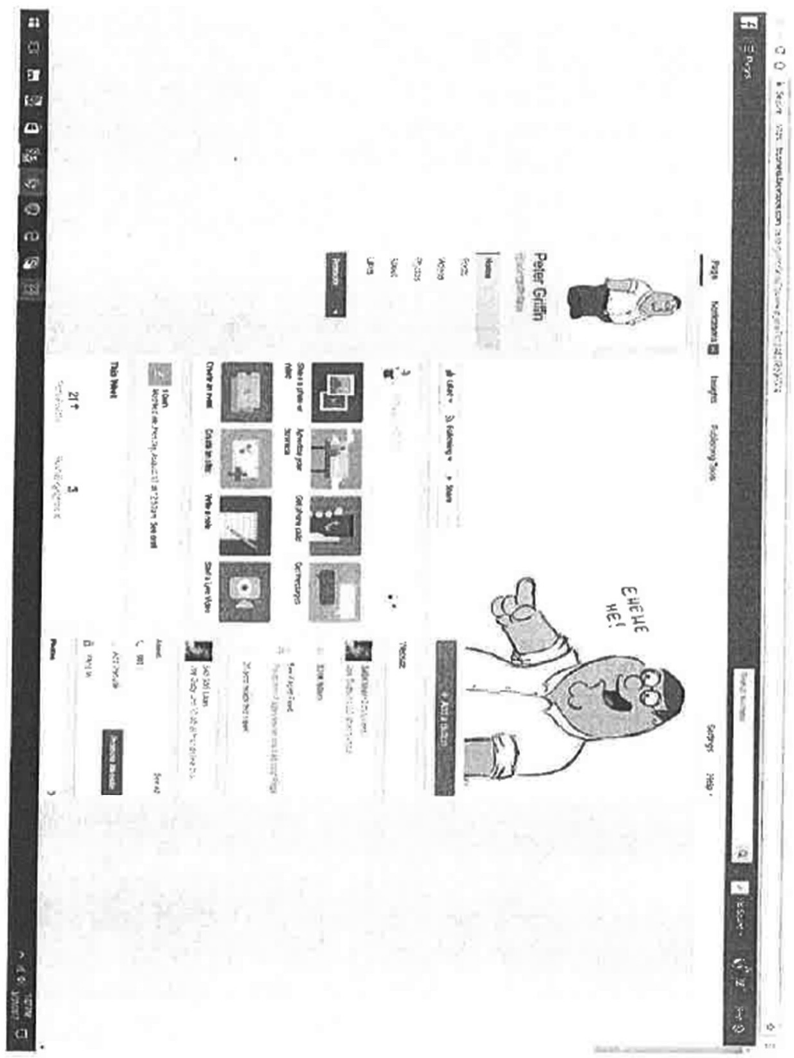
[. . .]

EXHIBIT B(5) – PETER GRIFFIN FACEBOOK PROFILE



[text not legible]

EXHIBIT B(6) – PETER GRIFFIN FACEBOOK PROFILE



[text not legible]

EXHIBIT C – THE NEW YORK TIMES ARTICLE

THE NEW YORK TIMES

The Shift

Facebook Emails Show Its Real Mission: Making Money and Crushing Competition

By Kevin Roose

Dec. 5, 2018

British lawmakers on Wednesday gave a gift to every Facebook critic who has argued that the company, while branding itself as a do-gooder enterprise, has actually been acting much like any other profit-seeking behemoth.

That gift was 250 pages' worth of internal emails, in which Facebook's executives are shown discussing ways to undermine their competitors, obscure their collection of user data and—above all—ensure that their products kept growing.

The emails, which span 2012 to 2015, were originally sealed as evidence in a lawsuit brought against Facebook by Six4Three, an app developer. They were part of a cache of documents seized by a British parliamentary committee as part of a larger investigation into Facebook's practices and released to the public on Wednesday.

It should not come as a surprise that Facebook—a giant, for-profit company whose early employees reportedly ended staff meetings by chanting "domination!"—would act in its own interests.

But the internal emails, a rare glimpse into Facebook's inner workings, show that the image the company promoted for years—as an idealistic enterprise more dedicated to "bringing the world closer together" than increasing its own bottom line—was a carefully cultivated smoke screen.

[Documents released in Britain show how Facebook used account data to favor some partners and punish rivals.]

These emails reveal that in the formative years of Facebook's growth, the company's executives were ruthless and unsparing in their ambition to collect more data from users, extract concessions from developers and stamp out possible competitors.

"It shows the degree to which the company knowingly and intentionally prioritized growth at all costs," said Ashkan Soltani, a privacy researcher and former chief technologist of the Federal Trade Commission.

In a blog post on Wednesday, Facebook said the documents included in the lawsuit were a cherry-picked sample that "tells only one side of the story and omits important context."

Here are four revelations from the emails that detail Facebook's aggressive quest for growth:

1. The company engineered ways to collect Android users' data without alerting them.

In February 2015, Facebook had a privacy dilemma.

The company's growth team—a powerful force within Facebook—wanted to release an update to the Android app that would continually collect users' entire SMS and call log history. That data would be uploaded to Facebook's servers, and would help Facebook make better recommendations, such as suggesting new friends to Android users based on the people they'd recently called or texted. (This feature, called "People You May Know," has been the subject of much controversy.)

But there was a problem: Android's privacy policies meant that Facebook would need to ask users to opt in to having this data collected. Facebook's executives worried that asking users for this data could bring a public backlash.

"This is a pretty high risk thing to do from a PR perspective but it appears that the growth team will charge ahead and do it," one executive, Michael LeBeau, wrote.

He outlined the nightmare scenario: "Screenshot of the scary Android permissions screen becomes a meme (as it has in the past), propagates around the web, it gets press attention, and enterprising journalists dig into what exactly the new update is requesting, then write stories about 'Facebook uses new Android update to pry into your private life in ever more terrifying ways.'"

Ultimately, Facebook found a workaround. Yul Kwon, the head of Facebook's privacy program, wrote in an email that the growth team had found that if Facebook's upgraded app asked only to read Android users' call logs, and not request other types of data from them, users would not be shown a permission pop-up.

"Based on their initial testing, it seems that this would allow us to upgrade users without subjecting them to an Android permissions dialog at all," Mr. Kwon wrote.

In a blog post on Wednesday, Facebook said that it collects call and text message logs only from Android users who opt in, and that as of 2018, it keeps this information only temporarily, since "the information is not as useful after about a year."

2. Mark Zuckerberg personally approved cutting off a competitor's data access.

In January 2013, one of Mr. Zuckerberg's lieutenants emailed him with news about Twitter, one of Facebook's biggest competitors. The company had introduced a video-sharing service called Vine, which allowed users to create and post six-second video clips.

When new users signed up for Vine, they were given the option of following their Facebook friends—a feature enabled through Facebook's application program interface, or API. This feature was widely used, and had become a valuable tool for new apps to accelerate user growth. But in Vine's case, Facebook played hardball.

"Unless anyone raises objections, we will shut down their friends API access today," wrote the lieutenant, Justin Osofsky, now a Facebook vice president.

Mr. Zuckerberg, the chief executive, replied: "Yup, go for it."

On Wednesday, Rus Yusupov, one of Vine's co-founders, said on Twitter, "I remember that day like it was yesterday."

Facebook's decision to shut off Vine's API access proved fateful. Months later, Instagram released its own short-form video feature, which many saw as a further attempt by Facebook to hobble Vine's growth. Vine shut down in 2016, after stagnant growth and heavy competition led many of its stars and users to go elsewhere.

On Tuesday, Facebook changed its developer policies, ending the prohibition on apps that competed with the company's own features.

3. Facebook used a privacy app to collect usage data about its competitors.

In 2013, Facebook acquired Onavo, an Israeli analytics company, announcing that Onavo's tools "will help us provide better, more efficient mobile products."

One of those tools, an app called Onavo Protect, was especially helpful in helping Facebook sniff out potential competitors. The app, which was billed to users as a way to keep their internet browsing private, also collected data about which apps those people used the most—including apps not owned by Facebook—and fed that information back to Facebook.

According to the emails released on Wednesday, Facebook executives received reports about the performance of rival apps, using data obtained through Onavo.

Sometimes, those reports revealed up-and-coming competitors. One report included in the email cache, dated April 2013, said that WhatsApp, the mobile messaging app, was gaining steam. According to Onavo's proprietary data, WhatsApp was being used to send 8.2 billion messages a day, whereas Facebook's own mobile app was sending just 3.5 billion messages daily.

Ten months later, Facebook announced that it was acquiring WhatsApp in a deal valued at $14 billion.

In August, Facebook pulled Onavo Protect from the App Store, after Apple reportedly said that it violated the company's privacy rules.

4. Facebook executives wanted more social sharing, as long as it happened on Facebook.

In November 2012, Mr. Zuckerberg sent a lengthy note to several top executives called "Platform Model Thoughts." It outlined how intensely he wanted Facebook to be the center of everyone's social life online.

The email addressed a debate that was raging inside Facebook at the time, about whether outside app developers should have to pay to connect their apps to Facebook's developer platform. Mr. Zuckerberg said that he was leaning away from a charge-for-access model, and toward what he called "full reciprocity"—giving third-party developers the ability to connect their apps to Facebook free, in exchange for those apps' giving data back to Facebook, and making it easy for users to post their activity from those services on their Facebook timelines.

By giving away access, Mr. Zuckerberg said, Facebook could entice more developers to build on its platform. And by requiring app developers to send data back to Facebook, it could use those apps to increase the value of its own network. He wrote that social apps "may be good for the world but it's not good for us unless people also share back to Facebook."

Facebook later put in place a version of this "reciprocity rule" that required developers to make it possible for users of their apps to post their activity to Facebook, but did not require them to send usage data back to Facebook. (Not coincidentally, this "reciprocity rule" explains why for several years, it was virtually impossible to go on Facebook without seeing dozens of updates about what your friends were watching on Hulu or listening to on Spotify.)

In a Facebook post on Wednesday, after the emails were made public, Mr. Zuckerberg wrote that the company had tightened its developer policies in 2014 in order to protect users from "sketchy apps" that might misuse their data.

But back in 2012, the company's worry was not about data misuse. Instead, the company was chiefly concerned with how to use those developers' apps to spur its own growth.

Sheryl Sandberg, Facebook's chief operating officer, wrote back to concur with Mr. Zuckerberg's approach to data reciprocity.

"I think the observation that we are trying to maximize sharing on Facebook, not just sharing in the world, is a critical one," she wrote.

Facebook internal emails show Zuckerberg targeting competitor Vine

By Donie O'Sullivan and Hadas Gold, CNN Business
Updated 5:16 PM EST, Wed December 5, 2018

New York and London CNN Business—

Mark Zuckerberg and his colleagues were apparently concerned enough about Vine, a video app from Twitter, that on the day it launched in January 2013, they moved to restrict its access to Facebook user data, a trove of internal Facebook emails released by the U.K. Parliament on Wednesday shows.

The decision to restrict Vine's access to data, which would have allowed its users to invite their Facebook friends to join the app, was in line with a company policy at the time, Facebook told CNN on Wednesday. That policy restricted apps' access to Facebook data when the company deemed that the apps "replicated" Facebook's "core functionality." In other word, apps that Facebook thought might compete with them.

"Twitter launched Vine today which lets you shoot multiple short video segments to make one single, 6-second video," Facebook vice-president Justin Osofsky wrote to Zuckerberg and others the day Vine launched, according to the emails released by the UK Parliament.

"Unless anyone raises objections, we will shut down their friends API access today. We've prepared reactive PR," Osofsky added.

"Yup, go for it," Zuckerberg responded.

Facebook said Wednesday that Zuckerberg and his colleagues were only following Facebook's policy protecting against competitors. But the company changed the policy on Tuesday, one day before the emails were released.

"As part of our ongoing review we have decided that we will remove this out of date policy so that our platform remains as open as possible. We think this is the right thing to do as platforms and technology develop and grow," a Facebook spokesperson said Wednesday.

"We built our developer platform years ago to pave the way for innovation in social apps and services. At that time we made the decision to restrict apps built on top of our platform that replicated our core functionality," the spokesperson said, adding, "These kind of restrictions are common across the tech industry with different platforms having their own variant including YouTube, Twitter, Snap and Apple."

Vine, which allowed users to shoot and posts six second looped videos, shut down in 2017. Twitter did not immediately respond to a request for comment.

Apparently responding to Wednesday's revelations, Vine co-founder Rus Yusupov tweeted, "Competition sucks, right? No. It allows for products to improve, become available to more people, at lower costs. Strive to build new things that people want and influence other creators for the cycle to continue."

Zuckerberg talks

The email discussion about Vine is part of a trove of internal Facebook documents the company fought to keep secret.

The documents include conversations among senior Facebook executives.

The cache stems from a lawsuit brought against Facebook by a small app company called Six4Three. In a blog post Wednesday, Facebook said "The documents were selectively leaked to publish some, but not all, of the internal discussions at Facebook."

Zuckerberg himself posted on Facebook as well, writing, "I understand there is a lot of scrutiny on how we run our systems. That's healthy given the vast number of people who use our services around the world, and it is right that we are constantly asked to explain what we do. But it's also important that the coverage of what we do – including the explanation of these internal documents – doesn't misrepresent our actions or motives. This was an important change to protect our community, and it achieved its goal."

The documents

A California judge had placed the documents under seal. But when Six4Three's CEO, Ted Kramer, was in London last month, he was escorted to Parliament and told to produce the documents or be held in contempt.

Six4Three—which had an app that allowed users to search for pictures of their friends in swimsuits—has accused the social media giant of having little regard for user privacy and claimed that Zuckerberg devised a plan that forced some of Facebook's rivals, or potential rivals, out of business. Facebook says the lawsuit is without merit.

The UK parliamentary committee, led by Damian Collins, asked for the documents as part of a larger investigation into Facebook, fake news, disinformation and data privacy that has been going on for more than a year. The committee has repeatedly asked Zuckerberg to give evidence, but thus far he's avoided the committee, even when it brought together lawmakers from nine different countries for an unprecedented "International Grand Committee on Disinformation."

"I believe there is considerable public interest in releasing these documents. They raise important questions about how Facebook treats users data, their policies for working with app developers, and how they exercise their dominant position in the social media market," Collins said on Twitter. "We don't feel we have had straight answers from Facebook on these important issues, which is why we are releasing the documents."

A Facebook spokesperson said in a statement after the release of the documents, "As we've said many times, the documents Six4Three gathered for their baseless case are only part of the story and are presented in a way that is very misleading without additional context. We stand by the platform changes we made in 2015 to stop a person from sharing their friends' data with developers. Like any business, we had many of internal conversations about the various ways we could build a sustainable business model for our platform. But the facts are clear: we've never sold people's data."

Correction: An earlier version of this story incorrectly reported the day on which the emails had been released.

EXHIBIT D – ARTICLE BY JESSICA GUYNN IN USA TODAY

Facebook emails suggest company explored selling people's data despite pledges not to

Jessica Guynn – USA TODAY

Published 11:59 a.m. ET Dec. 5, 2018 | Updated 4:36 p.m. ET Dec. 5, 2018

(Photo: Jonathan Nackstrand, AFP/Getty Images)

SAN FRANCISCO – Internal Facebook emails published online by U.K. lawmakers, some involving CEO Mark Zuckerberg, paint a picture of a company aggressively hunting for ways to make money from the reams of personal information it was collecting from users.

Wednesday's release of some 250 pages (https://parliament.uk/documents/commons-committees/culture-media-and-portiNote-by-Chair-and-selected-documents-ordered-from-Six4Three.pdf) of emails from 2012 to 2015 – a period of dramatic growth for the newly publicly traded company – provides a rare glimpse into Facebook's internal conversations, suggesting the social media giant gave preferential access to some third-party app developers such as Airbnb, Lyft and Netflix, while restricting access for others. It also considered charging app developers for access to data, despite pledges that it would never do so.

There is no indication that Facebook went forward with a proposal to charge app developers for access to the personal information of Facebook users. On Wednesday, Zuckerberg denied Facebook ever sold or considered selling the data of its more than 2 billion users.

