Appeal No. 21-16997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON FYK
Plaintiff-Appellant,

v.

FACEBOOK, INC.
Defendant-Appellee.

On Appeal from Denial of Motion for Relief Pursuant to Fed.R.Civ.P. 60(b) to Vacate and Set Aside Entry of Judgment of the United States District Court for the Northern District of California, 4:18-cv-05159 (Hon. Jeffrey S. White)

APPELLANT'S REPLY BRIEF

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I. Summary Of Reply Brief

This case is not about Plaintiff-Appellant, Jason Fyk ("Fyk"), treating Defendant-Appellee, Facebook, Inc. ("Facebook"), as "*the* publisher" of Fyk's content. Fyk has maintained, at all times, that Fyk is "the publisher" of his own content. This case is *entirely about Facebook's own unlawful anti-competitive conduct* motivated by corporate financial gain, antithetical to the "Good Samaritan" intelligible principle / general directive / general provision of the Communications Decency Act – Title 47, United States Code, Section 230 ("230" or "CDA").[1]

[1] The heart of Fyk's appeal is whether Facebook is a "passive" "interactive computer service" ("ICS") when it takes discretionary "action" to *discriminatorily* and / or *selectively* "enforce" the CDA (offensive content) against Fyk, while ignoring the identical purported "problematic" content (Fyk's content) when in the hands of Fyk's competitor who Facebook is *commercially* incentivized to develop. Facebook's selective application of the CDA as pretext to tortiously interfere with Fyk's business amounts to fraud, extortion, tortious interference, and unfair competition. Facebook is not "passively" displaying information provided by others online and uniformly enforcing the CDA as to all information content providers, it is "actively" developing (at least in part) the information of some users (Fyk's competitor) and tortiously interfering with the information of others (Fyk) based on financial *compensation*. *Facebook destroyed Fyk's business for its own financial gain*. Fyk contends that where (as here) Facebook's application of the CDA is purposeful commercial activity, Facebook enjoys no 230(c) immunity per express statutory language and per cases properly interpreting same; *i.e.*, there is zero possibility for Facebook to be both a "Good Samaritan" and an anti-competitor acting for its own financial gain – "Good Samaritan" and "anti-competitive actor" are *prima facie* oxymoronic. *See, e.g., Enigma Software Group USA, LLC v. Malwarebytes, Inc.* 946 F.3d 1040 (9th Cir. 2019); *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13, 208 L. Ed. 2d 197 (2020); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008); *see also Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021) (holding that a social media company is not entitled to CDA immunity where (as here) the

Distilled, this current appeal revolves primarily around one issue – did Congress intend for the "Good Samaritan" intelligible principle (*i.e.,* the general motivation) overarching all of 230 to apply to all of 230 or to only 230(c)(2)? This question is not only a matter of Congressional intent, but also a matter of plain statutory language and canons of statutory construction. Fyk maintains in this appeal that one must be acting as a "Good Samaritan" (*i.e.,* for the good of others) to be afforded *any* "Protection for 'Good Samaritan' blocking and screening of offensive material." Whereas Facebook's Answering Brief self-servingly asserts that "Fyk seeks simply to rewrite the Communications Decency Act and relitigate issues that he has already argued and lost." [D.E. 16] at 3. Wrong and wrong.

First, Fyk does not seek to "rewrite" the CDA in the instant action; rather, Fyk seeks enforcement of the CDA as written. 230(c)(1) does not speak to "*a* publisher," as this Court and others have erroneously treated as synonymous with "*the* publisher" in some opinions; rather, 230(c)(1) speaks to the "the publisher," which is *a critical distinction*.[2]

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complainant is not seeking to treat the company as "the publisher," but rather seeking to treat the company as the company for the company's *own* tortious conduct).

