No. 24-1116

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

Brief *Amicus Curiae* of America's Future, Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Free Speech Coalition, Free Speech Defense and Education Fund, The Senior Citizens League, Public Advocate of the U.S., Public Advocate Foundation, Heller Foundation, and Conservative Legal Defense and Education Fund in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Amici America's Future, Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Free Speech Coalition, Free Speech Defense and Education Fund, Public Advocate of the United States, Public Advocate Foundation, The Senior Citizens League, Heller Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* have filed *amicus* briefs in Section 230 and related social media censorship cases in various courts, including this Court. *See* Brief *Amicus Curiae* of America's Future, *et al.*, U.S. Supreme Court, No. 21-1333 (Dec. 7, 2022); Brief *Amicus Curiae* of America's Future, *et al.*, U.S. Court of Appeals for the Fifth Circuit, No. 23-30445 (Aug. 7, 2023); Brief *Amicus Curiae* of America's Future, *et al.*, U.S. Supreme Court, No. 23-411 (Feb. 9, 2024); Brief

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

of *Amici Curiae* Lt. General Michael Flynn (USA-ret.), *et al.*, U.S. Court of Appeals for the Fifth Circuit, No. 24-30252 (Sept. 25, 2024); and Brief of *Amici Curiae* Lt. General Michael Flynn (USA-ret.), *et al.*, U.S. Court of Appeals for the Fifth Circuit, No. 24-30252 (Nov. 25, 2024).

STATEMENT OF THE CASE

Plaintiff Jason Fyk developed certain content posted on Facebook, which Fyk asserts that Facebook suppressed in pursuit of its own financial enrichment, leading to Fyk being required to sell his online business to a competitor working in league with Facebook, for a below-market price.

Fyk filed suit against Facebook, Inc. in the U.S. District Court for the Northern District of California, alleging "intentional interference with prospective economic advantage, violation of California Business and Professions Code section 17200 et seq., civil extortion, and fraud for Facebook's devaluation of Plaintiff's online pages." *Fyk v. Facebook, Inc.*, 2019 U.S. Dist. LEXIS 234960 at *1 (N.D. Cal. 2019) ("*Fyk I*"). The district court granted Facebook's motion to dismiss on the ground that Facebook had complete immunity from suit under Section 230(c)(1) of the Communications Decency Act: "Publication involves the reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.... Thus, any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Id.* at *6 (internal quotations omitted).

Accordingly, the court dismissed without leave to amend. Even though the act of withdrawing or excluding content is expressly authorized in a limited manner in Section 230(c)(2)(A), the Court did not consider or rule on that ground.

On appeal, the Ninth Circuit "reject[ed] Fyk's argument that granting § 230(c)(1) immunity to Facebook renders § 230(c)(2)(A) mere surplusage.... [E]ven 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)." *Fyk v. Facebook, Inc.*, 808 Fed. Appx. 597, 598 (9th Cir. 2020) ("*Fyk II*"). Thus, even in invoking Section (c)(2)(A), the court never evaluated Facebook withdrawing or excluding material under that subsection and upheld the dismissal under Section 230(c)(1). In January 2021, this Court denied Fyk's petition for a writ of certiorari. *Fyk v. Facebook, Inc.*, 141 S. Ct. 1067 (2021).

In 2021, Fyk returned to the district court, unsuccessfully seeking relief pursuant to Federal Rule of Civil Procedure 60(b)(5). *See Fyk v. Facebook, Inc.*, 2021 U.S. Dist. LEXIS 235965 at *2 (N.D. Cal. 2021). On appeal, the Ninth Circuit ruled that Fyk had waited 18 months after the *Enigma* decision to file his motion, and accordingly, the district court had not abused its discretion in denying the relief. *Fyk v. Facebook, Inc.*, 2022 U.S. App. LEXIS 29030 (N.D. Cal. 2022), cert. denied Apr. 17, 2023.