"Like any organization, we had a lot of internal discussion and people raised different ideas. Ultimately, we decided on a model where we continued to provide the developer platform for free and developers could choose to buy ads if they wanted," he wrote in a Facebook post (https://ww.facebook.com(zuck/posts/10105559172610321) responding to the release of the internal emails by U.K. lawmakers. "Other ideas we considered but decided against included charging developers for usage of our platform, similar to how developers pay to use Amazon AWS or Google Cloud. To be clear, that's different from selling people's data. We've never sold anyone's data."

According to some of the emails, Facebook discussed cutting off access to rival companies and giving app developers who bought advertising special access to data. It also provided access to app developers that encouraged Facebook users to spend more time on the social network.

The revelations that shed light on previously unknown Facebook practices were included in internal documents seized by U.K. lawmakers from the developer of a now-defunct bikini photo searching app, Pikinis, as part of an investigation into fake news. The emails were sealed in a California lawsuit filed by Six4Three. Six4Three sued Facebook in 2015, alleging the social network's data policies favored some companies over others.

"I've been thinking about platform business model a lot this weekend. . . . if we make it so (developers) can generate revenue for us in different ways, then it makes it more acceptable for us to charge them quite a bit more for using platform," Zuckerberg wrote in one email.

In another email in 2012, Zuckerberg seemed to shrug off concerns about the security of Facebook users' data. "I think we leak info to developers, but I just can't think of any instances where that data has leaked from developer to developer and caused real issue for us," he wrote.

"The set of documents, by design, tells only one side of the story and omits important context," the company said in a statement. (https://newsroom.fb.com/news/2018/12/response-to-six4three-documents/)

Public trust in Facebook's handling of people's personal information has been shaken by a series of crises. Chief among them is Cambridge Analytica, a political consulting firm hired by Donald Trump's presidential campaign that has been accused of improperly accessing millions of Facebook accounts without users' consent.

A British researcher and his firm, Global Science Research, legitimately gained access to the personal data of Facebook users and their friends in 2013 while working on a personality app, and passed that data to Cambridge Analytica. Facebook began restricting app developers' access user data in 2014 and 2015.

"We still stand by the platform changes we made in 2014/2015, which prevented people from sharing their friends' information with developers like the creators of Pikinis," Facebook said in a statement. "The extensions we granted at that time were short term and only used to prevent people from losing access to specific functions as developers updated their apps. Pikinis didn't receive an extension, and they went to court."

Damian Collins, chairman of the digital, culture, media and sport parliamentary committee investigating Facebook, said lawmakers released the documents because "we don't feel we have had straight answers from Facebook on these important issues."

Last week, Collins announced he planned to release the emails after forcing Ted Kramer, the founder of Six4Three, to hand them over during a business trip to London. On Friday, California Superior Court Judge V. Raymond Swope ordered Kramer to turn over his laptop to a forensic expert after Kramer admitted he had turned over the Facebook documents to lawmakers.

"I believe there is considerable public interest in releasing these documents. They raise important questions about how Facebook treats users data, their policies for working with app developers, and how they exercise their dominant position in the social media market," he wrote in a Twitter post.

Damian Collins @DamianCollins · Dec 5, 2018
I believe there is considerable public interest in releasing these documents. They raise important questions about how Facebook treats users data, their policies for working with app developers, and how they exercise their dominant position in the social media market.

Damian Collins
@DamianCollins

We don't feel we have had straight answers from Facebook on these important issues, which is why we are releasing the documents.

352 9:31 AM - Dec 5, 2018

160 people are talking about this

Among the details in the Facebook emails:

–Facebook staffers explored how to use access to Facebook users' data to get companies to spend more on advertising. In 2012, Facebook staffers debated removing restrictions on user data for developers who spent $250,000 or more on ads.

Facebook's response: (https://newsroom.fb.com/news/2018/12/response-to-six4three-documents/ "We explored multiple ways to build a sustainable business with developers who were building apps that were useful to people. . . . We ultimately settled on a model where developers did not need to purchase advertising."

–When competitor Twitter launched Vine in 2013, Facebook shut down access to keep the mobile video app from growing through friends on the platform and competing with Instagram, which it owns. "Unless anyone raises objections, we will shut down their friends API access today. We've prepared reactive

PR," Facebook executive Justin Osofsky wrote to Zuckerberg. "Yup, go for it," Zuckerberg replied.

Facebook's response: "We built our developer platform years ago to pave the way for innovation in social apps and services. At that time we made the decision to restrict apps built on top of our platform that replicated our core functionality. These kind of restrictions are common across the tech industry."

–In 2015, the company began uploading call and text logs from Android phones. Collins' committee says Facebook tried to make it "as hard as possible" for users to understand that their calls and texts would be collected. At the time, a Facebook engineer said the practice was a "high-risk thing to do from a PR perspective." The data offered a comprehensive look into how users communicated on their mobile devices.

Facebook's response: The company says it allowed Facebook users to opt into giving the social network access to their call and text logs, but did it in the Facebook app, not on Android. "This was not a discussion about avoiding asking people for permission," it said.

–Facebook used its security app, Onavo, to gather information on how many people used certain apps and how often they used them to help Facebook decide which companies it should acquire, including messaging app WhatsApp for $19 billion, and which to view as a competitive threat.

Facebook's response: "We've always been clear when people download Onavo about the information that is collected and how it is used, including by Facebook. . . . People can opt-out via the control in their settings and their data won't be used for anything other than to provide, improve and develop Onavo products and services."

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:18-CV-05159-JSW-KAW

ORDER DENYING DEFENDANT'S NOVEMBER 1, 2018, MOTION TO DISMISS [D.E. 20]

This cause having come before the Court on Defendant's November 1, 2018, Motion to Dismiss [D.E. 20] and related responsive briefing, and the Court having had the benefit of examination of the record and oral argument, the Court hereby denies Defendant's Motion to Dismiss and instructs Defendant to answer the Complaint within _____ days.

DONE AND ORDERED in Chambers on this _____ day of _____________, 2019.

____
United States District Judge

DEFENDANT FACEBOOK'S MOTION TO DISMISS, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA [DE 20] (NOVEMBER 1, 2018)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:18-CV-05159-JSW

Date: December 14, 2018
Time: 9:00 a.m.
Dept.: Courtroom 5

Date Filed: August 22, 2018
Trial Date: Not set

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

[TOC & TOA Excluded]

NOTICE OF MOTION AND MOTION

Notice is hereby given to Plaintiff Jason Fyk that Defendant Facebook, Inc. hereby moves the Court to dismiss the Complaint pursuant to Federal Rule of

Civil Procedure 12(b)(6). This motion is noticed for hearing on December 14, 2018 at 9:00 a.m., in Courtroom 5, 2nd Floor, 1301 Clay Street, Oakland, California, 94612.

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF ARGUMENT

Plaintiff has filed a business tort case against Facebook that seeks to hold the company liable for actions that allegedly undermined the value of certain Facebook pages Plaintiff created. Plaintiff sold these pages for about $1 million, but believes that they were worth "billions" of dollars absent Facebook's conduct.

Plaintiff's claims should be dismissed for two reasons. *First*, each claim is barred by Section 230(c)(1) of the Communications Decency Act. That statute immunizes internet platforms like Facebook for claims that seek to target them for moderation of third-party content on the platform such as "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). *Second*, Plaintiff fails to state a cause of action for each of the claims he asserts. Accordingly, as explained below, this case should be dismissed with prejudice.

I. Introduction

Plaintiff Jason Fyk used Facebook's free platform to create a series of Facebook pages such as one dedicated to photos and videos of people urinating. *See* Complaint ("Compl."), ¶ 22 (describing Fyk's page www.facebook.com/takeapissfunny). Foregoing "food and other household necessities for him and his family," Plaintiff alleges that he "dedicated all the money he had" to creating a collection of such "funny" pages. Plaintiff alleges that Facebook took action that hindered the success of such pages. This alleged "unlawful interference," consisted of, among other things, blocking content posted by Plaintiff found to violate Facebook's community standards, failing to block similar content on his competitors' Facebook pages, and "muscling out" some of Plaintiff's content to make room for sponsored ads. Because of these alleged improprieties, Plaintiff allegedly was forced to "fire sell" his pages for one million dollars.

Notwithstanding Plaintiff's inflated claim that this is a "true case of David versus Goliath," Compl., ¶ 9, his Complaint is a pedestrian business tort case that should end before it gets started. The Complaint must be dismissed with prejudice for two reasons. *First*, Facebook enjoys immunity under Section 230(c)(1) of the Communications Decency Act, which protects internet platforms from claims targeting the exercise of their traditional editorial functions.

Second, the Complaint fails to state any plausible claim for relief: (i) Plaintiff's claim for civil extortion fails because the Complaint does not allege any actionable threat of unlawful injury; (ii) Plaintiff's claim for violation of the Unfair Competition Law is facially deficient because the Complaint does not plausibly allege that the purported "unfair" conduct violates antitrust principles or significantly harms competition; (iii) Plaintiff's claim for fraud and misrepresentation fails because Plaintiff does not plausibly allege any actionable misrepresentation; and (iv) Plaintiff's claim for intentional interference with prospective economic relations fails because it is entirely derivative of Plaintiff's other deficient claims.

II. Background

Facebook operates the world's leading social media service. Over two billion people worldwide use Facebook to create personal profiles, build community, and share content.

Plaintiff was "facing bankruptcy and eviction" when he started using Facebook's free platform "in the hopes of experiencing the American Dream." Compl., ¶ 32. Plaintiff created various "humorous" Facebook pages–such as www.facebook.com/takeapissfunny.com –"designed to get a laugh out of Fyk's viewers/followers." *Id.*, ¶¶ 15, 22. Initially, those pages attracted a wide following, allegedly generating hundreds of thousands of dollars per month in advertising and net traffic revenue. *Id.*, ¶ 22. According to Plaintiff, however, Facebook severely devalued those pages over time through various forms of alleged unlawful interference such that he was eventually forced to sell them for the "relatively nominal approximate" sum of $1,000,000. *Id.*, ¶ 42. Those pages were "realistically valuated by some in the nine figure range," according to Plaintiff. *Id.*, ¶¶ 42, 43. Thus, Plaintiff estimates that Facebook "has deprived" him of hundreds of millions ("if not billions") of dollars. *Id.*, ¶ 55.

Plaintiff alleges that Facebook's "meddling" took myriad forms. Most notably, Facebook allegedly blocked or deleted content found to violate Facebook's community standards. *E.g.*, Compl., ¶ 20. Plaintiff contends that these actions were "incorrect" and that Facebook was "unresponsive to [his] subsequent pleas for appeal and/or customer service." *Id.*, ¶ 21. He also contends that Facebook had no valid basis to block his content because Facebook did not block other similar content on other users' Facebook pages. *Id.*, ¶ 23. Instead, Plaintiff insists that Facebook's alleged selective enforcement of its standards was calculated only to strong-arm him into participating in Facebook's optional paid reach program, which Facebook purportedly implemented "overnight and pursuant to corporate greed." *Id.*, ¶¶ 14, 18–19, 68. Fyk did ultimately invest $43,000 in Facebook's paid reach program "out of fear of losing his business/pages." *Id.*, ¶ 19. But then Facebook allegedly "deactivated [his] ads account," leaving him "no reasonable alternative other than to return to an organic reach model." *Id.*

Facebook's alleged interference also took the form of "muscling out" some of the content on Plaintiff's Facebook pages to make room for sponsored ads from Facebook's own advertisers. In particular, Plaintiff alleges that "in order for users to see random Facebook-sponsored posts that they did not care to see, Facebook had to eliminate (or heavily curtail) the posts that people liked seeing on their news feeds (*e.g.*, Fyk's posts) and force Facebook-sponsored posts onto user feeds whether the user wanted that or not." *Id.*, ¶ 37. "By way of this misconduct, Facebook [allegedly] was/is making money from . . . random Facebook sponsored posts" while "strong-arming out user-friendly news feed posts like Fyk's." *Id.*, ¶ 39.

Finally, Plaintiff alleges that Facebook engaged in unlawful interference during the alleged "fire sale" of his Facebook pages to a competitor. Specifically, Plaintiff alleges that Facebook "offer[ed] [his] competitor customer service before, during, and after the fire sale" in order to "redistribute Fyk's economic advantage" to the competitor. *Id.*, ¶ 43. Plaintiff complains that the "customer service offered to the competitor . . . rose to the level of Facebook flying representation down to Los Angeles to meet with the competitor to make sure the Facebook-induced redistribution of Fyk's economic advantage . . . went through." *Id.*

Based on these allegations, Fyk asserts four claims: (1) intentional interference with prospective business advantage/relations; (2) unfair competition under California Business & Professions Code § 17200; (3) civil extortion; and (4) fraud/misrepresentation. Compl., ¶¶ 49–78.

III. Argument

A. Plaintiff's Claims Are Barred by Section 230(c)(1) of the CDA

Plaintiff's claims fail at the outset, and should be dismissed with prejudice, because they are barred by Section 230(c)(1) of the CDA. 47 U.S.C. § 230(c)(1). The Complaint seeks to hold Facebook liable for moderating what content it permits on its platform—something that Section 230(c)(1) directly prohibits.

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). Accordingly, courts routinely dismiss at the pleading stage claims like those asserted here under Section 230(c)(1). *See, e.g.*, *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1121 (9th Cir. 2007) (affirming dismissal of § 17200 unfair competition claim); *Levitt I*, 2011 WL 5079526, at *8-9 (dismissing claims for civil extortion and § 17200 unfair competition); *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1122–23 (E.D. Cal. 2010) (dismissing intentional interference and fraud claims).

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).[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 quotations and citations omitted), *opinion amended and superseded on denial of reh'g*, 488 F.3d 1102 (9th Cir. 2007). 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. "So long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of

[1] The CDA provides a second form of immunity under Section 230(c)(2). While Facebook reserves the right to assert Section 230(c)(2) immunity at a later stage, if necessary, it relies solely on Section 230(c)(1) for purposes of this motion, in the interest of judicial economy.

the editing or selection process." *Carafano v. Metro-splash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).

Facebook is entitled to immunity under Section 230(c)(1) if (1) it is a "provider . . . of an interactive computer service," (2) the allegedly offending content was "provided by another information content provider," and (3) Plaintiffs' claim treats Facebook as the "publisher" of that content. 47 U.S.C. § 230(c)(1); *accord Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016). The Complaint reveals that all three requirements for Section 230(c)(1) immunity are met.

1. Facebook is an interactive computer service provider

Facebook undoubtedly qualifies as a "provider" of an "interactive computer service." The CDA defines "interactive computer service" 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). Not surprisingly, every court to consider whether Facebook meets this definition has rightly concluded that it does. *See e.g., Sikhs for Justice, Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1093 (N.D. Cal. 2015); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1065 (N.D. Cal. 2016); *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 206 (2017).

Here, the Complaint itself alleges that Facebook provides an internet-based platform where millions of individual users can access third party content, including content uploaded by Plaintiff. *See, e.g.*, Compl. ¶ 2. The first requirement for Section 230(c)(1) immunity is thus met.

2. The content at issue was provided by someone other than Facebook

For the second requirement, the content at issue must come from an "information content provider" other than Facebook. "Information content provider" is broadly defined as "any person or entity that is responsible, in whole or in part, for the creation or development" of the content at issue. 47 U.S.C. § 230(f)(3); *see also Jefferson v. Zukerberg*, 2018 WL 3241343, at *5 (D. Md. July 3, 2018) (requirement met where "nothing in the Complaint suggests that Facebook was itself 'responsible' for the 'creation' or 'development' of any content"). Facebook's users, including Fyk, fit this definition, as numerous courts have held. *See, e.g.*, *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358–59 (D.C. Cir. 2014); *Sikhs for Justice*, 144 F. Supp. 3d at 1093–94.

Here, Fyk's claims arise almost entirely out of content created by Fyk or other Facebook users. Fyk's claims are based primarily on allegations that Facebook wrongfully removed content from various pages that Fyk created on Facebook. *E.g.*, Compl., ¶¶ 20–22, 42, 47, 52, 64, 66, 69. That content indisputably meets the second requirement for application of Section 230(c)(1) immunity. *See, e.g.*, *Sikhs for Justice*, 144 F. Supp. 3d at 1093-94. *Klayman*, 753 F.3d at 1358– 59; *Jefferson*, 2018 WL 3241343, at *5.