[2] This Court's June 12, 2020, decision in the first appeal erroneously held, in part, as follows: "Pursuant to § 230(c)(1) … immunity 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 … ." [D.E. 40-1] at 2 (emphasis added). Wrong – the CDA does not say "a publisher" (in a secondary

Second, this Court's *Enigma* decision was rendered on December 31, 2019, and was not "finalized" until the Supreme Court denied certiorari on October 13, 2020, well after the Ninth Circuit's June 12, 2020, Order in this case. This Court's *Enigma* decision came a mere three days before the January 3, 2020, Reply that Fyk filed in the first appeal. Fyk was unaware of *Enigma* during the first wave of filings (opening brief, answering brief, reply) in the first appeal in this case. Thus, this appeal does not seek to re-litigate the first appeal because the *Enigma* decision(s) post-dated the parties' prior briefing.

In refuting arguments in Facebook's Answering Brief, [D.E. 16] (while at the same trying to not repeat Fyk's Opening Brief, [D.E. 8]), this Reply Brief focuses most on the canons of statutory construction relevant to the current appeal.

As framed by Fyk's Opening Brief, this appeal asks the following: in denying Fyk's request for Federal Rule of Civil Procedure 60(b)(5) relief, did the District Court err in narrowing the 230(c) anti-competitive animus non-immunity holding of *Enigma*[3] to only a 230(c)(2) challenge, notwithstanding the facts that (1) the "Good Samaritan" intelligible principle (with the "intelligible principle" specifically

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publishing capacity … development in part), the CDA says "the publisher" (in a primary publishing capacity).

[3] *See Enigma Software Group USA, LLC v. Malwarebytes, Inc.* 946 F.3d 1040 (9th Cir. 2019) (conduct driven by an anti-competitive animus does not enjoy CDA immunity at the 230(c) Good Samaritan threshold), cert. denied *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13, 208 L. Ed. 2d 197 (2020).

expressed in quotes and with anti-competitive animus being the antithesis of "Good Samaritanism") is applicable to all of 230(c) (whether that be 230(c)(1) or 230(c)(2)), as reflected by the very title of 230(c) (*i.e.*, express statutory language); and / or (2) the express language of 230(c)(2)(B) draws from 230(c)(1), further demonstrating that "Good Samaritanism" is not a general directive that can be applied to just 230(c)(2) as the District Court and Facebook wrongly posit. Put differently, is an ICS (such as Facebook or Malwarebytes), entitled to *any* CDA immunity when the ICS' *actions* (*i.e.,* own conduct) are motivated by an anti-competitive animus (as was alleged by Enigma against Malwarebytes, and as was alleged by Fyk against Facebook)?[4]

II. Summary Of Facebook's Answering Brief

In Facebook's Answering Brief [D.E. 16], Facebook collapses Rules 60(b)(5) and 60(b)(6) together to avoid Fyk's entitlement to Rule 60 relief by claiming that *Enigma* did not constitute a change in controlling law because the "Good Samaritan" holdings in *Enigma* somehow only apply to a 230(c)(2) setting and Fyk's case is of

[4] Here, Fyk alleged that Facebook took *action* against Fyk's Facebook businesses / pages, so that Facebook could make more money after steering Fyk's businesses / pages into the hands of a Fyk competitor that paid Facebook appreciably more money. The content remained the same, but Facebook did not take discretionary CDA action against the better paying commercial Facebook user. *See* [D.E. 1], **ER** 176-204. Justice Thomas posits, *see Malwarebytes*, 141 S.Ct. 13: The first logical point for 230(c) immunity analysis is the "Good Samaritan" general provision overarching all of 230(c). If an ICS' action is not that of a "Good Samaritan," then the immunity analysis stops at the 230(c) threshold.

a 230(c)(1) ilk (according to Facebook's wayward rendition of Fyk's claims rather than the claims made by Fyk in his Verified Complaint). Fyk's Verified Complaint alleges that Facebook took restrictive actions against Fyk under the authority of the CDA in order to favor a Facebook user who was paying Facebook.[5] The "offending" material was, for example, Fyk's reference to the Disney movie *Pocahontas*. *See* n. 7, *infra*. Hence, Fyk's allegations against Facebook are of a 230(c)(2)(A) challenge ilk not of a 230(c)(1) ilk wherein Fyk would have had to have sought to treat Facebook as "the publisher" of his own content (again, not this case). As to Rule 60(b)(3), Facebook posits that the Rule 60 filings by Fyk at the District Court level did not say enough about 60(b)(3); *i.e.*, only discussed 60(b)(3) "in passing."