In 2024, Fyk filed another unsuccessful Rule 60(b) motion, this time challenging the constitutionality of

Section 230(c)(1). *Fyk v. Facebook, Inc.*, 2024 U.S. Dist. LEXIS 6867 (N.D. Cal. 2024). On appeal, the Ninth Circuit upheld the district court on the same grounds, that controlling precedent had not changed. *Fyk v. Facebook, Inc.*, 2024 U.S. App. LEXIS 31687 (9th Cir. 2024). Fyk then filed this petition for writ of certiorari.

STATEMENT

Companies like Facebook can become financially prosperous and politically powerful through competition, but they cannot become dangerous, abusive monopolies without the protection of government. In this case, it was not the President or Congress that has barred injured parties from obtaining justice for their abuses. Rather, it has been certain courts, particularly the Ninth Circuit, where a disproportionate number of cases against such Big Tech firms are brought due to the location of Silicon Valley. Through a series of decisions misinterpreting Section 230(c) of the Communications Decency Act as a grant of near absolute immunity, the Ninth Circuit has become the governmental protector and enabler of these abusive monopolies which pervert the free marketplace of ideas on which our constitutional republic depends.

A series of lower court decisions have protected these Silicon Valley companies from the accountability provided by our judicial system when they conspired with government under the Biden Administration to censor certain voices while promoting others. It is time for the judiciary's abuse of Section 230(c) to come

to an end, and this case provides an excellent vehicle, where the Petitioner has suffered real financial injury, to do just that.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision below yet again repeats its own error, made also by other lower courts, to misread Section 230(c) of the Communications Decency Act as granting "interactive computer service providers" near complete immunity for their operations. Such immunity is nowhere authorized by that statute. With the type of immunity enjoyed by few, if any, other companies, these Big Tech companies have become fabulously wealthy, politically powerful, and, predictably, increasingly abusive of their powers particularly in deleting the content of third parties.

Section 230(c)(1) only bars suits against Big Tech firms brought on the theory they are responsible for third-party content, yet was applied below because the claim "derives from" the posting of a third party — a vastly broader concept. Section 230(c)(1) here was said to apply to immunize Big Tech from the exercise of any function of publishing, including to "withdraw from publication" and to "exclude" any material it chooses, even in pursuit of a corrupt business scheme, as here. That fabricated grant of immunity under Section 230(c)(1) negates the limitations in Section 230(c)(2)(A) which allows removal of only seven categories of objectionable content — not removal of third party content for any reason.

Threats by politicians to remove judicially invented Section 230(c)(1) immunity causes these Big Tech firms to assert falsely that any accountability will bring down the Internet. Actually, the Ninth Circuit's abusive reading of this statute incentivizes Big Tech firms to obey the often secret directives to censor opponents from those in government perceived as having the greatest political power to remove Section 230 immunity.

ARGUMENT

I. THE SPECIFIC NATURE OF FYK'S COMPLAINT AGAINST FACEBOOK WAS DISREGARDED BY THE COURTS BELOW.

The Ninth Circuit affirmed the district court's decision granting Facebook's motion to dismiss Fyk's claim in a short opinion based on the assertion that Section 230 granted Facebook broad immunity from suit "derives from" any third party material. The district court's opinion was almost entirely devoid of any analysis of Petitioner's claims, but included the following fabrication:

> Fyk ... filed suit ... for intentional interference with prospective economic advantage ... civil extortion, and fraud for Facebook's devaluation of Plaintiff's online pages ... dedicated to videos and pictures of people

> urinating[2] [and] to make room for its own sponsored advertisements. [*Fyk I* at *1.]

Four times the district court used the term "immunize" to describe the protection provided by Section 230(c)(1), even though neither that word nor any comparable term appears in that subsection. Moreover, at no time did the district court make reference to Section 230(c)(2)(A), which is the provision of the Communications Decency Act which authorizes internet service providers to remove certain types of content.