The Complaint also alleges that Facebook has treated Plaintiff unfairly by failing to block similar content on his competitors' Facebook pages. Compl., ¶¶ 23–24, 42, 45. Such third-party content also satisfies the second requirement for Section 230(c)(1) immunity. *Klayman*, 753 F.3d at 1358–59; *Jefferson*, 2018 WL 3241343, at *5.

Finally, Plaintiff's claims are based on allegations that Facebook improperly "muscled out" some of his content to make room for sponsored posts from certain unidentified advertisers. *E.g.*, Compl., ¶¶ 37–40, 51, 65, 66. The content from those advertisers likewise satisfies the second requirement for Section 230(c)(1) immunity. *See, e.g.*, *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 890 (N.D. Cal. 2017) (rejecting argument that defendants, including Facebook, were liable as creators of content because they allegedly "select advertisements to pair with content on their services"); *see also Kimzey*, 836 F.3d at 1270–71 (user content republished by Yelp! as advertisements meets second requirement); *Jurin*, 695 F. Supp. 2d at 1123 (Google's "Sponsored Link" advertisements program meets second requirement because Google does not "provide the content" of the advertisements).

Because the Complaint does not allege that Facebook created any content, but rather concedes that the relevant content was created by Facebook users (including Fyk) and advertisers, the second requirement for Section 230(c)(2) immunity is met.

3. Plaintiff's claims seek to hold Facebook liable for "exercise of a publisher's traditional editorial functions"

The third requirement for Section 230(c)(1) immunity is met if a plaintiff "seek[s] to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). In determining whether the third requirement is met, "what matters is not the name of the cause of action" but rather "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 1101–02. If "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker,'" then "[S]ection 230(c)(1) precludes liability." *Id.* at 1102.

Here, each of Plaintiff's claims seeks to hold Facebook liable for, and is derived from, Facebook's "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Zeran,* 129 F.3d at 330. The civil extortion and § 17200 unfair competition claims are based on allegations that Facebook threatened to and/or did manipulate third-party content—deleting content from Plaintiff's pages, refusing to delete content from competitors, or promoting paid ads from others—to force Plaintiff to pay for advertising or benefit others who did. Compl. ¶¶ 63–65, 68–70. The intentional interference claim is derived from the same alleged conduct: Plaintiff alleges that Facebook interfered with his ability to get advertisers on his Facebook page by threatening to delete and/or actually deleting content from his page while promoting content from its own advertisers. Compl. ¶¶ 50–56. The fraud claim is no different. Plaintiff asserts that Facebook fraudulently claimed that it could properly take down content from his pages, when actually it did so to try to gain advertising revenue. Compl., ¶¶ 73–75. In other words, the fraud claim simply repackages his allegations that Facebook wrongfully threatened to and/or did take down content from his page.

Levitt I offers a useful analog for why Plaintiff's claims fall squarely within the scope of Section 230(c)(1)'s protections. In *Levitt I*, certain business owners alleged that Yelp pressured them into paying for its advertising program by threatening to manipulate, and actually manipulating, third-party content on the site to hurt them and/or help their competitors. 2011 WL 5079526, at *1–2.[2] The plaintiffs asserted claims of civil extortion and § 17200 unfair competition based on these allegations. *Id.* The Court dismissed both claims at the pleading stage under Section 230(c)(1), finding that they derived from the exercise of traditional editorial functions. *Id.* at *6 ("Plaintiffs' allegations of extortion based on Yelp's alleged manipulation of their review pages—by removing certain reviews and publishing others or changing their order of appearance—falls within the conduct immunized by § 230(c)(1)."); *id.* at *9 (same for § 17200 claim). Plaintiffs' allegations that Yelp acted out of improper financial motives made no difference, because "traditional editorial functions often include subjective judgments informed by . . . financial considerations," and "[d]etermining what motives are permissible and what are not could prove problematic" and undermine the purpose of Section 230(c)(1). *Id.* at *7-8. The Ninth Circuit affirmed the dismissal on other grounds, without reaching Section 230(c)(1), as discussed further below. *See Levitt v. Yelp! Inc.* ("*Levitt II*"), 765 F.3d 1123, 1129 (9th Cir. 2014).

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[2] The plaintiffs in *Levitt I* also made claims based on allegations that Yelp itself created certain content, and the court rejected those claims as insufficiently pled. 2011 WL 5079526, at *5, 9.

Here, just as in *Levitt I*, Plaintiff alleges that Facebook has improperly exercised traditional editorial functions to advance its own financial interests. Just as in *Levitt I,* Plaintiff's claims based on those allegations are barred by Section 230(c)(1).

B. Plaintiff Fails to Adequately Allege any Claim

Even if Fyk's claims were not barred entirely by Section 230(c)(1) of the CDA, they would have to be dismissed because they fail to state any plausible claim for relief.

1. The Complaint Fails to State a Claim for Civil Extortion

Plaintiff fails to state a claim for civil extortion because he does not and cannot allege that Facebook wrongfully threatened to withhold from him anything that he had a right to possess.

To the extent courts have recognized an independent cause of action for civil extortion, "it is based on the same elements as criminal extortion." *Levitt I*, 2011 WL 5079526, at *9 n.5 (noting that some courts have refused even to recognize such a cause of action). Under California law, "[e]xtortion is the obtaining of property from another, with his consent . . . induced by a *wrongful* use of force or fear." Cal. Penal Code § 518 (emphasis added). "California law also provides that '[f]ear, such as will constitute extortion, may be induced by a threat . . . [t]o do an *unlawful* injury to the person or property of the individual threatened,' 'thus excluding fear induced by threat to do a lawful injury.'" *Levitt II*, 765 F.3d at 1132–33 (quoting Cal. Penal Code § 519(1) and *People v. Beggs*, 178 Cal. 79, 83 (1918)) (emphasis, omission, and alterations in original). Accordingly, "to state a claim of economic extortion under both federal and California law, a litigant must demonstrate either that he had a pre-existing right to be free from the threatened harm, or that the defendant had no right to seek payment for the service offered." *Id*. at 1133. "[A]ny less stringent standard would transform a wide variety of legally acceptable business dealings into extortion." *Id*.

Plaintiff's claim is premised on his "fear" that Facebook would remove his content or promote content of others if he declined to enroll in Facebook's paid reach program. Compl., ¶¶ 18, 68–70. But the Complaint does not identify any contractual provision or any law giving him the right to maintain content on Facebook or to prevent Facebook from promoting the content of other Facebook users or advertisers. Furthermore, the only purported "threat" identified in the Complaint at all is an alleged remark by an unnamed "high ranking Facebook executive" purportedly advising him that "one has to pay Facebook in order to play with Facebook." Compl., ¶ 68; *see also id*., ¶ 18. This vague allegation is insufficient to state a plausible claim for relief.[3]

Once again, the Ninth Circuit's decision in *Levitt II* is on point. There, the plaintiffs alleged that Yelp

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[3] Plaintiff also alleges that after enrolling in the optional paid reach program he "noticed no appreciable increase in his already sizeable viewership." Compl., ¶ 70. But Plaintiff does not contend that the optional program in which he voluntarily enrolled was "a valueless sham," nor does he assert that he "was already entitled to the . . . privileges [Facebook] induced h[im] to buy." *Levitt II*, 765 F.3d at 1134. This allegation is therefore also insufficient. *See id.*

tried to force them to pay for its advertising program by threatening to manipulate content on its site to hurt their business and/or promote their competitors. The Ninth Circuit held that "any implicit threat by Yelp to remove positive reviews absent payment for advertising was not wrongful within the meaning of the extortion statutes," because the plaintiffs had no preexisting right to have positive reviews appear on Yelp's website. *Id*. at 1134. Plaintiffs there "allege[d] no contractual right pursuant to which Yelp must publish positive reviews, nor does any law require Yelp to publish them." *Id.* at 1133. As the court explained, "[b]y withholding the benefit of these positive reviews, Yelp is withholding a benefit that Yelp makes possible and maintains," but "[i]t has no obligation to do so." *Id*. The Court also rejected vague allegations that Yelp itself created negative reviews as insufficient to plausibly state a claim for relief. *Id.* at 1135.

The Court should reach the same conclusion here. Just as in *Levitt II*, what Fyk alleges Facebook withheld from him is "a benefit that [Facebook] makes possible and maintains," and, like the claim in *Levitt II*, Fyk's claim fails because it does not demonstrate any "pre-existing right to be free from the threatened harm." *Levitt II*, 765 F.3d at 1132–33. Accordingly, Plaintiff's claim fails to satisfy the "stringent standard" for stating a claim of civil extortion.

2. The Complaint Fails to State a Claim for Violation of California Business and Professions Code Sections 17200–17210 (Unfair Competition)

Plaintiff's unfair competition claim is predicated on the UCL's "unfair" prong. *See* Compl., ¶ 62 ("California's unfair competition law affords a private right of action where (as here) the conduct is predicated on 'unfair' conduct."). But Plaintiff fails to plead allegations that would support the assertion of an "unfair" conduct claim under the applicable test.

The Ninth Circuit set forth the requirements for pleading an "unfair" prong UCL claim in *Levitt II*. "At least with respect to business-competitor cases, to state a claim under the UCL's 'unfair' prong the alleged unfairness must 'be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.'" *Levitt II*, 765 F.3d at 1136 (quoting *Cel–Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 186–187 (1999)). That standard, known as the *Cel-Tech* standard, applies where "the crux of [the] complaint is that [defendant's] conduct unfairly injures [the plaintiff's] economic interests to the benefit of other businesses." *Id.*; *see also, e.g.,* Compl., ¶¶ 63–65. Accordingly, to state a claim under the "unfair" prong, a plaintiff must sufficiently allege "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, 'or otherwise significantly threatens or harms competition.'" *Levitt II*, 765 F.3d at 1136. In *Levitt II,* the Ninth Circuit affirmed the dismissal of a UCL claim predicated on "unfair" conduct where the plaintiffs had alleged that Yelp "harms competition by favoring businesses that submit to Yelp's manipulative conduct and purchase advertising to the detriment of competing businesses that decline to purchase advertising." *Id*.

Plaintiff's claim here likewise fails to meet the standard for pleading an unfair competition claim. First, he does not allege that Facebook violated any "legislatively declared policy" other than the prohibitions on extortion discussed above. As discussed above, the facts pled do not sufficiently allege a direct extortionate threat, nor do they support an inference of extortion.

Moreover, Plaintiff does not allege conduct rising to the level of an antitrust violation. Plaintiff asserts that Facebook's conduct is "conducive of economic instability and [is] antithetical to the American Dream." Compl., ¶ 63. But this general allegation "does not satisfy *Cel–Tech's* requirement that the effect of [Facebook's] conduct amounts to a violation of antitrust laws 'or otherwise significantly threatens or harms competition.'" *Levitt II*, 765 F.3d at 1136–37.

None of the other alleged "unfair" conduct satisfies, or is even relevant to, the *Cel-Tech* inquiry. Plaintiff alleges, for instance, that Facebook unfairly "reinstat[ed] the supposedly CDA violative pages for [Plaintiff's] competitor" (Compl., ¶ 64) and "muscl[ed] out the Fyk-related posts from user news feeds that users actually wanted" (Compl., ¶ 65). Those allegations do not plausibly suggest that Facebook has violated antitrust laws. *See Levitt II*, 765 F.3d at 1136–37.

Plaintiff also generally asserts that Facebook "steer[ed] Fyk's business/pages to the competitor to whom Fyk had to fire sell eight businesses/pages due to Facebook's leaving Fyk with no reasonable alternative." Compl., ¶ 63. This vague allegation also does not state a claim for unfair competition under *Cel-Tech*, or any other standard, particularly given Fyk's own averment that he voluntarily sold his pages for approximately one million dollars. Compl., ¶ 55. Fyk asserts, without support, that this sum is "relatively nominal" (*id*.), but he provides no factual basis for the bald assertion that Facebook's alleged unfair competition left him "with no reasonable alternative" but to make the million-dollar sale. *Id*., ¶ 63. Fyk also alleges that Facebook "fl[ew] representation down to Los Angeles" to "effectuate" the "fire sale" by "offer[ing] the competitor customer service" and that Facebook purportedly advised the competitor that it would "breath life back into the subject eight pages only if such were purchased by the competitor." *Id*., ¶¶ 42, 43. But such vague allegations do not demonstrate an entitlement to relief under the "unfair" prong. Fyk was a voluntary participant in the purported seven-figure "fire sale," and there is nothing unfair or unlawful about providing customer service to a competitor. In any event, that allegation does not plausibly suggest that Facebook has engaged in conduct that violates antitrust laws or principles. *Levitt II*, 765 F.3d at 1136–37.

Accordingly, Plaintiff has failed to state a claim under the UCL's "unfair" prong.[4]

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[4] To the extent Plaintiff contends that Facebook has engaged in deceptive advertising (*see* Compl., ¶ 66), the Complaint fails both to satisfy Rule 9(b) and to satisfy statutory standing requirements. *In re Arris Cable Modem Consumer Litig.*, 2018 WL 288085, at *6 (N.D. Cal. Jan. 4, 2018) (plaintiff must have actu-

3. The Complaint Fails to State a Claim for Fraud/Intentional Misrepresentation

Plaintiff's fraud claim fails because he does not plead any actionable misrepresentation, and certainly not with the level of specificity required under Rule 9(b).[5] "Rule 9(b) demands that the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge." *Id.* (quotations and citations omitted). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id.* Plaintiff does not and cannot satisfy this standard.

First, Plaintiff alleges that "Facebook represented to Fyk that businesses/pages Facebook crippled in or around October 2016 were violative of the CDA when, in reality, there was nothing CDA violative about such businesses/pages." Compl., ¶ 73. This allegation is incomprehensible because there is no such thing as speech that "violates" the CDA; rather, as detailed above, the CDA provides immunity to Facebook when the claims seek to treat Facebook as "the publisher . . . of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

ally relied on the misrepresentation, and suffered economic injury as a result of that reliance, in order to have standing to sue); *id.* (UCL claims premised on misleading advertising must comply with Rule 9(b)).

[5] To state a claim for fraud, a plaintiff must plead: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, *i.e.*, to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009).

Regardless, alleged "misrepresentations of law are not actionable as fraud." *Sosa v. DIRECTV, Inc.,* 437 F.3d 923, 940 (9th Cir. 2006).

Second, Plaintiff alleges that "Facebook represented to Fyk that the 'free' organic reach program was perfectly acceptable when, in reality, only the 'optional' paid for reach program is acceptable." Compl., ¶ 73. But he admits elsewhere in his Complaint that, in fact, "there is nothing explicitly making the 'optional' paid for reach program 'mandatory' that we are presently aware of sans the benefit of discovery," and that his allegation is based merely on what he has seen in "some news outlets report." Compl. ¶ 18 n.3. This allegation is also directly contradicted by his allegations that Facebook caused him to believe that he had no choice but to participate in the "optional" program. *E.g.*, Compl. ¶¶ 18–19, 68. This speculative and contradictory allegation is thus insufficient to plausibly state a claim for relief. *Levitt II*, 765 F.3d at 1135.

Third, Plaintiff alleges that Facebook falsely told him "he was welcomed to participate in the 'optional' paid for reach program" and "wished to bait [him] into" that program. Compl., ¶¶ 73, 75. But, again, he admits elsewhere that he in fact *was* able to participate in that program, at least for some time. *E.g.*, Compl. ¶ 19. Plaintiff does not allege that Facebook represented that he could participate in the program in perpetuity, regardless of anything else.

Finally, Plaintiff fails to allege with specificity the "who, what, when, where, and how" for any of the three theories outlined above thereby falling short of Rule 9(b)'s heightened pleading standard. For all of these reasons, Plaintiff's claim for fraud must be dismissed.

4. The Complaint Fails to State a Claim for Intentional Interference with Prospective Economic Relations

Plaintiff's claim for intentional interference rises or falls with all of the other claims he pleads. Because those other claims fail, as explained above, so too must the interference claim.

To state a claim for intentional interference with prospective economic relations under California law, a plaintiff must plead, among other things, "that the defendant engaged in an independently wrongful act in disrupting the relationship." *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1152 (2004). "An act is not independently wrongful merely because defendant acted with an improper motive." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158 (2003). Rather, the defendant's conduct must be "unlawful"—*i.e.*, "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id*.