As to Rule 60(b)(5) and 60(b)(6), *Enigma* was the first case (that we are aware of) wherein this Court properly started the 230(c) immunity analysis at the "Good Samaritan" *motivation* threshold (which is necessarily where the analysis *must start* because "Good Samaritan" is the Congressional intelligible principle overarching all of 230(c), including 230(c)(1)).[6] This Court's "Good Samaritan" *Enigma* holdings,

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[5] *See, e.g.*, **ER** 177 at ¶ 1; 177-178 at ¶ 5; 178 at ¶ 7; 179 at ¶ 14; 180-181 at ¶ 18; 181-182 at ¶ 19; 185 at ¶ 25 – 190 at ¶ 40; 191 at ¶ 42 – 193 at ¶ 46; 193 at ¶ 50 – 197 at ¶ 57; 197 at ¶ 59 – 199 at ¶ 66 (this entire count sounds in unfair competition).

[6] In this Court's June 12, 2020, decision in the first appeal, this Court erroneously held as follows: "Unlike 47 U.S.C. § 230(c)(2)(A), *nothing in § 230(c)(1) turns on the alleged motives* underlying the editorial decisions of the provider of an interactive computer service." [D.E. 40-1] at 4 (emphasis added). This Court's *Enigma* decision rectified this erroneous holding by properly determining that the

as discussed in Fyk's Opening Brief here, were grounded in 230(c) as a whole (*i.e.,* as a whole statute / Act), consistent with the structure of the statute – "Good Samaritan" is at the very start of 230(c), not at the start of 230(c)(2); *i.e.,* 230(c)'s "Good Samaritan" intelligible principle envelops both 230(c) subsections, not just one subsection (230(c)(2)) as Facebook self-servingly argues.

As to Rule 60(b)(3), had Facebook truly had a problem with the manner in which Fyk's Motion for Reconsideration (**ER** 21-83, [D.E. 46]) discussed Rule 60(b)(3), Facebook's Response to the Motion for Reconsideration (**ER** 17-20, [D.E. 47]) should have taken issue with same. Here, Facebook is precluded from making an argument for the first time – that Fyk's Motion for Reconsideration did not mention Rule 60(b)(3) enough.

III. Legal Analysis

A. Sections VII.A and VII.B Of Facebook's Answering Brief Are Amiss – The District Court's Reconsideration Order Wrongly Determined That The "Good Samaritan" Intelligible Principle Only Applied To A 230(c)(2) Setting, Bootstrapped On The Mischaracterization That Fyk's Case Is Somehow Of A 230(c)(1) Ilk

Facebook's argument against the Rule 60(b)(5) and 60(b)(6) relief sought by Fyk boils down to whether the *Enigma* anti-competition non-immunity "Good Samaritan" motivation holdings are limited to 230(c)(2) cases. *Enigma* does not say

"Good Samaritan" general provision (*i.e.,* motivation) applies to all of 230(c) at the immunity threshold.

that. The express language of 230 does not say that. The District Court did not say that – the District Court only noted that this case and the *Enigma* case were of a different CDA backdrop (*Enigma* being of a 230(c)(2) backdrop and this case being of a 230(c)(1) backdrop per Facebook's mischaracterization of Verified Complaint averments).[7] The District Court did not say that the "Good Samaritan" threshold immunity analysis applies only to 230(c)(2) cases. It is *only* Facebook saying the "Good Samaritan" threshold immunity analysis only applies to 230(c)(2); *i.e.*, Facebook is trying to rewrite the CDA, as to a non-existent carve-out, to its own benefit.