As Petitioner explains, the "urinating" reference is highly misleading and prejudicial, as the website was invoking the British colloquial expression "taking the piss" which has been defined as follows: "This graphic-sounding British phrase simply means you're mocking someone or you're not being serious about

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[2] Judge White recused himself from this case on August 22, 2023 (App. 917-18a due to "undisclosed tech stock" holdings (*see* Petition at 39) four years after he granted Facebook's motion to dismiss on June 18, 2019 (App. 912a). In that 2019 order of dismissal, Judge White referred to Fyk's online pages as "dedicate[d] to videos and pictures of people urinating." The available record reflects that no such "videos and pictures" existed except in an erroneous listing in a complaint about a page called "takeapissfunny." Petition at 16. *See also* App. 772a ("Facebook's suggestion that there was something 'filthy' about Fyk's businesses/pages via its glancing reference to a takeapissfunny page is misplaced, inaccurate, and out-of-context; *i.e.,* is not good faith"). Therefore, from the record available, it appears fair to describe Judge White's description of Fyk's business as a canard, which, although it should have no bearing at all on this case, still operates to denigrate Plaintiff unfairly.

something." *See* Petition for Certiorari at 16. The district court ruled under Section 230(c)(1), not 230(c)(2)(A), and there is no indication the content was removed for being vulgar as might be imagined from the district court's out-of-context description.

The district court simply determined that Facebook could face no liability because "the duty that the plaintiff alleges was violated by defendant **'derives from** the defendant's status or conduct as a "published [sic] or speaker."'" *Fyk I* at *5-6 (emphasis added). For this critical proposition, the court cited not to the statute, but to *Barnes v. Yahoo*, 570 F.3d 1096 (9th Cir. 2009), thereby compounding the Ninth Circuit's mistake in the *Barnes* decision. There is no "derives from" test in Section 230(c)(1), which rather prevents a plaintiff from claiming injury because of Facebook having been the publisher of information provided by a third party. The district court's assertion that Fyk could be a third party is irrelevant, as the essence of Fyk's complaint has nothing to do with Facebook allowing his material to be posted — it has to do with Facebook removing his material for a corrupt reason. Had the district court recognized that the subsection which addresses removing content is Section 230(c)(2)(A), then it would have had to decide if at least one of the seven tests contained in that subsection had been met — "[1] obscene, [2] lewd, [3] lascivious, [4] filthy, [5] excessively violent, [6] harassing, or [7] otherwise objectionable, whether or not such material is constitutionally protected." Section 230(c)(2)(A). Here, the district court followed the practice of other courts to disregard the limitations on removal of material set out in Section 230(c)(2)(A),

by asserting a blanket immunity under Section 230(c)(1) which immunity simply does not exist.

Through this statutory sleight-of-hand, the district court and the Ninth Circuit were able to grant Respondent Facebook a blanket immunity, to empower their favored Silicon Valley firms to censor any American's speech for corrupt reasons, which here allowed Facebook to adopt the following predatory business practice which Petitioner alleged violated California law:

> Facebook lured users like Fyk into building their businesses on its purportedly "free" platform for "all ideas," only to later implement anticompetitive content manipulation schemes, such as extortionate "paid-for-reach" (*i.e.*, sponsored) advertising model, which displaced other user's content and artificially suppresses visibility for those who refuse to pay, like Fyk. Facebook's deceptive trade practice fraudulently masked its profit-driven content restrictions as so-called "good faith" policy enforcement, while unfairly manipulating user reach to serve its financial interests. [Petition at 9.]

Specifically, Facebook suppressed Fyk's content, while promoting a competitor willing to pay Facebook fees, forcing Fyk to sell out, and allowing the competitor to take over at bargain prices the content that Fyk had developed:

> Facebook deliberately suppressed Fyk's "free" organic reach and speech on Facebook's purportedly "free" "platform for all ideas" by purposefully interfering with Petitioner's business property (a violation of Facebook's legal duties to Fyk), while redirecting that same stolen reach to his competitor, Red Blue Media (anonymously identified as "a competitor" in Fyk's Verified Complaint), through unlawful *backroom* deals that enriched Facebook. [*Id.*]

Facebook demonstrated that it had no problem with the content of Fyk's pages when it reinstated those pages once Red Blue Media took ownership of them. That led to Fyk selling several remaining pages at reduced value to Red Blue Media. *See id.* at 9-10.