Here, Plaintiff alleges that Facebook's conduct was independently wrongful because it constituted civil extortion and/or unfair competition. Compl., ¶ 52. But, as discussed above, his Complaint fails to state a plausible claim for relief for extortion, unfair competition, or fraud. Accordingly, his derivative claim for intentional interference must likewise be dismissed. *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1134 (9th Cir. 2015) (affirming dismissal of intentional interference claim where plaintiff failed to sufficiently allege predicate antitrust and trademark claims).

IV. Conclusion

For the foregoing reasons, Facebook respectfully requests that the Court dismiss Plaintiff's claims.

KEKER, VAN NEST & PETERS LLP

By: /s/ William Hicks
Paven Malhotra
Matan Shacham
William Hicks

Attorneys for Defendant
FACEBOOK, INC.

Dated: November 1, 2018

VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL [DE 1] (AUGUST 22, 2018)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No.

Plaintiff, Jason Fyk ("Fyk"), respectfully brings this action for damages and relief against Defendant, Facebook, Inc. ("Facebook"), and alleges as follows:[1]

NATURE OF THE ACTION

1. This case asks whether Facebook can, without consequence, engage in brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent practices that caused the build-up (through years of hard work and entrepreneurship) and subsequent destruction of Fyk's multi-million dollar business with

[1] As litigation and discovery progress, Fyk reserves the right to amend this complaint should additional causes of action manifest.

over 25,000,000 followers merely because Facebook "owns" its "free" social media platform. So as to put in perspective just how large Fyk's following was, one source ranked Fyk's primary business/page as the fifth most active page on Facebook, ranking one spot ahead of CNN, for example.

2. Fyk, believing in Facebook's promise of a "free" social media platform to connect the world, was a remarkable success story. Fyk created and posted humorous content on Facebook's "free" social media platform. Fyk's content was extremely popular, as evidenced by over 25,000,000 followers. The success of Fyk's Facebook pages resulted in these pages becoming business ventures, generating hundreds of thousands of dollars a month in advertising and/or web trafficking earnings flowing from Fyk's valuable high-volume fan base.

3. Fyk developed a significant "voice" in reliance on Facebook's inducement to build his businesses on its "free" social media platform. Fyk invested tremendous time, energy, and resources in reliance on Facebook's promises. Facebook's promises made it one of the most lucrative and valuable economic and influential forces in the world.

4. Facebook has broken its promise to everyone and committed significant wrongs specific to Fyk. Facebook's systemic and specific wrongs are both wrongs with remedies.

5. More specifically, Facebook induced many (including Fyk) to build the Facebook empire and then, in a classic bait and switch, stole the value for its own commercial gain by changing its operating system and forcing itself into the business arenas

others had developed. Fyk suffered damages as a result of this bait and switch. So as to put in perspective just how much Facebook damaged Fyk, former Fyk competitors (who were smaller and/or less successful than Fyk before Facebook destroyed Fyk's businesses/pages) have been valued between $100,000 ,000.00 and $1,500,000,000.00.

6. Amidst its bait and switch, Facebook damaged Fyk (and likely many others) by pretextually wielding the Communications Decency Act ("CDA"), Title 47, United States Code, Section 230(c)(2), against Fyk in order to unfairly and unlawfully destroy and/or severely devalue Fyk's businesses/pages. This case asks whether Facebook can manipulate its users' content and direct preferential treatment to certain users to the detriment of other users by applying discretionary "enforcement" policies and practices (under the guise of the CDA, for example) because Facebook exercises plenary control over its "free" social media platform. So as to put in perspective just how different Facebook's treatment of Fyk was compared to others, Facebook flew representation to Los Angeles, California to aid and abet a Fyk competitor in the competitor's Facebook-driven acquisition of the Fyk businesses/pages that Facebook had destroyed.

7. In stark contrast to its public claims (before Congress, for example) of freely and openly connecting the world, Facebook is unlawfully silencing people (including Fyk) for its own financial gain.

8. Despite Facebook's claims of being able to fully and completely control anything and everything that occurs on its "free" social media platform, Facebook is not above the law and must be held accountable for its wrongs.

9. Our system of justice is what prevents the strongest and most powerful in our nation from trampling on those who are weaker and less powerful. It would be hard to imagine a clearer illustration of why our justice system must protect the weak from the powerful than this case where the mighty (Facebook) has destroyed the weaker's (Fyk's) businesses and American Dream. This is a true case of David versus Goliath.

PARTIES

10. At all material times, Fyk was/is a citizen and resident of Cochranville, Pennsylvania.

11. Upon information and belief and at all material times, Facebook was/is a company incorporated in the State of Delaware, with its principal place of business in Menlo Park, California. While there is some question as to whether the California forum selection and choice of law provisions embedded in Facebook's terms of service are applicable to this action (which does not relate to the terms of service akin to a breach of contract), Fyk does not wish to squander time and resources (his or the Court's) quarreling with venue.

JURISDICTION AND VENUE

12. This Court possesses original jurisdiction pursuant to Title 28, United States Code, Section 1332, as the parties are diverse and the amount in controversy exceeds $75,000.00 exclusive of fees, costs, interest, or otherwise.

13. Venue is proper in the Northern District Court of California pursuant to Title 28, United States

Code, Section 1391(b), since this judicial district is where Facebook maintains its principal place of business, since various events or omissions which give rise to and/or underlie this suit occurred within this judicial district, and/or since the (in)applicability of the forum selection and choice of law provisions in Facebook's terms of service are not worth fighting about.

COMMON ALLEGATIONS

14. For a period of many years, Fyk maintained businesses/pages on Facebook's purportedly "free" social media platform. That is until Facebook unilaterally, systematically, systemically, and/or capriciously (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) changed the Facebook "free" social media platform model almost overnight and pursuant to corporate greed, playing judge, jury, and executioner as to the continued existence of businesses/pages of those like Fyk who had developed a livelihood on the platform.

15. Fyk's businesses were made up of many Facebook pages, with over 25,000,000 viewers/followers/audience at their peak. These businesses/pages were humorous in nature, designed to get a laugh out of Fyk's viewers/followers audience. The intended nature of the subject businesses/pages worked–at his peak, Fyk's primary business/page was, according to some ratings, the fifth largest Facebook viewership presence in the entire world (ahead of competitors like BuzzFeed, College Humor, and Upworthy, for examples, and ahead of other large media presences like CNN, for example) and making hundreds of

thousands of dollars a month in advertising and/or web trafficking earnings.

16. Indeed, the primary source of income generated by Fyk's businesses/pages was through advertisement earnings and/or web traffic to other sites (for valuable increased fanbase)–naturally, companies were inclined to pay Fyk to associate with his pages consisting of millions of viewers/followers.[2]

17. For many years in the 2010-2016 range (or thereabouts), Facebook had systematically and systemically welcomed folks into the seemingly warm waters of making a living on the "free" Facebook social media platform.

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[2] Companies that paid Fyk to advertise and/or traffic their companies (that is, before Facebook destroyed such economic relationships) included, but were not necessarily limited to, the following: (a) College Humor, (b) Guff, (c) Memez, (d) Mylikes, (e) Smarty Social, (f) Diply, (g) Top Ten Hen, (h) LOLWOT, (i) Cybrid Media, (j) PBH Media, (k) Liquid Social, (l) Red Can, (m) Ranker, (n) Bored Panda, and (o) Providr. And, then, there were many other realistic ways in which Fyk could have increased his economic advantage (*i.e.*, made money) but for Facebook's wrongdoing, which such realistic ways would have included, but not necessarily been limited to, the following: (a) an application called APPularity, further discussed below, (b) a TV series and/or movie, and (c) a book. Facebook was/is well aware that Fyk had business relations with companies like these, as Facebook's new mission is to demonetize folks like Fyk out of these relations by crushing folks like Fyk under the guise of CDA, filtering of purportedly low-quality content. *See, e.g.,* footnote 11, *infra*; *see also, e.g.,* June 22, 2016, https://www.c-span.org/video/?411573-1/facebook-coo-sheryl-sandberg-discusses-technological-innovation; July 1, 2015, http://fortune.com/2015/07/01/facebook-video-monetization; and Tessa Lyons' April 13, 2018 (https://www.youtube.com/watch?v=X3LxpEej7gQ).

18. Upon information and belief, it was towards the latter part of the aforementioned 2010-2016 timeframe that Facebook unilaterally, systematically, systemically, and/or capriciously (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) decided to implement an "optional" paid for reach program, rather than the organic reach program (*i.e.*, "free" Facebook social media platform) that Fyk and many other Facebook businessmen and businesswomen had been part of for years. Why? Because Facebook all-of-a-sudden no longer cared to continue to make business smooth for those who declined the "optional" paid for reach program. Why? Because Facebook was now of the unilateral, systematic, systemic, and/or capricious mindset (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) that it was time to make its "free" social media platform profitable at the expense of those like Fyk upon whose backs the "free" Facebook social media platform succeeded and notwithstanding nothing explicitly making the "optional" paid for reach program "mandatory."[3] What did this create for Fyk and likely the myriad other businessmen and businesswomen on Facebook's "free" social media platform? Fear. Fear (analogized

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[3] Although there is nothing explicitly making the "optional" paid for reach program "mandatory" that we are presently aware of sans the benefit of discovery, the threat is there that if people do not pay Facebook, they will not play with Facebook. For example, some news outlets report that Facebook (through the likes of Facebook's head of global news partnerships, Campbell Brown) is advising behind "closed doors" that Facebook will put people on "hospice" if people do not work with Facebook; *i.e.*, if payments are not received. *See, e.g.*, August 14, 2018, https://www.thesun.co.uk/news/7014408/facebook-threatens-press-saying-work-with-us-or-end-up-in-hospice.

in averments twenty-five through thirty-five, *infra,* to "claim jumping") that if Fyk did not engage in Facebook's new "optional" paid for reach program, he would be blacklisted in the form of having his businesses heavily curtailed or altogether eliminated. And, for Fyk, this fear was heightened when a high-ranking Facebook executive advised him that his business was not one Facebook much cared to work with when compared to other businesses (specific names intentionally omitted from this public record) who relented to Facebook's new "optional" paid for reach program to the tune of tens of millions of dollars in payments a year to Facebook.

19. So, with the very real fear hanging over him of losing his businesses/pages and the incredibly hard work that went into same in the spirit of the American Dream (most likely like many other Americans /administrators who, like Fyk, had built their businesses/pages on the premise that Facebook was indeed what it proclaimed and/or held itself out to be– a "free" social media platform), Fyk attempted to placate Facebook (and accordingly avoid putting his businesses/pages at risk of Facebook-created destruction) by entering Facebook's new "optional" paid for reach program for a period of time, investing approximately $43,000.00 into Facebook's "optional" paid for reach program. Such Fyk investment was underway and ongoing until Facebook unilaterally, systematically, systemically, and/or capriciously (in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion) deactivated Fyk's "ads account," making it such where Fyk could no longer be a protected or chosen one under Facebook's "optional" paid for reach program. Because of Facebook, Fyk was left

with no reasonable alternative other than to return to an organic reach model. Then Facebook's interference, unfair competition, civil extortion, and/or fraud increased–starting in small increments and escalating into destruction and/or severe devaluation of at least eleven of Fyk's businesses/pages (discussed further below).

20. Facebook's misconduct (again, implemented gradually by Facebook so as to not be so obvious) included, for examples, unilateral, systematic, systemic, and/or capricious (pretty much overnight) page and content outlawing, Facebook Messenger disconnection, page and content banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, deletion of individual Facebook administrative profiles, and/or splitting of posts into four categories (text, picture, video, and website links) and systematically directing its tortious inference the hardest at links because links were what made others (like Fyk) the most money and Facebook the least money. This misconduct was grounded, in whole or in part, in Facebook's overarching desire to redistribute reach and value (*e.g.*, wiping out Fyk and orchestrating the handing over of his businesses/pages to a competitor, discussed in greater detail below) through the disproportionate implementation of "rules" (*e.g.*, treating Fyk's page content differently for Fyk than for the competitor to whom Fyk's content was redistributed). Part and parcel with Facebook's disproportionate implementation of "rules" was a disproportionate implementation of Facebook's appeal and/or customer service programs for Fyk (discussed in greater detail

in the following averment, and punctuated by things like Facebook arranging meetings between its representatives and other businessmen and businesswomen, not named Fyk, in order to assist them but not Fyk). Of course, inoperable pages consisting of millions of viewers who are no longer engaged in such pages due to the inoperativeness of same does not make for an environment in which high paying advertisers and/or web traffickers (from whom Fyk and his employees had made a living) were interested in continuing to be a part of.

21. Not thinking much of Facebook's misconduct early on (again, Facebook's misconduct unfolded gradually and covertly), Fyk availed himself time and time again of the appeal and/or customer service programs supposedly in place at Facebook to remedy incorrect page and content outlawing, Facebook Messenger disconnection, page and content banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, and/or deletion of individual Facebook administrative profiles. These programs worked for Fyk for a period of time; *i.e.*, Facebook would capriciously breathe life back into Fyk's businesses/pages, conceding in the process that its page and content outlawing, Facebook Messenger disconnection, page and content banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, and/or deletion of individual Facebook administrative profiles was, in fact, incorrect. Fyk's businesses/pages would operate relatively smoothly for a while,

until Facebook meddled again with Fyk's businesses/pages (with millions of viewers, reach in the billions, and hundreds of thousands of monthly advertisement and/or web trafficking earnings at issue). Then, Fyk would appeal and/or work with customer service again. Then, Facebook would breathe life back into the subject businesses/pages. Then, Facebook would meddle again. Then, Facebook would breathe life back into the subject businesses/pages. So on and so forth for years, not tipping Fyk off as to what he was truly experiencing (or what Facebook's ulterior motives were, which such motives are still not entirely known sans the benefit of discovery) until Facebook's meddling culminated with the complete destruction and/or severe devaluation of eleven of Fyk's businesses/pages in October 2016 and unresponsiveness to Fyk's subsequent pleas for appeal and/or customer service.

22. More specifically, in October 2016, Facebook destroyed and/or severely devalued eleven of Fyk's pages (made up of over 25,000,000 viewers/followers), sending his millions of viewers and hundreds of thousands of dollars of monthly advertisement and/or web trafficking earnings down the proverbial drain. More specifically, the Fyk businesses/pages that Facebook destroyed and/or severely devalued (along with the viewer/follower count associated with each) were as follows: (a) Funniest pics–approx. 2,879,000, https://www.facebook.com/FunniestPicsOfficial, (b) Funnier pics–approx. 3,753,000, https://www.facebook.com/FunnierPics, (c) Take the piss funny pics and videos–approx. 4,300,000, https://www.facebook.com/takeapissfunny, (d) She ratchet–approx. 1,980,000,_https://www.facebook.com/sheratchetwtf, (e) All things Disney–approx. 1,173,000, https://www.facebook.com/Smiling-

loveyou, (f) Cleveland Brown–approx. 2,062,000, https://www.facebook.com/ClevelandBrownsfans, (g) Quagmire–approx. 1,899,000, https://www.faceboook.com/quagmirefans, (h) Peter Griffin–approx. 532,000, https://www.facebook.com/petergriffinfans, (i) WTF Magazine–approx. 2,600,000, https://www.facebook.com/wtfmagazine, (j) Truly Amazing–approx. 1,800,000, https://www.facebook.com/trulyamazingpage, and (k) APPularity–approx. 2,200,000, https://www.facebook.com/appularity. These page URL addresses were the original addresses, they may have subsequently changed, and they may accordingly not direct to the original locations.

23. Facebook's professed "justification" for its destruction and/or severe devaluation of Fyk's eleven businesses/pages was that the content of such businesses/pages was supposedly violative of the CDA. We now illustrate the ludicrousness of Facebook's CDA-related basis for destroying and/or severely devaluing Fyk's businesses/pages and interfering with his prospective economic advantage/relations (*e.g.*, advertisement and/or web trafficking earnings). As discussed in greater detail below, Facebook selectively "enforced" the CDA against Fyk by, for example, deeming identical content CDA-violative as it related to Fyk but not CDA-violative as it related to a Fyk competitor.

