No. 20-17489

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAMERON L. ATKINSON,
Plaintiff-Appellant,
v.

FACEBOOK, INC., MARK ZUCKERBERG
Defendants-Appellees.

On Appeal from the United States District Court of the
Northern District of California
No. 3:20-cv-05546-RS

BRIEF FOR APPELLANT

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INTRODUCTION

This case presents novel issues within the context of a familiar procedural posture. The Appellant, Cameron L. Atkinson, sought to speak his mind openly on Facebook, and Facebook stopped the presses on his pen. When Atkinson sued for redress, the district court dismissed his claims based on a truncated analysis of the law and a construction of his complaints in a manner that was highly unfavorable to him and stretched the bounds of reason.

Atkinson's claims admittedly face strong headwinds. He seeks to hold a private party responsible under the First Amendment and to sue for various broken promises in the face of broad statutory immunity. No matter how strong the headwinds are though, the law guarantees him the same procedural protections as anyone else. If the district court had carefully considered Atkinson's arguments and conducted a thorough analysis of the law, Atkinson's claims would have survived Facebook's motion to dismiss. Atkinson asks this Court to conduct that thorough analysis and to reverse the district court's dismissal of his claims and denial of leave to amend his complaint.

STATEMENT OF JURISDICTION

The district court, which had jurisdiction under 28 U.S.C. §§ 1331, 1332, and 1367, granted Facebook, Inc. and Mark Zuckerberg's motion to dismiss on

December 7, 2020 through a written order. ER1-12.[1] Atkinson filed a notice of appeal on December 23, 2020 after the district court granted Facebook, Inc. and Mark Zuckerberg's motion to dismiss. Dkt.76. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing the Plaintiff's complaint for failure to state claims upon which relief can be granted.

2. Whether the district court erred in denying the Plaintiff leave to amend his complaint to state a claim under California's Unfair Practices Act because he cannot allege that he has lost "money or property."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

47 U.S.C. § 230 is reproduced in its entirety in Addendum A pursuant to Circuit Rule 28-2.7.

[1] "ER" refers to the record excerpts submitted along with this brief.

STATEMENT OF THE CASE

I. Factual Background

Throughout the 2016 presidential election, Facebook, Inc. was accused of selling data to Cambridge Analytica and, in turn, Russian intelligence, which allegedly weaponized the information to influence American voters. In response to the threat of increased government regulation that followed these allegations, Facebook created vague community standards to "assuage an angry public and ultimately to protect its own financial interests." ER29-30, ¶ 14. About three years later in 2019, Atkinson learned that, under these community standards, Facebook was routinely removing posts that named the whistleblower whose complaint to the Intelligence Community Inspector General prompted impeachment proceedings against then-President Donald J. Trump. ER31, ¶ 22. To test the veracity of the public charges of censorship against Facebook, Atkinson composed two test posts and a third more nuanced reflection, all using the whistleblower's name. ER31-32, ¶¶ 22-27. The first post praised the whistleblower as a "hero for blowing the whistle on the Trump Administration's treason with Ukraine." ER31, ¶ 23. The second post named the whistleblower and labeled him a "dirty lying rat." ER31, ¶ 24. Within five hours of Atkinson creating the posts, Facebook removed both posts without warning or notification. ER32, ¶ 26. Soon after, Atkinson posted the third, neutral post naming the whistleblower, communicating his "conflicting thoughts" about

him, and opining that people should be debating the serious public question that he had raised. ER32, ¶ 27. Facebook also removed this post within five hours without notifying Atkinson or warning him. ER32, ¶ 28. Facebook never provided Atkinson with an explanation for why his complaint had been removed. ER32, ¶ 29.

On November 12, 2019, Atkinson initiated litigation against Facebook in the United States District Court for the District of Connecticut. ER26. He then provided periodic updates on the litigation through his personal blog, which he then shared to his social media accounts including Facebook and continued to comment candidly on public events. ER15-16.