This is exactly the type of abusive business behavior that could be expected of interactive computer service providers once Section 230(c)(1) is falsely converted into a grant of immunity to the wealthiest and most powerful companies in America, operating under the government's protection as provided by the Ninth Circuit.

II. THE NINTH CIRCUIT FOLLOWED ITS OWN PRECEDENTS, TAKING THE POSITION OF A NUMBER OF FEDERAL COURTS, IN MISCONSTRUING SECTION 230(C) TO GIVE FACEBOOK TOTAL IMMUNITY.

The first time that the Ninth Circuit considered a Fyk appeal, on June 12, 2020, was also the only time

that it made any attempt to evaluate the claims made in the Fyk complaint. In affirming the district court's dismissal of Fyk's complaint, the circuit court made numerous errors, even from the beginning of its analysis when it quoted a Ninth Circuit decision for the proposition that under Section 230(c)(1): "'**[i]mmunity from liability exists** for '(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.'" *Fyk II* at 597 (emphasis added). Seeking to convert statutory text into judicial shorthand can be a grave mistake and proved to be so here. In deciding the case as one involving immunity, the Ninth Circuit relieved itself of its duty to carefully analyze and follow the text of Section 230(c), leading the court astray. The Ninth Circuit stated: "When a plaintiff cannot allege enough facts to overcome Section 230 **immunity**, a plaintiff's claims should be dismissed." *Id*. (emphasis added). Believing Fyk's claim somehow **"derives from"** (as the district court asserted) material posted on its site by a third party, the Ninth Circuit felt dismissal warranted. This was error. Section 230(c)(1) only 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. [Section 230(c)(1) (emphasis added).]

Thus, all Section 230(c)(1) does is prevent an interactive computer service provider from being

treated as the publisher or speaker of third-party content appearing on its site.

As the circuit described it, Fyk's first claim was "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 ... for monetary purposes...." *Fyk II* at 598. Yet, the Ninth Circuit then totally ignored what it just stated Fyk's claim to be — that Facebook "de-published" Fyk's content in corrupt pursuit of Facebook's own financial interests. The Ninth Circuit focused rather on Facebook's later posting the same material for another client in substantially the same format, and thus Facebook was not involved in "creation or development of content." *Id*. All that was simply beside the point.

The Ninth Circuit then stated flatly: "[t]hat Facebook allegedly took its actions for monetary purposes does not somehow transform Facebook into a content developer." *Id*. Thus, the circuit court took the position that the atextual "immunity" that it believed exists attached to Facebook even when its removal of Fyk's material is in pursuit of an anti-competitive, financial self-interest, which harmed Fyk. The Ninth Circuit has repeatedly erred in granting Big Tech vast "immunity" under Section 230(c)(1) while ignoring the limitations on removal of content under Section 230(c)(2)(A).[3]

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[3] *See, e.g., Batzel v. Smith*, 333 F.3d 1018, 1032 (9th Cir. 2003) ("The scope of the immunity cannot turn on whether the publisher

Thus, Section 230(c)(1) has no applicability whatsoever to Fyk's claim. Fyk was not seeking to hold Facebook accountable for the content of a third party (himself), but rather for the business tort of removing his content in pursuit of a scheme to advance Facebook's own economic interests. Fyk never asked the district court to hold Facebook accountable for what any third party (including himself) published, but rather for the business tort committed when and after Facebook removed Fyk's content.