24. In or around the end of 2016, Facebook deleted one of Fyk's pages (with millions of viewers and thousands of advertising and/or web trafficking earnings at issue) because, for example, it contained a posted screenshot from the Disney movie *Pocahontas*. Facebook claimed that this screenshot (from a Disney children's movie) was racist and accordingly violative of the CDA; *i.e.*, to use Facebook terminology, the

Pocahontas screenshot post constituted a "strike" (the "strike" notion is discussed in greater detail at footnote 8, *infra*). Meanwhile, for comparison's sake, Facebook allowed other businesses/pages at that same time (in or around the end of 2016) and thereafter for that matter to maintain, for examples, a posted screenshot of a mutilated child or instant article Facebook advertisements (moneymakers for Facebook) of things like sexual activities, among other things that really were violative of the CDA.[4] And, for purposes of a public record, these are "benign" examples compared to the other examples we have. And, meanwhile, for comparison's sake within Fyk's own businesses/pages,

[4] Fyk even reported the disgusting posted screenshot of the mutilated child to Facebook and in December 2016 Facebook advised Fyk that such disgusting post was perfectly ok. Of note, Fyk has routinely reported unsavory content to Facebook in an effort to keep Facebook a "safe and welcoming" community. More specifically as to Fyk's reporting of the mutilated child post, Facebook advised Fyk as follows: "Thank you taking the time to report something that you feel may violate our Community Standards. Reports like yours are an important part of making Facebook a safe and welcoming environment. We reviewed the photo you reported for being annoying and uninteresting and found it doesn't violate our Community Standards." An example of a BuzzFeed (a Fyk competitor) post that Facebook apparently deemed perfectly ok was BuzzFeed's July 23, 2017, post entitled *27 NSFW Movie Sex Scenes That'll Turn You The Fu[$#] On.* Ironically, "NSFW" stands for "Not Safe for Work," and remember that Facebook was purportedly concerned with maintaining "a safe and welcoming environment." Other examples (and the list could go on) of BuzzFeed posts that Facebook deemed "safe and welcoming" amidst its "Community Standards" include: *12 Sex Positions Everyone In A Long-Term Relationship Should Try* on May 7, 2016, *Here's How Most People Have Anal Sex* on April 25, 2017, *These Insane Sex Stories Will Blow Your Fu[$#]ing Mind* on May 12, 2017, and *15 Sex + Poop Horror Stories That'll Make You Feel Better About Yourself* on August 11, 2017.

Facebook allowed other Fyk businesses/pages (of incredibly similar nature to the business/page with the *Pocahontas* screenshot post) to stand. Translated, there was absolutely positively nothing about Fyk's pages violative of the CDA warranting Facebook's crippling of Fyk's livelihood (and the livelihood of his employees), certainly no "good faith" basis for Facebook's wreaking havoc on Fyk under the pretext of the CDA, which such "good faith" language is straight out of Section 230(c)(2) of the CDA. But the best proof in the "there was nothing CDA violative about Fyk's businesses/pages" pudding is set forth in averments forty-two through forty-six, *infra*, in relation to Fyk's fire sale of eight of his businesses/pages (out of the subject eleven businesses/pages noted above) to a similar (if not identical) competitor because of Facebook's irrational and unwarranted tortious interference, unfair and anti-competitive conduct, extortion, and/or fraud leaving him with no other reasonable alternative.

25. Another way to properly classify and better illustrate Facebook's conduct (when one properly disregards Facebook's wayward CDA contention) is "claim jumping," which is more of a lay description of tortious interference with prospective economic advantage/relations.

26. A locally rooted example of "claim jumping" in this country's history was California gold mining. Analogous to Facebook's conduct here, centuries ago in California a small percentage of smalltime miners struck gold/staked claims. Then, it was not uncommon for a stronger, richer mining company to swoop in and "jump the claim" of the smalltime miner. Put differently, it was not uncommon for the stronger, richer mining company to make the smalltime miner an offer he or

she could not refuse (often backed by direct or indirect threat for livelihood, striking fear in the miner), strong-arming the smalltime miner out of his or her realized economic advantage (or prospective economic advantage associated with the extraction of the found gold) developed by his or her hard work in the vein of the American Dream.

27. Here, the land that was/is replete with resources was/is the worldwide web. Facebook does not own the worldwide web, Facebook manages/services a space on the worldwide web (called a platform) in which people (like Fyk) can stake claims (create pages, *see* averment number twenty-two, *supra*). Staking a claim first involves the discovery of a valuable "mineral" in quantity. Here, the "mineral" (gold) that Fyk discovered on the land (the worldwide web) was advertising earnings, distribution value, news feed space, and/or the like. Fyk prudently invested time and resources in recovering the "mineral" and otherwise staked claims within Facebook's "free" social media platform through the development of boundaries (*i.e.*, development of businesses/pages, web URLs, page identity numbers).

28. Facebook (worldwide web manager/servicer) realized there was a lot of money to be made in the "gold mining" (advertising and web trafficking spaces), so Facebook began mining gold for itself in tortious, unfair, extortionate, fraudulent competition with claim stakeholders like Fyk. Most of the best gold claims (pages, news feeds), however, had been staked by people like Fyk. With past being prologue, Facebook wanted more and more and more . . . and, then, some more. And, so, Facebook (the land manager/servicer turned mining company) changed its strategy to

suppress the resources of the larger claim stakeholders (Fyk). Facebook did not want to get caught sapping the resources of other claim stakeholders, so Facebook came up with "rules and regulations" to be disproportionately implemented/ enforced depending on whether or not the claim stakeholder (Fyk) was favorable to or preferred by the land manager/servicer (Facebook). The rules and regulations that Facebook made up were so nebulous in nature that any and all types of gold mining effectively became violative of the land manager's/servicer's new rules and regulations, justifying the Facebook "claim jumping" that ensued in "we can do whatever we want because we are Facebook" fashion.

29. Facebook's "claim jumping" was effectuated by Facebook's doing a variety of things, for examples (a) closing the mine gates (Fyk's businesses/pages) until the land management/service company (Facebook) was paid more by the claim stakeholder (Fyk)–unpublishing pages so as to tortiously interfere, unfairly compete, and/or extort, (b) closing the mine down or cancelling the claim–deleting pages so as to tortiously interfere, unfairly compete, and/or extort, (c) cutting off resources to the mine–reducing reach/distribution so as to tortiously interfere, unfairly compete, and/or extort, (d) replacing individual miners with management/ service company (Facebook) miners–replacing Fyk news feeds with Facebook ads so as to tortiously interfere, unfairly compete, and/or extort, and/or (e) imposing regulations that made the mine financially unsound with the intent to usher in a new mining company (Fyk competitor) who paid the management/servicing company (Facebook) a higher percentage–unpublishing, reducing reach, deleting

pages, and assisting a competitor in purchasing the pages so as to tortiously interfere, unfairly compete, and/or extort.

30. As Facebook CEO, Mark Zuckerberg, has proclaimed, Facebook is a "platform for all ideas" (just as California land was once a platform for all gold miners).[5] Land management/servicing was Facebook's business, whereas mining the land was Fyk's business. Once Facebook saw how lucrative Fyk's business was, Facebook jumped the claims that Fyk had staked. Like big mining companies did to the little gold miner in California centuries ago, Facebook crushed Fyk who had staked successful claims through hard work and had not volunteered himself to being crushed.

31. One key common denominator between "claim jumping" (like the gold mining example) and Facebook's conduct here is the involuntariness of same–the crushed little guy in each instance (including Fyk

[5] Mr. Zuckerberg disingenuously proclaimed at his Harvard commencement speech last summer, Facebook "understand[s] the great arc of human history bends towards people coming together in greater even numbers–from tribes to cities to nations–to achieve things we couldn't on our own . . . . This is my story too–a student at a dorm connecting one community at a time and keeping at it until one day we connect the whole world." Mr. Zuckerberg's disingenuous lip service also included this: "Finding your purpose isn't enough. The challenge for our generation is to create a world where everyone has a sense of purpose." Sounds so rosy, sounds so nice . . . but, alas, Facebook talks that talk and then walks the Fyk walk. Fyk found his sense of purpose, Facebook destroyed it. Facebook disconnected Fyk, rather than connected Fyk. Facebook is destroying and/or disconnecting businesses/pages (like Fyk's) that generate advertising and/or web trafficking earnings so that Facebook can bleed away such monies for itself in legally untenable ways.

here) had no choice or alternative in the business world other than to swallow the difficult pill that the mighty (here, Facebook) had force-fed. Here, Facebook welcomed Fyk (as well as many others, for that matter) into a "free" social media platform and lurked around until someone became the so-called miner who found gold on the Facebook platform; *i.e.*, until someone like Fyk did tremendously well on the "free" Facebook social media platform by building his assets /economic advantage (*e.g.*, audience and distribution, akin to the aforementioned gold). Then, Facebook swooped in with an "optional" paid for reach program (*i.e.*, an offer people were not supposed to refuse), devalued and redistributed Fyk's economic advantage without Fyk volunteering himself or his businesses to same.

32. Fyk had hardly anything to his name when he launched his businesses/pages on Facebook's "free" social media platform. More specifically, Fyk was facing bankruptcy and eviction when he joined the "free" Facebook social media platform in the hopes of experiencing the American Dream and building a future for his family. He dedicated all the money he had on building a Facebook audience, rather than buying food and other household necessities for him and his family. Kudos to Fyk for building successful businesses/pages through very hard work in the vein of the American Dream.

33. Then, Facebook sent Fyk's American Dream up in smoke, pretty much overnight, without Fyk volunteering himself or his businesses to same. What is next if Facebook's conduct is allowed to stand? Will fast food restaurant franchisors, for example, lurk around to find the most successful franchisees (built

upon the hard work of the franchisee prescribing to the American Dream) and swoop in to "jump the claim;" *i.e.*, steal or destroy the franchisee's restaurant and redistribute the franchisee's restaurant to the franchisor mothership or some other franchisee who the franchisor likes better as Facebook did to Fyk here? Those are not the pillars upon which this country and the associated American Dream were built.

34. "Claim jumping" (predicated on force exerted by the mighty that the little guy could not reasonably evade in the business world) is not the economic model upon which this country has functioned since its existence, as "claim jumping" makes for a highly unstable economy. Thankfully, in today's legal world the little guy has legal recourse to rectify the wrongful forced conduct experienced at the hands of the mighty in the business world. Today, we call this kind of legal recourse claims for relief, *infra*, which sound in Facebook's tortious interference with prospective economic advantage/relations (First Claim for Relief), unfair competition (Second Claim for Relief), civil extortion (Third Claim for Relief), and/or fraud (Fourth Claim for Relief). As noted in averment numbers one through nine, *supra*, these legal actions are designed to protect the weaker from the stronger; *i.e.*, meant as legal checks and balances to the unbridled "we can do anything we want because we are stronger" mentality of those like Facebook.

35. Another way to view one of Facebook's seeming motivations for jumping the claims of those (like Fyk) who did well for themselves on the "free" Facebook social media platform was/is to steal the advertising and/or web trafficking earnings generated on successful pages like Fyk's pages; *i.e.*, take the Fyk-

built reach from which the advertising and/or web trafficking monies enjoyed by Fyk flowed and redistribute same to other "sponsors."

36. One need only look to one's Facebook news feed to see examples of such. There stands a good chance that there will be a post on one's news feed from an unknown source; *i.e.*, from somebody or some company unknown to the user of the news feed. This unknown, mystery post will likely have the word "sponsored" in light print. The "sponsor" is a paid advertiser on Facebook.

37. Facebook is now making money in the advertising space (like Fyk did) by unilaterally, systematically, systemically, and/or capriciously replacing Fyk with "sponsors." In order to clear space for Facebook's advertising efforts, Facebook had to clear out posts on Facebook user news feeds that the users actually wanted to see. For example, users wanted to see Fyk's content–that is why he had over 25,000,000 viewers across the subject eleven businesses/pages. Accordingly, Fyk's posts would take up a sizable portion of users' news feeds. So, in order for users to see the random Facebook-sponsored posts that they did not care to see, Facebook had to eliminate (or heavily curtail) the posts that people liked seeing on their news feeds (*e.g.*, Fyk's posts) and force Facebook-sponsored posts onto user news feeds whether the user wanted that or not.

38. In an effort to insulate itself from this misconduct, Facebook initially forced out folks like Fyk under the guise that Fyk's content was "spam." Per Merriam-Webster's Dictionary, "spam" is defined as "unsolicited usually commercial messages (such as . . . Internet postings) sent to a large number of

recipients or posted in a large number of places."[6] Fyk's audience chose to be his audience at the threshold and then had to choose to click on any content website link found in Fyk's businesses/pages which would then lead to content on the website in which an advertisement could be seen that would earn Fyk money; *i.e.*, there was nothing "unsolicited" about Fyk's businesses/pages and associated content website links. Put differently, there was nothing "spammy" about Fyk's businesses/pages and associated content website links upon which Facebook could have legitimately justified muscling him out under the guise of "spam."

39. By way of this misconduct, Facebook was/is making money from whatever advertisers and/or web traffickers are associating themselves with the random Facebook-sponsored posts it is forcing onto user news feeds while strong-arming out user-friendly news feed posts like Fyk's. What Facebook is doing (the forced removal of Fyk-like posts on user news feeds and the forced insertion of Facebook-sponsored posts) is the definition of "spam."[7]

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[6] https://www.merriam-webster.com/dictionary/spam

[7] As another example of Facebook's forcing itself upon users in "spammy" fashion, when a user scrolls through their news feed and has their audio setting set to "off," some advertisements will mysteriously pop up and disregard the user's audio "off" setting (*i.e.*, force the user's audio setting to "on"). This kind of mystery advertisement, of course, is a Facebook-sponsored advertisement and Facebook is blatantly and unilaterally disregarding the user's settings so as to loudly announce (literally) something that makes Facebook money. Facebook's manipulation of users' news feeds hurts the user just as much as the content provider and, to call a fig a fig, amounts to censorship. In lay terms, Facebook is no longer allowing the user to see what he/she wants

40. So, as best we can presently tell sans the benefit of discovery, Facebook's effort to crush the American Dream of hard workers like Fyk who built a life for themselves (and their employees, since laid off in Fyk's case due to Facebook's crippling) on the "free" Facebook social media platform all boils down to Facebook's crooked corporate greed: (a) Muscle out (through interference, unfair competition, extortion, fraud, and/or *et cetera*) those who do not wish to (or could no longer, in Fyk's case) partake in Facebook's "optional" paid for reach program, and (b) Delete the news feed posts that Facebook users want to see and inject news feed Facebook-sponsored posts (*i.e.*, "spam") that Facebook users do not want to see and/or have the ability to avoid. The methods by which Facebook is accomplishing such amount to unfair competition, extortion, and fraud, which badly interferes with the prospective economic advantage/relations of hard working Americans who built lives for themselves, their families, their employees, and their employees' families around Facebook's false promises of a "free" social media platform.

41. In relation to Facebook's October 2016 destruction and/or severe devaluation of Fyk's eleven businesses/pages, Fyk's efforts to unravel Facebook's misconduct (akin to the procedure set forth in averment twenty-one, *supra*) was regrettably to no avail–

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to see and hear what he/she wants to hear. Many "loved" that they could watch videos with sound off, *see, e.g.,* July 1, 2015, http://fortune.com/2015/07/01/facebook-video-monetization, that is until Facebook unilaterally force-changed users' preferences. This Facebook force-feeding as it relates to the user cripples the content provider (like Fyk) in tortious, unfair, anti-competitive, extortionate, and/or fraudulent fashion.

Facebook had now officially decided it was time to completely destroy Fyk's business and interfere with his prospective economic advantage/relations. Facebook's interference and unfair competition even went so far as to lock Fyk out of his advertisement account; *i.e.*, not allowing Fyk to continue his participation in the "optional" paid for reach program.

42. After a few months of Fyk's inability to breathe life back into the businesses/pages that Facebook had destroyed and/or severely devalued (eleven pages consisting of over 25,000,000 viewers/followers) and after Fyk regrettably had to lay off employees due to Facebook's crippling interference, Fyk was left with no reasonable alternative other than to fire sell eight of his crippled pages (realistically valuated by some in the nine figure range) for a relatively nominal approximate $1,000,000.00 in January 2017 to a competitor located in Los Angeles, California with that competitor already having been advised by Facebook that Facebook would breathe life back into the subject eight pages only if such were purchased by the competitor. This proves, among other things, that there was nothing CDA violative about these eight Fyk businesses/pages that Facebook crippled, as further discussed below.