As discussed in the 60(b)(3) section of Fyk's Opening Brief, the District Court misclassified Fyk's case as a 230(c)(1) case because of Facebook's mischaracterization of Verified Complaint's averments. Even if the *Enigma* "Good Samaritan" holdings somehow only applied to a 230(c)(2) scenario, the *Enigma* "Good Samaritan" holdings would still apply here because, again, at the dismissal stage, the allegations contained in Fyk's Verified Complaint were to be taken as true with all reasonable inferences drawn therefrom in favor of Fyk. And, again, if the

[7] "Mischaracterization" because the Verified Complaint, as actually pleaded by Fyk (not as rewritten by Facebook and rubberstamped by the District Court), is of a 230(c)(2)(A) ilk. *See, e.g.,* **ER** 182 at ¶ 20 – 185 at ¶ 24 (Paragraph 24 is perhaps the most glaring example of how this case is of a 230(c)(2)(A) ilk rather than of a 230(c)(1) ilk – Facebook destroyed one of Fyk's businesses / pages because he posted a screenshot of the Disney kids movie *Pocahontas* because Facebook felt that such content was somehow racist or otherwise violative of 230(c)(2)(A)).

allegations of Fyk's Verified Complaint were anything under the CDA, they would be labeled as of a 230(c)(2)(A) ilk, not a 230(c)(1) ilk. That the nature of this case somehow falls under 230(c)(1) was a Facebook fabrication (involving Rule 60(b)(3), discussed in Fyk's Opening Brief); *i.e.*, complete mischaracterization / rewrite of Verified Complaint's allegations.

Second, Facebook's Answering Brief, in more than one place, says that Fyk contends *Enigma* announced a general directive. *See, e.g.,* Facebook Answering Brief, [D.E. 16] at 2 and 17. That is not what Fyk is saying about *Enigma* – it is not the place of a court to announce an intelligible principle in relation to enacted law, it is the place of Congress at the time of enactment.[8] Fyk's Opening Brief says that the "Good Samaritan" intelligible principle has always been in place vis-à-vis the plain statutory language enacted by Congress over twenty-six years ago, and this Court's *Enigma* decision recognized the intelligible principle laid down by Congress (*i.e.,* the general *motivation* for rulemaking) for the very first time in relation to the anti-competitive animus at play in *Enigma* (which, again, is the exact same animus underlying Fyk's case).

[8] In 1996, Congress sought to protect an ICS provider from liability arising out of the ICS's engaging (as a "Good Samaritan") in voluntary restriction of offensive materials online in an effort to help protect our children from harmful web content and/or otherwise rid the Internet of filth; hence, the enactment of the CDA.

Fyk's Opening Brief makes clear (*via* direct *Enigma* citations) that this Court's *Enigma* holdings sounded in the "Good Samaritan" intelligible principle overarching all of 230(c), not just 230(c)(2) simply because the *Enigma* case had a 230(c)(2) backdrop. Fyk's Opening Brief cites the Court's "Good Samaritan" related holdings in *Enigma* to demonstrate that these cases necessarily flow from the 230(c) motivation threshold, which naturally includes 230(c)(1) (*i.e.,* a change of law). As touched upon in Fyk's Opening Brief (and underlying Motion for Reconsideration), reading the "Good Samaritan" principle to somehow only apply to 230(c)(2) would cut against myriad canons of statutory construction (*e.g.*, Harmonious-Reading, Irreconcilability, Whole-Text, and Surplusage canons of statutory construction).

The Whole-Text canon of statutory construction stands for the proposition that "the text must be considered as a whole."[9] The Surplusage canon of statutory construction stands for the proposition that "[W]e are advised by the Supreme Court that we must give meaning to all statutory terms, avoiding redundancy or duplication wherever possible."[10] *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (citing *Park 'N Fly, Inc.*

[9] Antonin Scalia & Bryan A. Garner, *Canons of Construction*, at 2 (2018).