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approaches the selection process as one of inclusion or removal"); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170-1171 (9th Cir. 2008) ("any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230"); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) ("[P]ublication involves ... deciding whether to publish or to withdraw from publication third-party content"); *Bandha Yoga Publ'ns, LLC v. Dorset (In re Long)*, 854 Fed. Appx. 861, 865 (9th Cir. 2021) ("§ 230 bars state law claims that seek to treat an online service provider as the publisher of another user's content, and 'removing content' — or allowing content — 'is something publishers do.... [S]ection 230 protects from liability 'any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online'" (citations omitted); *Diep v. Apple, Inc.,* 2024 U.S. App. LEXIS 7214, at *3 (9th Cir. 2024) ("Publishing conduct, to which section 230(c)(1) applies, includes 'reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content'") (quoting *Roommates.com*); *Doe v. Twitter, Inc.*, 2023 U.S. App. LEXIS 10808 at *6 (9th Cir. 2023) ("Because the complaint targets 'activity that can be boiled down to deciding whether to exclude material that third parties seek to post online,' such activity 'is perforce immune under section 230'") (quoting *Roommates.com*).

The Ninth Circuit asserted that "nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service." *Id*. Although that may be true if a plaintiff were seeking to hold Facebook liable for the content of material provided by a third party, to repeat, that is not an issue here.

The Ninth Circuit asserted that "the fact that he [Fyk] generated the content at issue does not make § 230(c)(1) inapplicable.... As to Facebook, Fyk is 'another information content provider.'" *Fyk II* at 598. This assertion is entirely irrelevant as Fyk was not seeking to hold Facebook responsible for posting his material. Fyk alleged that Facebook removed his material and then, acting in concert with another business, reposted that material in the name of that other business, in order to demonstrate the elements of the business tort at the heart of its complaint. That reposting exposed that Fyk's material was not removed for its content, but rather was part of an abusive business practice to deprive Fyk of the fruits of his own labor and to convey it to another business operating in league with Facebook.

The Ninth Circuit correctly stated that "motive" is relevant to the applicability of section 230(c)(2)(A), which 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.... [Section 230(c)(2)(A) (emphasis added).]

The Ninth Circuit never sought to apply Section 230(c)(2)(A) to this case even though that subsection addresses the principal issue raised by Fyk — Facebook's liability for the anti-competitive removal of content posted by a third party.

Justice Thomas has succinctly explained why Section 230(c)(1) does not impose categorical immunity:

> [H]ad Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in §230(c)(1): No provider "shall be held liable" for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content. §230(c)(2). Where Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful. [*Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) at *16 (Thomas, J., concurring in denial of certiorari) (citations omitted).[4]]

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[4] Justice Thomas since has expressed similar concerns in two additional cases: *Doe v. Facebook, Inc.*, 142 S. Ct. 1087 (2022)

The Ninth Circuit's view that since Section 230(c)(1) provides Facebook "immunity," Section 230(c)(2)(A) is irrelevant to Facebook's actions is completely wrong. By way of contrast, these *amici* suggest the correct understanding of the statutory scheme as applied here is as follows:

1. Under **Section 230(c)(1)**, a user of Facebook such as Fyk cannot prevail if his claim is predicated on the theory of liability that Facebook is the publisher or speaker of third party objectionable content which appears on its site. Fyk never based its claim against Facebook as being the **publisher or speaker of any third party material** on the Internet. Therefore, Section 230(c)(1) does not apply, provides no protection, and certainly does not provide atextual "immunity" to Facebook as granted by the Ninth Circuit. Fyk's claim against Facebook for a business tort must rise or fall based on what Facebook itself did in removing Fyk's postings and taking other action to advance its own financial interests.

2. Even though Section 230(c)(1) provides Facebook no protection against Fyk's principal claim against Facebook for removing or downgrading Fyk's content, **Section 230(c)(2)(A)** could provide complete protection from liability for **removal of third-party material** — but only under certain situations. Congress protected social media sites

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(Thomas, J., respecting the denial of certiorari); *Doe v. Snap, Inc.*, 144 S. Ct. 2493 (2024) (Thomas, J., dissenting from denial of certiorari, joined by Gorsuch, J.).