43. Facebook offered the competitor customer service before, during, and after the fire sale of Fyk's eight business/pages so as to effectuate the fire sale (*i.e.*, so as to redistribute Fyk's economic advantage) to the competitor. In fact, the Facebook customer service offered to the competitor (but never to Fyk at any such level, or, really, at any meaningful level) rose to the level of Facebook flying representation down to Los Angeles to meet with the competitor to make sure

the Facebook-induced redistribution of Fyk's economic advantage (fire sale of the audience and reach that made up the subject eight businesses/pages) went through.

44. Reason being, Facebook plainly wanted to play a direct role in ushering Fyk out of the Facebook "free" social media platform business world in favor of Fyk's competitor. Facebook made clear that the subject eight Fyk businesses/pages that Facebook had blacklisted would have no chance of having life breathed back into them until the sale of the businesses/pages was completed with Fyk's competitor–indeed, this is what Facebook represented to the Fyk competitor out of Los Angeles. Facebook worked with the competitor to orchestrate and carry out the sale.

45. Almost immediately after the fire sale to the Fyk competitor went through (thanks, in whole or in part, to Facebook's interactions with the competitor before, during, and after the fire sale process), the supposedly CDA violative Fyk businesses/pages that were fire sold were magically reinstated by Facebook within days of the fire sale's consummation (*i.e.*, contract completion between Fyk and the competitor) <u>with no appreciable change (if any change) in the content of the pages that were supposedly violative of the CDA.</u> Meaning, again, there was absolutely nothing CDA violative about Fyk's businesses/ pages . . . Facebook just wanted to steer Fyk's businesses/pages (a/k/a assets, a/k/a economic advantage) to a competitor and otherwise eliminate Fyk by any means necessary. Facebook did so–it severely devalued Fyk's eleven businesses/pages (economic advantage) to the point of Fyk having no reasonable alternative other than to fire sell eight of the businesses/pages for a

relatively low sum and then it revalued the same businesses/pages for the Fyk competitor to whom the businesses/pages were sold.[8]

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[8] The three businesses/pages that Fyk still maintains (Truly Amazing, WTF Magazine, APPularity) are valueless from advertising and/or web trafficking perspectives (which were the real moneymakers) because of Facebook. Though these three businesses/pages were crippled by Facebook along with the other eight businesses/pages in October 2016, Facebook's more recent disproportionate implementation and/or shell-gaming of "rules" pertaining to branded content is what is causing the current advertising and/or web trafficking valuelessness of these three pages. To further illustrate Facebook's discriminatory treatment of Fyk, the chronology concerning Facebook's new branded content rules is noteworthy. Facebook was to roll out its new branded content "rules" starting March 1, 2018, and yet further crippled one of Fyk's remaining three pages prior in February 2018 for two posts purportedly violative of Facebook's new branded content "rules." A certain number of "violations" (called "strikes" by Facebook) on a page could result in the page being banned (lost), Facebook does not tell folks how many such strikes are afforded until there is a ban, and Facebook has kept arbitrarily levying strikes against Fyk (still to this day on his remaining three pages) until it accomplishes what it wants–Fyk's being banned, which cripples his reach. *See* https://newsroom.fb.com/news/2018/08/enforcing-our-community-standards/. The writing is on the wall as to this vicious circular cycle predicated on Facebook whim. Moreover as to Facebook's continued wrongdoing related to Fyk's remaining three businesses/pages, Facebook is still treating Fyk unlike others. For example, on August 13, 2018, Fyk's WTF Magazine business/page received a post ban by Facebook. Fyk's profile was subsequently banned for thirty days due to the purported inappropriate content of the aforementioned post, which such post was doing quite well for Fyk until Facebook's interference. So, Fyk went to the original post of the aforementioned post (on another's page where he originally found the post) and reported that identical post to Facebook. Facebook found the identical post acceptable for another. More specifically, by message dated August 15, 2018, Facebook advised Fyk as follows as to the identical post on

46. And the timing of Facebook's ultimate Fyk crippling in October 2016 is no coincidence to the timing of the Facebook-aided fire sale of Fyk's business/pages to the Fyk competitor who was in Facebook's good, paying graces. Put differently, the proximity of this cause and effect further demonstrates the relevant connection to Facebook's wrongdoing (interference with prospective economic advantage/relations, unfair or deceptive practices, unfair competition, civil extortion, and/or fraud)

47. Fyk was wrongly singled out by Facebook, even per the admission of a high-ranking Facebook employee (Chuck Rossi, director of engineering at Facebook) kind enough to communicate reality to Fyk because Mr. Rossi seemingly does not share Facebook's devious and publicly harmful agendas.[9] Indeed, Mr. Rossi, whether known to Facebook or not, administers a group dedicated to restoring businesses/pages

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another's page that Fyk reported to Facebook: "Thanks for letting us know about this. We looked over the photo, and though it doesn't go against one of our specific Community Standards, you did the right thing by letting us know about it. . . . " Moreover as to damages, Fyk built the APPularity business/page to support an application called APPularity and Fyk personally invested approximately $50,000.00 (and countless hours) in this ap endeavor. Facebook's crippling (again, still to this day) of APPularity (which, again, is one of the three businesses/pages Fyk still maintains) has rendered the APPularity application worthless; *i.e.*, robbed Fyk of his approximate $50,000.00 investment and all the future monies (*i.e.*, prospective economic advantage) he would have doubtless enjoyed from same.

[9] In October 2016, Fyk's Peter Griffin business/page had been unpublished by Facebook. Mr. Rossi helped Fyk restore the Peter Griffin business/page that had been wrongfully unpublished by Facebook. Regrettably, very soon thereafter, Facebook again shut Peter Griffin down.

that Facebook has wrongly shut down. Such singling out of Fyk by Facebook might rightly be characterized as discrimination

48. In sum, Facebook's actions with Fyk were unlawful.

FIRST CLAIM FOR RELIEF–INTENTIONAL INTEFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE/RELATIONS

49. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

50. Facebook intentionally interfered with economic relationships between Fyk and his various advertising companies and/or web traffickers (*see* footnote 2, *supra*, for a non-exhaustive list of such companies) associated with the aforementioned eleven businesses/pages that Facebook intentionally interfered with, which such economic relationships would have doubtless continued to result in an economic benefit/advantage to Fyk.

51. Facebook knew of Fyk's advertising and/or web trafficking relationships . . . advertising and/or web trafficking in general on the Facebook "free" social media platform is no secret, that is how most (if not all) businesses/pages make money through the Facebook social media platform. In fact, Facebook was/is so aware of advertising and/or web trafficking relationships and the lucrativeness of same that Facebook has muscled its way into that line of work while muscling out the very folks who cultivated that line of work all the way back in the days when Facebook was akin to baron land or an unchartered frontier. Recall, Facebook

is not that old,[10] and it needed worker bees (like Fyk) to make it what it is today over a relatively short period of time–that is until the honey was produced and Facebook figured it would kill the bees and take the honey and/or redistribute the honey to other worker bees.

52. Facebook engaged in wrongful conduct separate from the interference with Fyk itself. For example, as discussed in the above common allegations and below other causes of action, Facebook implemented its interference with Fyk *via* the separately wrong conduct of civil extortion (*e.g.*, coercing Fyk to pay approximately $43,000.00 towards worthless "optional" paid for reach amidst threat and fear that his businesses/pages would be crippled if he did not and then not allowing Fyk to continue in the "optional" paid for reach program). As another example, as discussed in the above common allegations and below other causes of action, Facebook implemented its interference with Fyk *via* the separately wrong conduct of unfair competition (*e.g.*, unilaterally deleting Fyk posts from users' news feeds that garnered significant advertising and/or web trafficking monies so as to begin forcing random "spammy" Facebook-sponsored posts into users' news feeds). And, no, there is no competition privilege at play here somehow justifying Facebook's conduct–that privilege only applies when the competition is by fair play; *i.e.*, devoid of independently

[10] Although Facebook is so interwoven into the fabric of our society (to the point of obsession, in particularly with society's youth) that one might think it has been around since Creation or the Big Bang (depending on belief systems), it has only been around since February 4, 2004, the same day the United States government (Darpa) nixed its LifeLog program.

wrongful conduct. Put differently and for example, there was, in theory, nothing wrong with Facebook entering the advertising and/or web trafficking realms on its platform if that is all Facebook had done side-by-side, mano-a-mano with other advertising and/or web trafficking competitors; but, Facebook did not just enter the advertising and/or web trafficking realms in side-by-side, mano-a-mano competition with other companies earning advertising and/or web trafficking income (like Fyk), Facebook instead engaged in a calculated, systematic, systemic campaign to eliminate its competition by, for examples, (a) unilateral deletion of competitors' news feed posts and unilateral force-placing of "spammy" Facebook-sponsored posts into the news feeds of users who did not invite same (at least not consciously, since so much of the Facebook paradigm is cryptic beyond ordinary comprehension or recognition), (b) deletion of competitor businesses/pages (to which advertisements and/or web trafficking were tied) under misrepresentative pretext like CDA violation, and (c) splitting of posts into four categories (text, picture, video, and website links) and systematically directing its tortious inference the hardest at links because links were what made others (like Fyk) the most money and Facebook the least money.

53. Facebook, in engaging in the aforementioned interference *via* myriad methods of conduct wrongful in and of itself, either intended or knew that the advertising and/or web trafficking disruption experienced by Fyk (not to mention other lost economic opportunities set forth in footnote 2, *supra*) was certain or substantially certain to occur as a result of such interference.

54. Fyk's relationships with myriad advertising and/or web trafficking companies was significantly disrupted (in fact, eliminated) due to Facebook's interference. Again, Fyk had to fire sell eight businesses /pages (out of the eleven Facebook had crippled) to a competitor amidst Facebook's direct involvement in effectuating that sale; *i.e.*, amidst Facebook's steering of competition.

55. Facebook has deprived Fyk of hundreds of millions of dollars (if not billions of dollars–case in point, BuzzFeed, a Fyk competitor, now being worth approximately $1,500,000,000.00 according to some sources) by way of Facebook's interference and disruption of his advertising and/or web trafficking monies. At a peak and prior to Facebook's interference, Fyk earned approximately $300,000.00 in one month in advertising and/or web trafficking monies, for example. There was no realistic end in sight to Fyk's economic gain before Facebook's interference; rather, all signs pointed towards Fyk earning even more advertising money but for Facebook's interference. To illustrate, competitors who have survived Facebook's onslaught and were far less successful than Fyk at the time of Facebook's devastating interference (*i.e.*, had millions less followers and accordingly earning significantly less advertising earnings than Fyk) have, upon information and belief, had their businesses on Facebook's platform professionally valuated in the hundreds of millions to billions of dollars range. And, yet, Fyk had to fire sell eight of his hard-earned businesses/pages for many zeros less than what they should have been worth but for Facebook's interference; *i.e.*, for a relatively nominal approximate $1,000,000.00 due to Facebook's interference.

56. Not only was Facebook's conduct a substantial factor in Fyk's significant loss of business income and prospective economic advantage, it was the only factor. Facebook's interference with Fyk's economic advantage imposes liability on Facebook for improper methods of disrupting or diverting Fyk's business relationships (*e.g.*, advertising and/or web trafficking companies, *see* footnote 2, *supra*) outside the boundaries of fair competition. In actuality, one of Facebook's motives (collecting "optional" paid for reach monies on a purportedly "free" social media platform) amounts to extortion, which, in turn, has a chilling effect on fair competition. When it comes to Facebook's desire to take over the advertising and/or web trafficking businesses through forced and unwanted Facebook-sponsored "spammy" posts on users' news feeds by muscling out the posts users want (like Fyk posts), that is where glaring unfair competition comes into play. Users cannot avoid the forced, "spammy" Facebook-sponsored posts, and Facebook is no longer the "free," "give the people a voice" social media platform it purports to be;[11] rather, it, again, has become a platform predicated on redistribution of assets (through legally untenable means) developed

[11] "Purports" because of the kind of false rhetoric Facebook disseminates to the public with a brainwashing aim based, in part (sans the benefit of discovery), on supposed feedback from mystery Facebook focus groups. *See, e.g.,* Tessa Lyons' April 13, 2018 (https://www.youtube.com/watch?v=X3LxpEej7gQ), May 23, 2018 (https://www.bloomberg.com/news/videos/2018-05-23/facebook-s-fight-against-misinformation-and-fake-news-video), and June 21, 2018 (https://www.youtube.com/watch?v=DEVZeNESiqw). Ms. Lyons is Facebook's product manager; *see also, e.g.*, June 22, 2016, https://www.c-span.org/video/?411573-1/facebook-coo-sheryl-sandberg-discusses-technological-innovation.

by folks (like Fyk) under the pillar of our society that is the American Dream.

57. Tortious interference with prospective economic advantage/relations is intended to protect stable economic relationships; again, the United States of America was built on fostering stable economic relationships developed in the spirit of the American Dream. Facebook's conduct with Fyk (and many others, for that matter) frustrates such stability and the underlying American Dream, akin to the crooked "claim jumping" scheme set forth above.

WHEREFORE, Plaintiff Jason Fyk respectfully requests the entry of judgment against Defendant Facebook, Inc. for damages including, but not necessarily limited to, (a) compensatory damages well in excess of the $75,000.00 amount in controversy threshold, (b) punitive damages, (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable (*e.g.*, injunction), just, and/or proper.

SECOND CLAIM FOR RELIEF–VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE SECTIONS 17200-17210 (UNFAIR COMPETITION)

58. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

59. California Business & Professions Code Section 17203 provides, in pertinent part, as follows:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent

> jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

60. California Business & Professions Code Section 17201 provides, in pertinent part, as follows: "As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."

61. California Business & Professions Code Section 17200 provides, in pertinent part, as follows: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ."

62. California's unfair competition law affords a private right of action where (as here) the conduct is predicated on "unfair" conduct.

63. Here, there was nothing fair about Facebook's steering Fyk's business/pages to the competitor to whom Fyk had to fire sell eight businesses/pages due to Facebook's leaving Fyk with no reasonable alternative. Such is the epitome of unfair competition, conducive of economic instability and antithetical to the American Dream.

64. Again, Facebook wished to eliminate one competitor (Fyk) in favor of another competitor (the company Fyk was forced to fire sell to because of Facebook) because, for example, the other competitor paid Facebook lucrative sums under Facebook's "optional" paid for reach program. Again, Facebook's excuse for eliminating Fyk was of course not its preference to steer his businesses/pages to a competitor who paid Facebook lots of money notwithstanding a purportedly "free" social media platform, but was instead the nonsense about the content of Fyk's businesses/ pages being violative of the CDA (mainly, supposedly "spammy"). But, again, as discussed in greater detail above, this was a lie as evidenced by the fact that Facebook immediately reinstated the supposedly CDA violative pages for the competitor who Fyk was forced to sell to because of Facebook <u>without any appreciable change, if any change, in the content of the subject pages.</u>

65. And there is more to Facebook's unfair competition. Facebook wished to enter into the lucrative advertising and/or web trafficking businesses for itself once it saw how successful those businesses had become for folks like Fyk. Facebook did not fairly enter into competition with Fyk in this regard, such as by building a massive fanbase as Fyk did from the ground up and then reaping the benefits of the advertising and/or web trafficking earnings that flowed from such hard work in the vein of the American Dream. Rather, Facebook imposed its might in anti-competitive fashion by muscling out the Fyk-related posts from user news feeds that users actually wanted and muscling the "spammy" Facebook-sponsored posts

into user news feeds that users had not asked for. This is the epitome of unfair competition.