About six months later, Atkinson repeatedly expressed his "sincere opinion that the current government measures to combat coronavirus are blatantly unconstitutional and have resulted in a suspension of constitutional liberties for all Americans." ER14-15. When he noticed a CNN article in which a Facebook spokesperson issued a statement purportedly confirming Facebook's consultation with state officials "as to which posts were organizing protests against 'stay-at-home' orders and promoting 'illegal' behavior" and its removal of posts coordinating mask protests in California, New Jersey, and Nebraska, Atkinson penned an article for his personal blog condemning Facebook's censorship. ER15. As his custom was, he then sought to share his blog post entitled "I Sued Facebook For Coordinating Speech Censorship With Governments. Today, They Admitted It,"

to his various social media accounts. ER15. He successfully shared it to LinkedIn and Twitter, but, despite seven attempts to share the article to his Facebook page, Facebook blocked it from being shared on his page. ER15. Once again, Facebook provided Atkinson with no notification that it was refusing to let him share his blog post to Facebook and it never provided him with an explanation for why. ER15-16.

II. Proceedings Below

On November 12, 2019, Atkinson sued Facebook, Inc. and Mark Zuckerberg in the United States District Court for the District of Connecticut. ER26. Facebook and Zuckerberg moved to dismiss his complaint on January 21, 2020, or, in the alternative, to transfer the case to the United States District Court for the Northern District of California. While Facebook and Zuckerberg's initial motion to dismiss or to transfer was still pending decision, Atkinson moved for permission to file a supplemental complaint on April 28, 2020, which the district court granted on May 21, 2020. Atkinson filed his supplemental complaint on May 22, 2020, and Facebook and Zuckerberg moved for permission to file a supplemental Rule 12 motion on May 26, 2020, which the court granted on May 27, 2020.

On July 27, 2020, the United States District Court for the District of Connecticut denied Facebook and Zuckerberg's motion to dismiss without prejudice and granted their motion to transfer the case to the United States District Court for

the Northern District of California. Facebook and Zuckerberg then renewed their motion to dismiss on August 31, 2020, which Atkinson opposed pro se.

The district court then granted Facebook and Zuckerberg's motion to dismiss with prejudice and denied Atkinson leave to amend on December 7, 2020. ER1-12.

SUMMARY OF ARGUMENT

Atkinson's issues on appeal fall into two categories: the dismissal of his claims and the denial of leave to amend.

He contends that the district court erred in dismissing his claims for failure to state a claim upon which relief can be granted for three reasons. First, he argues that the U.S. Supreme Court has held that statutory grants of immunity can convert otherwise private action into state action. Thus, by virtue of the statutory immunity extended to editorial decisions made by interest companies, the First Amendment applies to content-based censorship decisions made by social media companies under the entwinement exception.

Second, Atkinson argues that the United States government has historically treated the internet as a public resource by managing the infrastructure on which it operates. When the United States government transitioned control of that infrastructure to a private body and then granted statutory immunity to facilitate the operation of the Internet, it created a constructive public trust, allowing free and open access to the Internet.

Third, Atkinson argues that this Court's precedents make clear that Congress's grant of immunity to social media companies for quintessential publishing decisions does not immunize them from breaking promises. Relying on a distinction that this Court drew to allow contract claims to proceed against Yahoo!.com, Atkinson argues that the Congressional grant of immunity to social media companies for publishing decisions does not liberate them from obligations and limitations that they impose on their own editorial decisions by virtue of the promises that they make to the public to form contracts with its members.

Finally, Atkinson argues that the district court erroneously concluded that he could not allege a loss of "money or property" under California's Unfair Practices Act, thus depriving him of statutory standing. Data, however, is property, which this Court recognized last year in another case involving Facebook. He argues that he could have alleged that he lost the value of his data to Facebook's deceptive trade practices and that he should have been granted leave to amend his complaint to plead a claim under the California Unfair Practices Act.

STANDARD OF REVIEW

The Court reviews a district court's dismissal of an action for failure to state claims upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) de novo. *See Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019).

The Court reviews a district court's denial of leave to amend a complaint for an abuse of discretion. *See Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013).