> from liability for removing material which fell into one of seven identified categories: "[1] obscene, [2] lewd, [3] lascivious, [4] filthy, [5] excessively violent, [6] harassing, or [7] otherwise objectionable, whether or not such material is constitutionally protected." This provision gives effect to the Section's title: "Protection for 'Good Samaritan' blocking and screening of offensive material." Facebook was never put to the test as to whether it could be afforded protection from liability under this subsection, as it was given atextual "immunity" under Section 230(c)(1).

Viewed together, these two subsections make complete sense, and are not in any way duplicative or redundant, as the Ninth Circuit indicated. *Fyk II* at 599. Section 230(c)(1) prevents the social media company from being held responsible as the publisher **for hosting** what a third-party publishes on its site. Then, Section 230(c)(2)(A) prevents the social media company from being held responsible **for removing** certain — but not all — objectionable content.

Here, the Ninth Circuit, affirming the district court's grant of immunity to Facebook based on some manufactured "derives from" theory, erred. Its grant of immunity assumes the statute reads something like this:

> Interactive computer service providers have absolute immunity for posting or removing any content for any reason, including the commission of an anticompetitive act constituting a business tort under state law.

The Ninth Circuit should never have viewed Section 230(c)(1) as a grant of immunity to Facebook. It should never have read that section to provide Facebook any protection from wrongdoing because the claim somehow "**derives from**" the posting of a third party.

The Ninth Circuit should have reversed and remanded the case to the district court to allow Facebook to demonstrate that its removal of Fyk's post was justified under one of the seven categories set out in Section 230(c)(2)(A).

III. PROTECTED BY JUDICIALLY CREATED IMMUNITY, BIG TECH COMPANIES HAVE BECOME ENRICHED AND DANGEROUS.

A. Big Tech Companies Have Parlayed Judicial Immunity into Trillion Dollar Businesses with the Unchallengeable Power to Operate in an Anticompetitive Manner.

Fyk's petition correctly asserts that the Ninth Circuit has "absolv[ed] [Big Tech] corporations of essentially all liability, ... empower[ing] them to eliminate competition, consolidate power, control public discourse (even on behalf of the government), and escape accountability." Petition at 7-8. None of these effects are the result of Section 230 as written by Congress, but rather are an invention of those judges who seem to believe their role is to protect Internet companies from accountability. Jeff Kosseff, author of the book Twenty-Six Words that Created the Internet

(Cornell Univ. Press: 2019), has asserted that Big Tech companies have "proceeded for years basically treating Section 230 like it's a right that's enshrined in the Constitution, and ... frankly, some of the large platforms in particular have gotten incredibly arrogant."[5] Senator Josh Hawley (R-MO) explains how it works:

> Today's section 230 is a sweetheart deal for companies like Facebook and Google, who are **treated like telephone companies** and internet service providers **despite their active engagement with and manipulation of the experience of their users**. Originally passed as a "family empowerment" provision, section 230 now empowers the tech giants. The companies who benefitted from the original section 230 were a small, fledgling industry; the biggest beneficiaries of today's **judicially distorted section 230** are some of **the most powerful companies** in the world. [J. Hawley, "The True History of Section 230" at 8 (emphasis added).]

Congress' findings envisioned Section 230 as providing "a true diversity of political discourse ... and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). That law was supposed to promote free markets and expanded opportunity. Instead, what has emerged is a small handful of Big Tech companies,

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[5] M. Laslo, "The Fight Over Section 230—and the Internet as We Know It," *Wired* (Aug. 13, 2019).

worth trillions of dollars, driving financial competitors from the business marketplace and political competition from the marketplace of ideas:

> Amazon, Apple, Google, and Microsoft — the four American companies — now worth more than a trillion dollars each (Microsoft with a market cap of $2 trillion and Apple nearly $3 trillion), there seems to [be] no ceiling on their domination. The combined market shares of Apple, Amazon, Alphabet, Microsoft, and Facebook now constitute 20 percent of the stock market's total worth....[6]