66. Moreover, Facebook's unfair competition contravenes its own policies–for examples, Facebook has policies of public neutrality in filtering content, giving people a "voice" (as Ms. Lyons, for example, disingenuously proclaims, *see* footnote 11, *supra*), and "connecting" people (as Mr. Zuckerberg, for example, disingenuously proclaims, *see* footnote 5, *supra*). Where (as here) there is, for example, no neutrality employed in content filtering so as to filter out a competitor (Fyk) and his businesses/pages, predicated on Facebook's false advertising (among other things), California law geared towards safeguarding fair competition is turned upside down. Facebook should be held (whether that is legally, equitably, or both) to its professed policies of public neutrality, voice, and connection; *i.e.*, Facebook should not be allowed to arbitrarily throw its professed public policies aside so as to engage in case-by-case unfair competition that singles out and destroys one person (Fyk) both by unfairly steering the hard work of one competitor (Fyk) to another competitor (*e.g.*, Facebook's aiding and abetting the fire sale of eight Fyk businesses/pages to another competitor), by muscling Fyk's advertisement-backed posts off of users' news feeds and muscling in unwanted random "spammy" Facebook-sponsored posts laced with advertising money, and who knows what else sans the benefit of discovery.

WHEREFORE, Plaintiff Jason Fyk, pursuant to California Business & Professions Code Section 17203, respectfully requests the entry of judgment against Defendant Facebook, Inc., for damages including, but not necessarily limited to, (a) restitution in an amount appropriate to restore Fyk's loss of advertising and/or web trafficking monies at the hands of Facebook's unfair competition (*e.g.*, restore Fyk for every bit of lost advertising and/or web trafficking money associated with every one of his posts on user news feeds that Facebook unilaterally supplanted with its "spammy" sponsored news feed posts), (b) an order enjoining the methods, acts, or practices complained of in this complaint (*e.g.*, Facebook's unsubstantiated banning, reduction of organic views (reach) of pages and content, reduction of website link views (reach), advertising account deletion, page and content unpublishing, page and content deletion, deletion of individual Facebook administrative profiles, and/or the like of Fyk businesses/pages), (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable, just, and/or proper.

THIRD CLAIM FOR RELIEF–
CIVIL EXTORTION

67. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

68. Facebook implemented its "optional" paid for reach program, in out-of-the-blue fashion for those (like Fyk) who had functioned under an organic reach program on the purportedly "free" Facebook social media platform for years, backed by a transparent "threat" that those who did not engage in the "optional" paid for reach program would suffer (*see, e.g.,* averment number eighteen, *supra*, in regards to the high-ranking Facebook representative advising Fyk that one has to pay Facebook in order to play with Facebook). Then, to boot, Facebook would not even

allow Fyk to continue participating in the "optional" paid for reach program beyond his approximate $43,000.00 investment into same.

69. In so implementing, Facebook knew its "threat" was wrongful or had no basis in fact. Facebook's unilateral "optional" paid for reach program was anything but "optional," as Fyk learned the hard way after his approximate $43,000.00 investment in the "optional" paid for reach program proved worthless and Facebook subsequently kicked him out of the "optional" paid for reach program. "The hard way" because, not-so-coincidentally, Facebook's elimination of Fyk from the "optional" paid for reach program coincided with the financially detrimental merry-go-round that Facebook then subjected him to as outlined in averment number twenty-one, *supra*, and culminating in Facebook's October 2016 destruction and/or severe devaluation of eleven of Fyk's very lucrative businesses/pages and the Facebook-aided fire sale of eight of Fyk's business/pages to a Fyk competitor in January 2017.

70. The "threat" that was the "optional" paid for reach program was coupled with an express demand for money. Fyk reasonably feared for the sustainability of his business/pages if he did not relent to Facebook's "optional" paid for reach program "threat." Because of that fear, Fyk relented to the "optional" paid for reach program for a period of time (to the tune of approximately $43,000.00) in an effort to placate Facebook; *i.e.*, in an effort to inspire Facebook not to meddle with (or eventually crush) this businesses/pages. Again, Fyk noticed no appreciable increase in his already sizable viewership. Again, then Facebook excluded Fyk from the "optional" paid for reach program. And,

again, this is when "threat" and related fear became very real. Once Fyk's "optional" payments to Facebook went away, Facebook's "threat" materialized into what Fyk had feared–the very real hardships outlined in the preceding averment and detailed throughout this complaint.

71. Again, as with all of the Facebook misconduct set forth in this complaint, Facebook's civil extortion undermines the pillars upon which America was built–hard work invested by the proverbial little guy like the gold miner (here, Fyk) to accomplish the American Dream and economic stability crushed (*via* extortion or otherwise) by the powerful like big mining (here, Facebook) bent on snuffing out the little guy's American Dream.[12]

WHEREFORE, Plaintiff Jason Fyk respectfully requests the entry of judgment against Defendant Facebook, Inc., for damages including, but not necessarily limited to, (a) Facebook's reimbursement to Fyk of the approximate $43,000.00 Fyk paid to Facebook in conjunction with Facebook's "optional" paid for reach program, (b) punitive damages, (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable, just, and/or proper.

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[12] Public record reflects that the vast majority of Facebook's shareholder population is made up of institutions rather than individuals.

FOURTH CLAIM FOR RELIEF– FRAUD/INTENTIONAL MISREPRESENTATION

72. Fyk re-alleges Paragraphs 1 through 48 as if fully set forth herein.

73. Facebook made myriad false representations to Fyk that harmed him. For example, Facebook represented to Fyk that the "free" organic reach program was perfectly acceptable when, in reality, only the "optional" paid for reach program is acceptable (*see, e.g.,* footnote 3, *supra*). As another example, Facebook represented to Fyk that he was welcomed to participate in the "optional" paid for reach program when, in reality, that was false. As another example, Facebook represented to Fyk that the businesses/pages Facebook crippled in or around October 2016 were violative of the CDA when, in reality, there was nothing CDA violative about such businesses/pages.

74. Facebook either knew its representations to Fyk (exemplified in the preceding averment) were false or Facebook made such representations to Fyk recklessly and without regard for the truth of such representations

75. Facebook intended for Fyk to rely on its representations. For example, Facebook wished to bait Fyk into the "optional" paid for reach program knowing that it would be quick to pull that rug out from underneath Fyk, and Fyk relied on Facebook's representations that he was welcomed in the "paid for" reach program to the tune of a $43,000.00 investment into same. As another example, Facebook wished for Fyk to rely on its representation that his businesses/pages were violative of the CDA knowing such

representation to be false, and Fyk relied on Facebook's representation that his businesses/pages were CDA violative in fire selling eight of same to the competitor who Facebook steered the fire sale towards.

76. Fyk's reliance on Facebook's representation was reasonable, especially considering the unequal balance of power between the parties. Fyk had no reasonable alternatives other than to try the "optional" paid for reach program and fire sell eight of his crippled businesses/pages, for example.

77. Fyk was harmed by his reliance. For example, Fyk's $43,000.00 investment into the "optional" paid for reach program proved useless. As another example, Fyk's fire sale of eight pages for a relatively nominal approximate $1,000,000.00 to a competitor when competitors (once smaller and/or less successful than Fyk) are now valued anywhere from hundreds of millions of dollars to billions of dollars.

78. Fyk's reliance on Facebook's misrepresentations was not only a substantial factor in Fyk's losing substantial economic advantage (realized and prospective), we submit it was the only factor.

WHEREFORE, Plaintiff Jason Fyk respectfully requests the entry of judgment against Defendant Facebook, Inc., for damages including, but not necessarily limited to, (a) compensatory damages well in excess of the $75,000.00 amount in controversy threshold, (b) punitive damages, (c) any awardable attorneys' fees and costs incurred in relation to this action, (d) any awardable forms of interest, and (e) other relief as this Court deems equitable (*e.g.*, injunction/enjoinder), just, and/or proper.

JURY DEMAND

Fyk hereby demands jury trial on all matters so triable as a matter of right.

Dated: August 22, 2018

Respectfully submitted,

PUTTERMAN LANDRY + YU LLP

By: /s/ Constance J. Yu

and

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VERIFICATION

I, JASON FYK declare:

I am the Plaintiff in the above-entitled matter.

I have read the foregoing VERIFIED COMPLAINT and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare (or certify) under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed on August 22, 2018.

/s/ Jason Fyk

CIVIL DOCKET FOR CASE #: 4:18-CV-05159-HSG (AUGUST 22, 2018)

U.S. District Court
California Northern District (Oakland)
CIVIL DOCKET FOR CASE #: 4:18-cv-05159-HSG

Fyk v. Facebook, Inc.
Assigned to: Judge Haywood S Gilliam, Jr
Case in other court: Ninth Circuit Court of Appeals, 19-16232
U.S. Supreme Court, 20-00632
USCA, 21-16997, 24-00465
Cause: 28:1332 Diversity-(Citizenship)

Date Filed: 08/22/2018
Date Terminated: 06/18/2019
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

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08-22-2018
1 COMPLAINT *VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL* against Facebook, Inc. (Filing fee $400, receipt number 0971-12618798.). Filed byJason Fyk. (Attachments: # 1 Summons, # 2 Civil Cover Sheet)(Yu, Constance) (Filed on 8/22/2018) (Entered: 08/22/2018)

08-22-2018
2 MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice* (Filing fee $310, receipt number 0971-12618807.) filed by Jason Fyk. (Yu, Constance) (Filed on 8/22/2018) (Entered: 08/22/2018)

08-22-2018
3 MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice* (Michael Smikun) (Filing fee $310, receipt number 0971-12618812.) filed by Jason Fyk. (Yu, Constance) (Filed on 8/22/2018) (Entered: 08/22/2018)

08-22-2018
4 MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice* (Jeffrey Greyber) (Filing fee $310, receipt number 0971-12618814.) filed by Jason Fyk. (Yu, Constance) (Filed on 8/22/2018) (Entered: 08/22/2018)

08-23-2018

5 Case assigned to Magistrate Judge Kandis A. Westmore.

Counsel for plaintiff or the removing party is responsible for serving the Complaint or Notice of Removal, Summons and the assigned judge's standing orders and all other new case documents upon the opposing parties. For information, visit E-Filing A New Civil Case at http://cand.uscourts.gov/ecf/caseopening.

Standing orders can be downloaded from the court's web page at www.cand.uscourts.gov/judges. Upon receipt, the summons will be issued and returned electronically. Counsel is required to send chambers a copy of the initiating documents pursuant to L.R. 5-1(e)(7). A scheduling order will be sent by Notice of Electronic Filing (NEF) within two business days. Consent/Declination due by 9/6/2018. (as, COURT STAFF) (Filed on 8/23/2018) (Entered: 08/23/2018)

08-23-2018

6 Proposed Summons. (Yu, Constance) (Filed on 8/23/2018) (Entered: 08/23/2018)

08-24-2018

7 Summons Issued as to Facebook, Inc. (jmlS, COURT STAFF) (Filed on 8/24/2018) (Entered: 08/24/2018)

08-24-2018

8 *Initial Case Management Scheduling Order with ADR Deadlines: Case Management Statement due by 11/13/2018. Initial Case Management Conference set for 11/20/2018 01:30 PM. (jmlS, COURT STAFF) (Filed on 8/24/2018) (Entered: 08/24/2018)*

08-28-2018

9 CERTIFICATE OF SERVICE by Jason Fyk re 2 MOTION for leave to appear in Pro Hac *Vice Application for Admission of Attorney Pro Hac Vice* (Filing fee $310, receipt number 0971-12618807.), 3 MOTION for leave to appear in Pro Hac *Vice Application for Admission of Attorney Pro Hac Vice* (Michael Smikun) (Filing fee $310, receipt number 0971-12618812.), 7 Summons Issued, 1 Complaint, 4 MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice* (Jeffrey Greyber) (Filing fee $310, receipt number 0971-12618814.), 8 Initial Case Management Scheduling Order with ADR Deadlines *Proof of Service on Facebook, Inc.* (Yu, Constance) (Filed on 8/28/2018) (Entered: 08/28/2018)

09-04-2018

10 Amended MOTION for leave to appear in Pro Hac Vice *Application for Admission of Attorney Pro Hac Vice previously filed Docket #2* (Filing fee $310, receipt number 0971-12618807.) Filing fee previously paid on 08/22/18 filed by Jason Fyk. (Yu, Constance) (Filed on 9/4/2018) (Entered: 09/04/2018)

09-04-2018

11 *ORDER by Magistrate Judge Kandis A. Westmore granting 3 Motion for Pro Hac Vice for Michael Smikun. (sisS, COURT STAFF) (Filed on 9/4/2018) (Entered: 09/04/2018)*

09-04-2018

12 *ORDER by Magistrate Judge Kandis A. Westmore granting 4 Motion for Pro Hac Vice for Jeffrey Greyber. (sisS, COURT STAFF) (Filed on 9/4/2018) (Entered: 09/04/2018)*

09-04-2018

13 *ORDER by Magistrate Judge Kandis A. Westmore granting 10 Motion for Pro Hac Vice for Sean Callagy. (sisS, COURT STAFF) (Filed on 9/4/2018) (Entered: 09/04/2018)*

09-11-2018

14 STIPULATION *(Joint) to Extend Facebook, Inc.'s Time to Respond to Complaint* filed by Facebook, Inc. and Jason Fyk. (Shacham, Matan) (Filed on 9/11/2018) Modified on 9/12/2018 (jmlS, COURT STAFF). (Entered: 09/11/2018)

09-25-2018

15 DECLINATION to Proceed Before a US Magistrate Judge by Facebook, Inc. (Shacham, Matan) (Filed on 9/25/2018) Modified on 9/26/2018 (jmlS, COURT STAFF). (Entered: 09/25/2018)

09-26-2018

16 CLERK'S NOTICE OF IMPENDING REASSIGNMENT TO A U.S. DISTRICT COURT JUDGE: The Clerk of this Court will now randomly reassign this case to a District

Judge because either (1) a party has not consented to the jurisdiction of a Magistrate Judge, or (2) time is of the essence in deciding a pending judicial action for which the necessary consents to Magistrate Judge jurisdiction have not been secured. You will be informed by separate notice of the district judge to whom this case is reassigned.

ALL HEARING DATES PRESENTLY SCHEDULED BEFORE THE CURRENT MAGISTRATE JUDGE ARE VACATED AND SHOULD BE RE-NOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THIS CASE IS REASSIGNED.

This is a text only docket entry; there is no document associated with this notice. (sisS, COURT STAFF) (Filed on 9/26/2018) (Entered: 09/26/2018)

09-26-2018

17 *ORDER REASSIGNING CASE. Case reassigned to Judge Jeffrey S. White for all further proceedings. Magistrate Judge Kandis A. Westmore no longer assigned to the case. This case is assigned to a judge who participates in the Cameras in the Courtroom Pilot Project. See General Order 65 and http://cand.uscourts.gov/cameras. Signed by Executive Committee on 9/26/2018. (Attachments: # 1 Notice of Eligibility for Video Recording) (jmlS, COURT STAFF) (Filed on 9/26/2018) (Entered: 09/26/2018)*

10-29-2018

18 NOTICE of Appearance by William Sellers Hicks (Hicks, William) (Filed on 10/29/2018) (Entered: 10/29/2018)

10-29-2018

19 NOTICE of Appearance by Matan Shacham (Shacham, Matan) (Filed on 10/29/2018) (Entered: 10/29/2018)

11-01-2018

20 MOTION to Dismiss filed by Facebook, Inc.. Motion Hearing set for 12/14/2018 09:00 AM in Oakland, Courtroom 5, 2nd Floor before Judge Jeffrey S. White. Responses due by 11/15/2018. Replies due by 11/23/2018. (Attachments: # 1 Proposed Order)(Hicks, William) (Filed on 11/1/2018) (Entered: 11/01/2018)

11-12-2018

21 STIPULATION REGARDING

ENLARGEMENT OF THE NOVEMBER 15, 2018, DEADLINE FOR PLAINTIFF TO RESPOND TO DEFENDANTS NOVEMBER 1, 2018, MOTION TO DISMISS AND RELATED DEADLINES filed by Jason Fyk, Facebook, Inc. (Attachments: # 1 Proposed Order) (Yu, Constance) (Filed on 11/12/2018) Modified on 11/13/2018 (cjlS, COURT STAFF). (Entered: 11/12/2018)

11-13-2018

22 ORDER GRANTING AS MODIFIED 21 STIPULATION REGARDING ENLARGEMENT OF THE NOVEMBER

15, 2018, DEADLINE FOR PLAINTIFF TO RESPOND TO DEFENDANTS NOVEMBER 1, 2018, MOTION TO DISMISS AND RELATED DEADLINES. Signed by Judge Jeffrey S. White on 11/13/18. Responses due by 11/30/2018. Replies due by 12/14/2018. Motion Hearing set for 1/25/2019 09:00 AM in Oakland, Courtroom 5, 2nd Floor before Judge Jeffrey S. White. (jjoS, COURT STAFF) (Filed on 11/13/2018) (Entered: 11/13/2018)