ARGUMENT

I. The District Court Erred In Dismissing Atkinson's Complaint For Failure To State Claims Upon Which Relief Can Be Granted.

A motion to dismiss a complaint under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the claims alleged in the complaint. *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011). Dismissal under Rule 12(b)(6) may occur when the complaint lacks a cognizable legal theory or sufficient facts under a cognizable legal theory. *Id*. at 1242. When evaluating a motion to dismiss, courts must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1140 (9th Cir. 2017). "[C]onclusory allegations of law and unwarranted inferences…," however, "are insufficient to defeat a motion to dismiss for failure to state a claim." *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (internal quotation marks and citation omitted).

Fed. R. Civ. P. 8(a)(2) does not require a plaintiff to plead detailed factual allegations. Instead, it requires a plaintiff to make sufficient factual allegations in his complaint to state a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Id*. This standard asks for "more than a sheer possibility that a defendant has acted unlawfully." *Id*. Instead, the determination of facial plausibility is context-specific and requires a court to "draw on its judicial experience and common sense." *Id*. at 679.

A. Supreme Court precedent clearly establishes that statutory grants of immunity to private actors can convert private conduct into state action if the immunized conduct would be unconstitutional if government engaged in it, thus saving Atkinson's First Amendment claim.

The district court granted Facebook's motion to dismiss Atkinson's First Amendment claims on several grounds. First, it held that this Court's decision in *Prager University v. Google LLC*, 951 F.3d 991 (9th Cir. 2020) categorically forecloses any First Amendment claims against a private social media company on the theory that it is performing a public function. ER4-6. Second, it held that Atkinson pled insufficient facts to sustain a First Amendment cause of action under an entwinement theory. ER6-8.

Because the First Amendment only prohibits government action unless an exception is met, *see Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928 (2019), Atkinson asks this Court to review his entwinement argument in light of the United States Supreme Court's decisions in *Railway Emp. Dept. v. Hanson*,

351 U.S. 225 (1956) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).[2]

1. Statutory grants of immunity can convert otherwise private conduct into state action.

The United States Supreme Court first raised the possibility that private actions could violate constitutionally protected rights or private rights under state law in *Railway Emp. Dept. v. Hanson*, 351 U.S. 225 (1956). In *Hanson*, a railroad company's Nebraska employees sued it for entering into a union shop agreement with various labor organization. *Id*. at 227. The agreement's terms required the company's employees to join the railroad workers' union within sixty days and maintain an active membership as a condition of their employment. *Id*. at 227. Under federal law, the union shop agreement superseded the right to work provision of the Nebraska constitution, and the employees also claimed that it restricted their First Amendment rights to freedom of association. *Id*. at 230.

Even though federal law did not compel companies or employees to enter into union shop agreements, the U.S. Supreme Court agreed with the Nebraska Supreme Court's view that,

> [i]f private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares state law is superseded…. In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed….

[2] Atkinson did raise a public function theory under the First Amendment before the district court. He does not raise that argument on appeal.

> The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.

Id. at 232.

Thus, while the U.S. Supreme Court held that the Supremacy Clause allowed the federal law to supersede the Nebraska state constitution, it still reached the merits of the First Amendment question because the statute converted a private contract into state action by immunizing private conduct and raised a serious question about whether it intruded upon the railroad employees' First Amendment rights.[3] *Id*. at 233.

Likewise, in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), railroad employees challenged permissive regulations promulgated by the Federal Railroad Administration that allowed railroad companies to take breath and urine tests from employees suspected to be under the influence of alcohol or another substance as a violation of the Fourth Amendment. The Supreme Court described these regulations as pre-empting "state laws, rules, or regulations covering the same subject matter… and… [were] intended to supersede any provision of a collective bargaining agreement, or arbitration award construing such an agreement." *Id*. at

[3] *Hanson*'s rationale rested on the cursory assumption that the union shop agreement did not infringe on any expressive rights. The U.S. Supreme Court, however, explicitly overruled its *Hanson* holding that the union shop agreement did not violate the First Amendment in *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S.Ct. 2448 (2018).