Instead of Congress' dream of more competition, the opposite has happened — a near-monopolization of information in the hands of just a few corporations:

> [T]he Big Tech monopolists of the 21st century ... control all of the digital infrastructure ... from the internet itself to the software, cloud hosting, apps, payment systems, and even the delivery service. These corporate neo-feudal lords don't just dominate a single market or a few related ones; **they control the *marketplace*. They can create and destroy entire markets**.... If a competitor does manage to create a **new product**, US Big Tech monopolies can **make it disappear**. [B. Norton, "How US Big Tech monopolies

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[6] B. Le, "Big-Tech is Watching You: The Rise in Big-Tech Companies and Their Influence," *JuniorEconomist.org* (Feb. 28, 2022).

colonized the world: Welcome to neo-feudalism," *GeopoliticalEconomy.com* (Aug. 19, 2024) (bolding added).]

B. The Judicial Rewriting of Section 230 Has Led to a Dangerous Co-dependency between Big Tech and Government.

During the 2020 presidential election, Facebook and other Big Tech sites served the interests and directives of the Biden Administration by ruthlessly suppressing coverage by the *New York Post* of the Hunter Biden laptop story, based on knowingly false claims from the FBI that the story was "Russian disinformation." On January 12, 2025, the *Post*'s editorial board ran an editorial decrying the "incredible, blind arrogance of the 'fact checking' censors" who censored true stories including the Biden laptop. After ending Facebook's "fact checking" policing program, Meta (Facebook) CEO Mark Zuckerberg finally admitted that "[w]hat started as a movement to be more inclusive has increasingly been used to shut down opinions and shut out people with different ideas."[7]

Ironically, a law intended to protect free online expressions of ideas has instead been used to silence political debate. The courts' "blanket immunity" rewriting of Section 230 has enabled the vast arrogance of the Big Tech companies that has fueled the upending of congressional intent.

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[7] L. Le Mahieu, "Zuckerberg Says Meta 'Restoring Free Speech,' Will 'Get Rid Of Fact-Checkers'," *Daily Wire* (Jan. 7, 2025).

Despite — or because of — the massive advantages afforded to Big Tech companies by the judicial rewriting of Section 230, these companies operate under only one mortal fear — that the benefits the government has bestowed, it can withdraw. Today, "[a] handful of Big Tech companies are now controlling the flow of most information in a free society, and they are doing so aided and abetted by government policy."[8] A handful of "international mega-corporations [are] determining what news, information and perspectives Americans are allowed to read, hear and access." *Id.*

Big Tech views the loss of this "immunity" as an existential threat — and will do essentially anything required to maintain their advantage. If this means accepting government directives to control what Americans are allowed to read, hear, and access, to protect whatever Administration may be in power, they will comply. Conspiring with government to censor dissent is a price Big Tech has proven all too willing to pay.

The unhealthy co-dependence between Big Tech and government is pervasive. Big Tech executives have repeatedly begged Congress not to revoke Section 230, stoking unreasonable fear that, without immunity, the Internet would be destroyed. In October 2020, Twitter CEO Jack Dorsey told Congress that "Section 230 is the most important law protecting internet speech. In removing Section 230, we will

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[8] R. Bovard, "Section 230 protects Big Tech from lawsuits. But it was never supposed to be bulletproof," *USA Today* (Dec. 13, 2020).

remove speech from the internet."[9] Alphabet and Google CEO Sundar Pichai testified that Section 230 "has been foundational to US leadership in the tech sector."[10] And "[t]he Internet Association, an industry group that represents major tech stocks including Google, Facebook, Amazon and Microsoft, agrees. It has said the 'best of the internet would disappear' without Section 230."[11]

Fear of losing its immunity led Big Tech in 2020-2021 to serve the incoming Biden Administration, even while President Trump was still in office, by Twitter permanently blocking the account of the President of the United States. Facebook's action was comparatively mild — a suspension for two years.[12] Even the vigorously anti-Trump ACLU decried the precedent established by censoring President Trump:

> it should concern everyone when companies like Facebook and Twitter wield the unchecked power to remove people from platforms that

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[9] A. Conklin, "Dorsey, Zuckerberg defend Section 230, signal openness to changes during censorship hearing," *Fox Business* (Oct. 28, 2020).