[10] Surplusage canon – "If possible, every word and every provision is to be given effect … . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Canons of Construction* at 2.

v. Dollar Park & Fly, Inc., 469 U.S. 189, 197 (1985)). The Harmonious-Reading Canon provides that the provisions of a law should be interpreted in a way that renders them compatible, not contradictory:[11] "our task is to fit, if possible, all parts into a harmonious whole." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (citing *FTC v. Mandel Brothers, Inc*., 359 U.S. 385, 389 (1959)); *see also, e.g., Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (courts should "accord more coherence" to disparate statutory provisions where possible). The Irreconcilability canon provides that "[i]f a [statute] contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 189 (2012).[12] If the text of a statute contains "truly irreconcilable provisions," an irreconcilable conflict is determined to exist and "the next inquiry is whether the provisions at issue are general or specific." *See, e.g., State v. Conyers*, 719 N.E.2d 535, 538 (Ohio 1999) (internal citation omitted).

[11] Harmonious-Reading Canon – "The provisions of a text should be interpreted in a way that renders them compatible, not contradictory." *Canons of Construction* at 2.

[12] *See also Canons of Construction* at 2 for this description of the Irreconcilability Canon: "[i]f a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect."

Courts are often asked (as Facebook asks this Court) to consider immunity under *isolated statutory subsections* (*e.g.*, just 230(c)(2)), without considering 230 as a whole. Defendants typically cite questionable out-of-context precedent to "prove up" the defendants' straw man argument as if it were controlling authority. This is known as "proof-texting:"

> the practice of using [isolated, out-of-context] quotations from a document, either for the purpose of exegesis, or to establish a proposition in eisegesis … [*i.e.*, interpretation of a text by reading into it, one's own ideas]. Such quotes may not accurately reflect the original intent of the author [*e.g.,* Congress], and a document quoted in such a manner, when read as a whole, may not support the proposition for which it was cited.[13]

When read as a whole, many cases (including this case thus far) are not harmonious or reconcilable with the "Good Samaritan" general provision. Here, this Court previously misinterpreted the CDA: "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. 40-1] at 5. Development in part (*i.e.,* information content provision) is still a publishing function (*i.e.,* still redundant if a provider or user cannot be treated as "a publisher"); thus, *this Court's prior holding resolves nothing*, leaving the CDA disharmonious (*i.e., still surplusage and-*

[13] Wikipedia, *Prooftext*, https://en.wikipedia.org/wiki/Prooftext .

irreconcilable) with respect to 230(c)(1) and 230(c)(2) and the definition of an ICP under 230(f)(3).

The reason for the disharmony is simple – in not giving "every word of the text" (*e.g.,* the word "the" or the words "Good Samaritan") proper effect, courts (including this Court here) and defendants (including Facebook here) have rewritten the statute and obliterated the purpose of 230(c)(1) and the basic function of the entire statute. 230(c)(1) *does not say* the ICS cannot be treated as "a publisher" (a secondary publisher – Facebook), it says "the publisher" (the primary publisher – Fyk). 230(c) also says, in plain text, that civil liability protection only exists for "Good Samaritan" blocking and screening (which did not happen in Fyk's case). Courts (including this Court) have failed to apply the actual words of the CDA resulting (absurdly) in sovereign online immunity for all unlawful conduct, antithetical to acting under Congress' expressed general motivation for rule-making – "Good Samaritan."