11-28-2018

23 MOTION for Extension of Time to File Response/Reply as to 20 MOTION to Dismiss filed by Jason Fyk, Facebook, Inc. (Attachments: # 1 Proposed Order)(Greyber, Jeffrey) (Filed on 11/28/2018) Modified on 11/28/2018 (cjlS, COURT STAFF). (Entered: 11/28/2018)

11-30-2018

24 O*RDER GRANTING AS MODIFIED 23 MOTION for Extension of Time to File Response/Reply as to 20 MOTION to Dismiss. Signed by Judge Jeffrey S. White on 11/30/18. Responses due by 12/7/2018. Replies due by 12/21/2018. Motion Hearing set for 2/1/2019 09:00 AM in Oakland, Courtroom 5, 2nd Floor before Judge Jeffrey S. White. (jjoS, COURT STAFF) (Filed on 11/30/2018) (Entered: 11/30/2018)*

12-07-2018

25 RESPONSE IN OPPOSITION TO 20 DEFENDANT'S NOVEMBER 1, 2018, MOTION TO DISMISS filed by Jason Fyk. (Yu, Constance) (Filed on 12/7/2018) Modified

on 12/7/2018 (cjlS, COURT STAFF). (Entered: 12/07/2018)

12-07-2018

26 PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF 25 HIS RESPONSE IN OPPOSITION TO 20 DEFENDANT'S MOTION TO DISMISS filed by Jason Fyk. (Yu, Constance) (Filed on 12/7/2018) Modified on 12/7/2018 (cjlS, COURT STAFF). (Entered: 12/07/2018)

12-14-2018

27 REPLY (re 20 MOTION to Dismiss) filed by Jason Fyk. (Attachments: # 1 Proposed Order) (Greyber, Jeffrey) (Filed on 12/14/2018) (Entered: 12/14/2018)

12-14-2018

28 Request for Judicial Notice re 27 Reply to Motion to Dismiss filed by Jason Fyk. (Related document(s) 27) (Greyber, Jeffrey) (Filed on 12/14/2018) Modified on 12/14/2018 (cjlS, COURT STAFF). (Entered: 12/14/2018)

12-14-2018

29 STIPULATION WITH [PROPOSED] ORDER Regarding One Week Enlargement of Time for Plaintiff to File a Brief in Response to Facebooks Motion to Dismiss that Complies with Applicable Page Limits, and Enlargement of Related Deadlines filed by Facebook, Inc., Jason Fyk. (Hicks, William) (Filed on 12/14/2018) Modified on 12/14/2018 (cjlS, COURT STAFF). (Entered: 12/14/2018)

12-17-2018

30 *ORDER by Judge Jeffrey S. White granting AS MODIFIED 29 Stipulation Regarding One Week Enlargement of Time for Plaintiff to File a Brief in Response to Facebooks Motion to Dismiss that Complies with Applicable Page Limits, and Enlargement of Related Deadlines. (jjoS, COURT STAFF) (Filed on 12/17/2018) (Entered: 12/17/2018)*

12-17-2018

Set/Reset Deadlines as to 20 MOTION to Dismiss. Responses due by 12/14/2018. Replies due by 12/28/2018. Motion Hearing set for 4/5/2019 09:00 AM in Oakland, Courtroom 5, 2nd Floor before Judge Jeffrey S. White. (jjoS, COURT STAFF) (Filed on 12/17/2018) (Entered: 12/17/2018)

12-28-2018

31 REPLY (re 20 MOTION to Dismiss) filed by Facebook, Inc.. (Hicks, William) (Filed on 12/28/2018) (Entered: 12/28/2018)

12-28-2018

32 Opposition to 28 Plaintiff's Request for Judicial Notice filed by Facebook, Inc. (Hicks, William) (Filed on 12/28/2018) Modified on 12/28/2018 (cjlS, COURT STAFF). (Entered: 12/28/2018)

03-19-2019

33 Clerk's Notice of Video Recording Request. Video Camera hearing set for 4/5/2019 09:00 AM. Objections to Video Recording due 3/26/2019. (jjoS, COURT STAFF) (Filed on 3/19/2019) (Entered: 03/19/2019)

03-25-2019

34 *CLERK'S NOTICE CONTINUING HEARING ON 20 MOTION TO DISMISS:* Motion Hearing set for 6/21/2019 09:00 AM in Oakland, Courtroom 5, 2nd Floor before Judge Jeffrey S. White. (jjoS, COURT STAFF) (Filed on 3/25/2019) (Entered: 03/25/2019)

04-15-2019

35 Clerk's Notice of Video Recording Request. Video Camera hearing set for 6/21/2019 09:00 AM. Objections to Video Recording due 4/22/2019. (jjoS, COURT STAFF) (Filed on 4/15/2019) (Entered: 04/15/2019)

04-29-2019

36 *Clerks Notice of Video Recording Decision* (Related documents(s) 35)(jjoS, COURT STAFF) (Filed on 4/29/2019) (Entered: 04/29/2019)

06-17-2019

37 *CLERK'S NOTICE VACATING HEARING ON 20 MOTION TO DISMISS (jjoS, COURT STAFF) (Filed on 6/17/2019) (Entered: 06/17/2019)*

06-18-2019

38 *ORDER by Judge Jeffrey S. White granting 20 Motion to Dismiss. (jjoS, COURT STAFF) (Filed on 6/18/2019) (Entered: 06/18/2019)*

06-18-2019

39 *JUDGMENT. Signed by Judge Jeffrey S. White on 6/18/19. * * * Civil Case Terminated. (jjoS, COURT STAFF) (Filed on 6/18/2019) (Entered: 06/18/2019)*

06-19-2019

40 NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Jason Fyk. Appeal of Order on Motion to Dismiss 38, Judgment, Terminated Case, Terminate Deadlines and Hearings 39 (Appeal fee of $505 receipt number 0971-13450908 paid.) (Greyber, Jeffrey) (Filed on 6/19/2019) (Entered: 06/19/2019)

06-20-2019

41 USCA Case Number 19-16232 Ninth Circuit Court of Appeals for 40 Notice of Appeal, filed by Jason Fyk. (cjlS, COURT STAFF) (Filed on 6/20/2019) (Entered: 06/20/2019)

06-12-2020

42 USCA Memorandum as to 40 Notice of Appeal, Affirmed, filed by Jason Fyk. (cjlS, COURT STAFF) (Filed on 6/12/2020) (Entered: 06/15/2020)

07-30-2020

43 MANDATE of USCA as to 40 Notice of Appeal, filed by Jason Fyk. (cjlS, COURT STAFF) (Filed on 7/30/2020) (Entered: 07/31/2020)

11-10-2020

44 USCA Case Number 20-632 U.S. Supreme Court. (cjlS, COURT STAFF) (Filed on 11/10/2020) (Entered: 11/16/2020)

01-13-2021

45 ORDER of U.S. Supreme Court as to 44 USCA Case Number. The Petition for a Writ of Certiorari is Denied. (cjlS, COURT STAFF) (Filed on 1/13/2021) (Entered: 01/13/2021)

03-22-2021

46 MOTION FOR RELIEF PURSUANT TO FED.R.CIV.P. 60(b) TO VACATE AND SET ASIDE ENTRY OF JUDGMENT filed by Jason Fyk. Motion Hearing set for 7/23/2021 09:00 AM in Oakland, Courtroom 5, 2nd Floor before Judge Jeffrey S. White. Responses due by 4/5/2021. Replies due by 4/12/2021. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Smikun, Michael) (Filed on 3/22/2021) (Entered: 03/22/2021)

04-05-2021

47 OPPOSITION/RESPONSE (re 46 MOTION FOR RELIEF PURSUANT TO FED.R.CIV.P. 60(b) TO VACATE AND SET ASIDE ENTRY OF JUDGMENT) filed by Facebook, Inc.. (Hicks, William) (Filed on 4/5/2021) (Entered: 04/05/2021)

04-12-2021

48 REPLY (re 46 MOTION FOR RELIEF PURSUANT TO FED.R.CIV.P. 60(b) TO VACATE AND SET ASIDE ENTRY OF JUDGMENT) filed byJason Fyk. (Smikun, Michael) (Filed on 4/12/2021) (Entered: 04/12/2021)

06-04-2021

49 PLAINTIFF'S NOTICE OF FILING SUPPLEMENTAL AUTHORITY IN FURTHER SUPPORT OF 46 PLAINTIFF'S MARCH 22, 2021, MOTION FOR RELIEF PURSUANT TO FED.R.CIV.P 60(b) TO VACATE AND SET ASIDE ENTRY OF JUDGMENT by Jason Fyk. (Smikun, Michael) (Filed on 6/4/2021) Modified on 6/4/2021 (cjlS, COURT STAFF). (Entered: 06/04/2021)

07-08-2021

50 CLERK'S NOTICE VACATING HEARING AS TO 46 MOTION FOR RELIEF PURSUANT TO FED.R.CIV.P. 60(b) TO VACATE AND SET ASIDE ENTRY OF JUDGMENT. A written ruling shall issue.

(This is a text-only entry generated by the court. There is no document associated with this entry.) (jjoS, COURT STAFF) (Filed on 7/8/2021) (Entered: 07/08/2021)

11-01-2021

51 *ORDER by Judge Jeffrey S. White denying 46 Motion FOR RELIEF PURSUANT TO FED. R. CIV. P. 60(B). (jjo, COURT STAFF) (Filed on 11/1/2021) (Entered: 11/01/2021)*

12-01-2021

52 NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Jason Fyk. Appeal of Order on Motion for Miscellaneous Relief 51 (Appeal fee of $505; receipt number ACANDC-16676227 paid) (Yu, Constance) (Filed on 12/1/2021) (USCA Case No. 21-16997) (Entered: 12/01/2021)

12-02-2021

53 USCA Case Number 21-16997 for 52 Notice of Appeal to the Ninth Circuit filed by Jason Fyk. (slh, COURT STAFF) (Filed on 12/2/2021) (Entered: 12/02/2021)

10-19-2022

54 USCA Memorandum as to 52 Notice of Appeal to the Ninth Circuit, filed by Jason Fyk. (mcl, COURT STAFF) (Filed on 10/19/2022) (Entered: 10/19/2022)

11-17-2022

55 MANDATE of USCA as to 52 Notice of Appeal to the Ninth Circuit, filed by Jason Fyk. (mcl, COURT STAFF) (Filed on 11/17/2022) (Entered: 11/17/2022)

12-07-2022

56 Received Document, "Affidavit of Notice of Awareness" by Jason Fyk. (Attachments: # 1 Envelope) (wsn, COURT STAFF) (Filed on 12/7/2022) (Entered: 12/09/2022)

12-12-2022

57 ORDER of USCA as to 41 USCA Case Number 21-16997 42 USCA Memorandum. (kmg, COURT STAFF) (Entered: 12/14/2022)

02-13-2023

58 ORDER of U.S. Supreme Court re 52 Notice of Appeal. The petition for a writ of certiorari was filed on February 7, 2023 and placed on the docket February 10, 2023 as No. 22-753. (mcl, COURT STAFF) (Filed on 2/13/2023) (Entered: 02/13/2023)

04-18-2023

59 ORDER of U.S. Supreme Court as to 52 Notice of Appeal to the Ninth Circuit, filed by Jason Fyk. The petition for a writ of certiorari is denied. (mcl, COURT STAFF) (Filed on 4/18/2023) (Entered: 04/18/2023)

06-08-2023

60 NOTICE by Jason Fyk *of Change of Firm and Email Designations* (Greyber, Jeffrey) (Filed on 6/8/2023) (Entered: 06/08/2023)

06-16-2023

61 Second MOTION for Relief Pursuant to Fed. R.Civ.P. 60(b) filed by Jason Fyk. Responses due by 6/30/2023. Replies due by 7/7/2023. (Attachments: #1 Exhibit 1, #2 Exhibit 2, #3 Exhibit 3) (Greyber, Jeffrey) (Filed on 6/16/2023) (Entered: 06/16/2023)

06-30-2023

62 OPPOSITION/RESPONSE (re 61 Second MOTION for Relief Pursuant to Fed.R.Civ.P. 60(b)) filed by Facebook, Inc.. (Malhotra, Paven) (Filed on 6/30/2023) Modified on 7/3/2023 (kmg, COURT STAFF). (Entered: 06/30/2023)

07-07-2023

63 REPLY (re 61 Second MOTION for Relief Pursuant to Fed.R.Civ.P. 60(b)) filed by Jason Fyk. (Yu, Constance) (Filed on 7/7/2023) (Entered: 07/07/2023)

08-22-2023

64 ORDER OF RECUSAL. Signed by Judge Jeffrey S. White on 8/22/2023. (kkp, COURT

STAFF) (Filed on 8/22/2023) (Entered: 08/22/2023)

08-22-2023

65 ORDER REASSIGNING CASE. Case reassigned using a proportionate, random, and blind system pursuant to General Order No. 44 to Judge Haywood S Gilliam, Jr for all further proceedings. Judge Jeffrey S. White no longer assigned to case. Signed by The Clerk on 8/22/2023. (bar, COURT STAFF) (Filed on 8/22/2023) (Entered: 08/22/2023)

09-19-2023

66 MOTION RE: (Un)Constitutionality of 47 U.S.C. § 230(c)(1) filed by Jason Fyk. Responses due by 10/3/2023. Replies due by 10/10/2023. (Greyber, Jeffrey) (Filed on 9/19/2023) (Entered: 09/19/2023)

09-29-2023

67 NOTICE of Appearance by Indraneel Sur (Sur, Indraneel) (Filed on 9/29/2023) (Entered: 09/29/2023)

10-02-2023

68 NOTICE by United States of America re 66 MOTION RE: (Un)Constitutionality of 47 U.S.C. § 230(c)(1) *in acknowledgment of notice* (Sur, Indraneel) (Filed on 10/2/2023) (Entered: 10/02/2023)

10-03-2023

69 REPLY (re 66 MOTION RE: (Un)Constitutionality of 47 U.S.C. § 230(c) (1)) *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) filed by Facebook, Inc.. (Hicks, William) (Filed on 10/3/2023) (Entered: 10/03/2023)

10-03-2023

70 RESPONSE re 68 Notice (Other) by Jason Fyk. (Greyber, Jeffrey) (Filed on 10/3/2023) (Entered: 10/03/2023)

10-10-2023

71 REPLY (re 66 MOTION RE: (Un)Constitutionality of 47 U.S.C. § 230 (c) (1)) Reply to D.E. 69 filed byJason Fyk. (Greyber, Jeffrey) (Filed on 10/10/2023) (Entered: 10/10/2023)

11-14-2023

72 NOTICE of Change of Address by Jeffrey Lewis Greyber (Greyber, Jeffrey) (Filed on 11/14/2023) (Entered: 11/14/2023)

12-15-2023

73 NOTICE by Jason Fyk re 66 MOTION RE: (Un)Constitutionality of 47 U.S.C. § 230(c) (1), 61 Second MOTION for Relief Pursuant to Fed.R.Civ.P. 60(b) (Attachments: #1 Supplement Notice of Supp Authority) (Greyber, Jeffrey) (Filed on 12/15/2023) (Entered: 12/15/2023)

01-12-2024

74 *ORDER by Judge Haywood S. Gilliam, Jr. DENYING 61 MOTION FOR RELIEF PURUSANT TO FED. R. CIV. P. 60(B) AND TERMINATING 66 MOTION RE: CONSTIUTIONALITY OF 47 U.S.C. SEC. 230(C)(1). (ndr, COURT STAFF) (Filed on 1/12/2024) (Entered: 01/12/2024)*

01-25-2024

75 NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Jason Fyk. Appeal of Order on Motion for Miscellaneous Relief, 74 (Appeal fee of $605 receipt number BCANDC-19061632 paid.) (Greyber, Jeffrey) (Filed on 1/25/2024) (Entered: 01/25/2024)

01-29-2024

76 USCA Case Number 24-465 for 75 Notice of Appeal to the Ninth Circuit filed by Jason Fyk. (mcl, COURT STAFF) (Filed on 1/29/2024) (Entered: 01/29/2024)