[10] C. Albanesius, "Tech CEOs Face Congress Over Section 230, But Members Mostly Pick Partisan Fights," *PCMag.com* (Oct. 28, 2020).

[11] B. Deagon, "Congress May Tear Apart A Law That Launched The Internet," *Investors Business Daily* (Dec. 30, 2020).

[12] E. Tannenbaum, "Every Social Media Platform Donald Trump Is Banned From Using (So Far)," *Glamour* (June 4, 2021).

> have become indispensable for the speech of billions — especially when political realities make those decisions easier. President Trump can turn to his press team or Fox News to communicate with the public, but others — like the many Black, Brown, and LGBTQ activists who have been censored by social media companies — will not have that luxury.[13]

President Biden threatened before taking office to revoke Section 230. In a *New York Times* interview in January 2020, "Biden called for tech's biggest liability shield, Section 230 of the Communications Decency Act, to be 'revoked, immediately.'"[14] As the Biden Administration took power, officials repeatedly echoed the threat to revoke Section 230. When Elon Musk first proposed buying Twitter, White House press secretary Jen Psaki threatened revocation.[15] When a number of medical figures (including now-Health and Human Services Secretary Robert Kennedy, Jr. and now-National Institutes of Health director Dr. Jay Bhattacharya) took to social media to question the Biden Administration's views on COVID protocols and

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[13] C. Enloe, "ACLU voices concern about 'unchecked power' by Big Tech after Twitter permanently bans Trump," *The Blaze* (Jan. 10, 2021).

[14] M. Kelly, "Joe Biden wants to revoke Section 230," *The Verge* (Jan. 17, 2020).

[15] M. Hyman, "Jen Psaki, Model of First Amendment Hostility, Honored by News Association," *American Spectator* (Mar. 8, 2024).

vaccines, the White House again threatened Section 230:

> White House Communications Director Kate Bedingfield ... stated that the White House would be ... examining how misinformation fits into the liability protection granted by Section 230 of the Communications Decency Act.... Bedingfield further stated the administration was reviewing policies that could include amending the Communication Decency Act and that the social-media platforms "should be held accountable." [*Missouri v. Biden*, 680 F. Supp. 3d 630, 653 (W.D. La. 2023).]

Besides inextricably entangling government and the Big Tech companies, the judicial rewriting of Section 230 has thwarted Congress' original assumption that the law would broaden public access to information. Instead, it has led to vast consolidation that only makes government suppression of speech easier. As Missouri Attorney General Andrew Bailey testified to Congress in 2023:

> The judicially misconstrued Section 230 has made it much easier for the federal government to create a vast censorship network permeating every fabric of our society. By granting certain companies far more protection than Congress ever contemplated, the incorrectly interpreted Section 230 has enabled social media companies to consolidate control of social media into the hands of a few enormously powerful actors. This

> consolidation reduces the pressure not to censor that would otherwise exist in a competitive market, while simultaneously making it much easier for federal officials to exercise pressure over the vast majority of the social media field.[16]

It is not Section 230(c) that has enabled Big Tech companies to censor speech and to engage in anti-competitive business practices against victims like Petitioner. It is the judicial rewriting of the statute by the Ninth Circuit and certain other circuit and district courts that has inflicted the damage, and with this case, this Court has the opportunity to restore order.

CONCLUSION

The petition for certiorari should be granted to correct the error which has been embraced by the Ninth Circuit as well as other circuit and district courts, that Section 230 immunizes the largest and most powerful monopolies in the nation from liability for both their business wrongdoing and their censorship of Americans.

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[16] House Oversight Committee, "Testimony of Missouri Attorney General Andrew Bailey," at 4 (June 21, 2023).

Respectfully submitted,

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