230's "harmonious-reading" went astray as early as 1997. In *Zeran v. America Online Inc.*, 129 F.3d 327 (4th Cir. 1997), the first appellate court to consider the statute erroneously held that, although the text of 230(c)(1) grants immunity only from "publisher" or "speaker" liability, it eliminates distributor liability too; that is, 230 confers immunity even when a company distributes content that it knows is illegal (*i.e.,* information content provision). This determination (without considering

230 as a whole) eliminated *all liability* (*i.e.*, including information content provision and restriction), thus swallowing the purpose of the "very next subsection, which governs removal of content, § 230(c)(2)." *Malwarebytes*, 141 S.Ct. at 16.

The *Zeran* decision rendered 230(c)(2) mere "surplusage" (*i.e.*, redundant / superfluous) as early as 1997, and courts have spent more than two decades trying to reconcile this mistaken application of 230(c)(1) and / or otherwise trying to put forth a clear meaning and / or application of 230; largely to no avail.[14] Under the most harmonious, reconcilable reading of the statute, 230(c)(1) can only (*i.e.,* harmoniously) apply to passive (*i.e.,* inactive) distributor liability protection (*i.e.*, the omission of action) and 230(c)(2) applies to active distributor liability protection (*i.e.*, publisher liability protection when actively blocking and screening offensive material, so long as such blocking and screening is done in "good faith" and as a "Good Samaritan"). If the interpretation / application were to be kept as narrow / simple as the preceding sentence, the CDA could possibly work as is (*i.e.,* harmoniously as a whole text).

230 enables an ICS to "voluntarily" take action, at the prerogative of Congress, to restrict content it "considers" "objectionable," *but it must follow* the

[14] "Largely" because, as discussed in this appeal, the Ninth Circuit Court has started to come around at least with respect to the "Good Samaritan" threshold CDA immunity analysis within an anti-competitive animus setting. *See, e.g.*, *Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* 946 F.3d 1040 (9th Cir. 2019).

"Good Samaritan" blocking and screening of offensive material" moderation obligation, in "good faith," articulated in the statute, if it is to be afforded *any liability protection*. When an ICS "considers" information, it is acting in a traditional editorial role. 230(c)(2) limits (*i.e.*, applicable narrowed provision) that editorial role to the exclusion of material.[15] The presently broken CDA, however, allows an ICS the editorial ability to decide what content is made available (*i.e.*, provided – developed in part). Development, in whole or in part, is the role of an Information Content Provider ("ICP") by definition under 230(f)(3);[16] thus, the ICS' role as an information content *restrictor* also allows the ICS to act as an ICP who can "knowingly distribute" unlawful information under civil liability protection.

This is at odds with the "Good Samaritan" general directive of the statute and creates an irreconcilable conflict between 230(c)(2) and 230(c)(1) and the 230(f)(3)

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[15] 230(c)(2)(A) provides an ICS with immunity if the ICS restricts another ICP's content in "good faith." 230(c)(2)(B) provides an ICS with immunity if the ICS does not directly take action upon another ICP's content, but instead provides another with the tools / services needed to appropriately act upon yet another's materials; *e.g.*, where an ICS provides ICP #1 (*e.g.,* a parent) with the tools / services needed to act upon (restrict) offensive materials posted by ICP #2 so as to protect a child from harm, the ICS (Facebook, for example) enjoys a "no action" (upon content) immunity akin to that of 230(c)(1), which is why the express language of 230(c)(2)(B) relates back to 230(c)(1).

[16] Again, this Court created an imaginary level of development with its June 12, 2020, decision ratifying the *Kimzey* holding: "A website may lose immunity under the CDA by making a material contribution to the creation or development of content." Imaginary because the actual language of the CDA says no such thing as to "material contribution." [D.E. 40-1] at 3.

definition of an ICP. Information "consideration" (*i.e.*, restriction and development in part) gave rise to the mistaken *Zeran* decision and the confusion surrounding 230's proper application. Any information that is "considered" (*i.e.*, active editorializing) and "allowed" (*i.e.*, not restricted – knowingly chosen, advanced, or developed) by an ICS (even in part) must be subject to civil liability (especially if not done as a "Good Samaritan") or, as a result, all distribution / publishing / content provision / content restriction liability is eliminated, including unlawful distribution / publishing (*i.e.*, knowingly causing harm). The statute cannot be reconciled in a way that distinguishes between "development by proxy" (as a result of content restriction consideration) and "development in part" (as a result of information content provision). *See* n. 15, *supra*.

Restricting users' materials online, under the supposed protection of 230, is not a *voluntary choice* to act privately (*i.e.,* without obligation or consideration); instead, it is the *voluntary choice* to act under the directive of Congress (*i.e.,* state directed action) to restrict statutorily specified (*i.e.,* 230(c)(2)(A)) offensive materials. A common definition of "voluntary" is as follows: "done by design or intention; acting or done of one's own free will *without* valuable *consideration* or legal *obligation*."[17] Put differently, a provider or user cannot take *any voluntary*

[17] Merriam-Webster Dictionary, *Voluntary*, https://www.merriam-webster.com/dictionary/voluntarily (emphasis added).

action whatsoever in a private capacity and still somehow enjoy CDA immunity; rather, a provider or user is authorized by (*i.e.*, delegated by) the state to engage in *certain Internet content policing activity* as a state actor *via* "Good Samaritan" general provision and in a "good faith" fashion. Put yet another way, a *private* actor cannot seek 230 civil liability protection for any and all private / commercialized activity because, if a provider or user seeks "protection" (*i.e.*, the consideration), it must have taken its action under the legal obligation (*i.e.*, as a state actor at the prerogative of Congress) to block and screen offensive material. The term "voluntarily" (a private function) is irreconcilable with 230's own obligatory / induced governmental function – 230 is an irreconcilable "voluntary mandate" (*i.e.*, governmentally induced private function), as the phrase "voluntary mandate" is a *prima facie* oxymoron.

If this Court were to somehow embrace Facebook's contention that the "Good Samaritan" intelligible principle somehow only applies to 230(c)(2), such embracement would disable a whole text and harmonious read of the CDA, would render 230(c)(2)(A) mere surplusage of 230(c)(1), would render 230(c)(1) and 230(c)(2) irreconcilable, and would create an absurd result in contravention of the Absurdity doctrine. This Court should not endorse a Facebook position that would contravene several canons of statutory construction – there is simply no other way

to read 230 other than to read the "Good Samaritan" principle, found at the very start of 230(c) as applicable to all of 230(c), including 230(c)(1).[18]

Whether viewed through the lens of express CDA wording or the lens of canons of statutory construction, *Enigma* was the first case (that we are aware of) that properly employed a "Good Samaritan" immunity analysis at the threshold. In order for this Court's *Enigma* holdings to square with the express language of the CDA (namely, the "General Samaritan" principle being situated by Congress at the very start of 230(c), not embedded within a subsection such as 230(c)(2)) and / or not run afoul of the aforementioned canons of statutory construction, the "Good Samaritan" immunity analysis should have unfolded at the threshold of the immunity analysis in this case. Had that properly occurred (at any point during the approximate four-year lifespan of this case), Fyk would have enjoyed the same result as Enigma; *i.e.*, would not have been dismissed because Fyk's Verified Complaint very plainly argues anti-competition (heck, the Verified Complaint dedicates an entire count to California's unfair competition statute), which such anti-competitive animus was found by this Court in *Enigma* to cut against the "Good Samaritan" threshold motivation.

[18] 230 is irreconcilably unconstitutional. We invite this Court to review Fyk's constitutional challenge complaint recently filed in the District of Columbia District Court for more detail. *See Fyk v. U.S.A.*, No. 22-cv-01144 (DDC Apr. 26, 2022).

It would make zero sense for the Court to now somehow say that the *Enigma* anti-competition / "Good Samaritan" analysis is only applicable to cases of a 230(c)(2) backdrop. More pointedly, that interpretation would be wholly inconsistent with the express provisions of the statute.

B. Section VII.C Of Answering Brief – Facebook's "Fyk Said Too Little About Rule 60(b)(3)" Argument Is Too Late

Facebook's Answering Brief [D.E. 16] contends, for the first time, that Fyk's Motion for Reconsideration said too little about Rule 60(b)(3) relief, as if a shorter discussion rendered it appropriate for the District Court and Facebook to entirely overlook same. Facebook, however, did not make this argument in its Response to the Motion for Reconsideration (where the argument was first available to Facebook to make), thereby precluding Facebook from making such an argument for the first time in this appeal; *i.e.*, Facebook's failure to address Rule 60(b)(3) relief in its District Court Response constitutes a waiver and / or estoppel in relation to Facebook rebutting Rule 60(b)(3) relief for the first time in its Answering Brief on this appeal. Facebook's Response to the Motion for Reconsideration (a mere few pages) does not even mention Rule 60(b)(3).

> Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so. One 'exceptional circumstance' is when the issue is one of law and either does not depend on the factual record, or the record has been fully developed.

In re America West Airlines, Inc. v. America West Airlines, Inc., 217 F.3d 1161, 1165 (9th Cir. 2000) (internal citations omitted); *see also, e.g., Casey v. Colvin*, 637 Fed.Appx. 389, 390 (9th Cir. 2016) ("These arguments were raised for the first time on appeal and are therefore waived").

Here, the Rule 60(b)(3) relief that Fyk sought in the District Court entirely depended on the factual record (a record that has by no means been "fully developed" because this matter has yet to make it past the pleading stage); *e.g.*, (1) Facebook's misrepresentation to the District Court concerning the subject matter of one of the Fyk businesses / pages that Facebook destroyed (that subject matter being of public urination per Facebook falsehood); (2) Facebook's misrepresentation to the District Court that Fyk's case was / is of a 230(c)(1) ilk rather than of a 230(c)(2)(A) ilk as actually pleaded in Fyk's Verified Complaint.

Here, there is no "exceptional circumstance" under which this Court should entertain the Rule 60(b)(3) argument that Facebook's Answering Brief raised for the first time in this appeal. Facebook could have made the same Rule 60(b)(3) argument in its Response to the Motion for Reconsideration but it did not even mention Rule 60(b)(3). Facebook is precluded from making its Rule 60(b)(3) argument for the first time in this appeal; *i.e.*, Facebook waived any right to make an argument against Rule 60(b)(3) relief.

Because Fyk's request for Rule 60(b)(3) relief remains unrebutted for all legal intents and purposes, this Court should reverse and remand on this basis alone. Although, as discussed above, *Enigma* absolutely marked a change in controlling law applicable to this case; and, thus, as discussed above, Rule 60(b)(5) and 60(b)(6) relief is (and should be made) available.

C. Conclusion

Fyk simply asks this Court to interpret and apply 230 as the CDA is actually (narrowly) written. The Court's overly broad interpretation of 230(c) has gone beyond anything that plausibly could have been intended by Congress.

This Court's *Enigma* "Good Samaritan" threshold holdings were in relation to the entirety of 230(c), which necessarily captured (but was not limited to) the 230(c)(2) setting of *Enigma.* Under the Whole-Text, Harmonious Reading, Irreconcilability, and Surplusage canons of statutory construction, there is just no other way to apply the "Good Samaritan" intelligible principle.

For all of the foregoing reasons, whether considered separately or together, Fyk respectfully requests this Court's reversal of the November 1, 2021, Order Denying Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) (**ER** 3-4, [D.E. 51], and remand to the District Court for resolution on the merits, consistent with the analysis of *Enigma* (controlling authority of the Ninth Circuit).

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32 (a)(7)(B)(ii) because the type-volume limitation does not exceed 6,500 words (exclusive of this certificate, cover pages, signature block, and certificate of service). This Reply Brief includes 6,377 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM / ECF system. Participants in the case who are registered CM / ECF users will be served by the appellate CM / ECF system.

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