615. The regulations also did not allow railroads to divest themselves of the right to take such tests, and they did not provide an employee any right to refuse a test. *Id*. at 615. Finally, the Federal Railroad Administration made it clear in the regulations that it hoped that companies would share the results of the tests with it. *Id*. at 615.

In view of these features, the Supreme Court first stated that the mere fact "that the Government [does] not [compel] a private party to perform a search does not, by itself, establish that the search is a private one." *Id*. at 615. It then explained why:

> The Government has removed all legal barriers to the testing authorized by Subpart D and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions. In addition, it has mandated that the railroads not bargain away the authority to perform tests granted by Subpart D. These are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment.

Id. at 615-616.

In other words, the fact that the federal government gave the railroad companies an unchecked license to conduct Fourth Amendment searches on their employees, prevented them from bargaining away the authority to conduct the searches, and expressed a desire to partake of the results showed sufficient government involvement for the regulations to violate the Fourth Amendment.

Thus, both *Hanson* and *Skinner* show that, when the federal government grants complete immunity to a private party for conduct that would be

unconstitutional if the government engaged in it, a constitutional right likely is implicated. As discussed below, 47 U.S.C. § 230 and the federal government's actions violate the First Amendment for the same reason.

2. *Hanson* and *Skinner* required the denial of Facebook's motion to dismiss Atkinson's First Amendment claim under the entwinement exception.

The Supreme Court has held that a non-state actor may be deemed a state actor "because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982); *see also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (citation omitted) ("[S]tate action may be found ... only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961). Thus, "private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct." Erwin Chemerinsky, Constitutional Law 519-21 (4th ed. 2011).

In the First Amendment context, encouragement does not necessarily mean a pat on the back. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61-62 (1963), four book publishers claimed a First Amendment violation when their Rhode Island distributor chose to stop distributing their books after receiving a veiled threat of

prosecution from Rhode Island's "morality" commission. The Supreme Court held that, while no formal state action existed, the commission had informally censored and suppressed the books to the point of committing a First Amendment violation. *Id*. at 67.

This Court reached a similar conclusion in *Carlin Communications, Inc. v. Mountain States Tel. and Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987). In *Carlin*, a company supplied "salacious telephone messages to the public" and a semi-public Arizona telephone utility began to carry them. *Id*. at 1292-93. A deputy prosecutor in Arizona then wrote to the telephone utility and threatened prosecution if the utility did not remove the company's messages from its services. *Id*. at 1293. The utility then terminated its provision of services to that company. *Id*. at 1293. Even though the telephone utility insisted that there was a genuine dispute of fact on whether the prosecutor's threat had played a role in its decision, this Court held that a threat of adverse government action – prosecution – so involved the government as to convert the private action into state action. *Id*. at 1295.

These cases – taken with *Hanson* and *Skinner* – establish that threats of regulation or the extension of complete immunity for conduct that would be unconstitutional if performed by the state convert normal private action into state action. In other words, these cases establish a species of the entwinement doctrine.

Here, Atkinson has pled sufficient facts to sustain a First Amendment claim. First, § 230 immunizes Facebook for censoring speech that would otherwise be protected. Both *Hanson* and *Skinner* demonstrate that such immunity converts private action into state action, thus sustaining Atkinson's First Amendment.

Second, as a factual matter, in his initial complaint, Atkinson has alleged that Facebook faced enormous pressure from members of the United States government after the 2016 presidential election to engage in content-based censorship of political speech. ER29-30, ¶¶ 13-14. This pressure from members of the United States government extended to carefully crafting and perpetuating a narrative about the impeachment of President Donald Trump, which caused the content-based censorship of a wide range of political viewpoints at the behest of members of the United States government. ER31-32, ¶¶ 22, 30. Atkinson is unsure of every form that government influence was brought to bear on Facebook to engage in content-based censorship, but he is very sure of the repeated times that Mr. Zuckerberg and Facebook officials testified in front of Congress and faced public threats[4] to curtail

[4] The public threats have not been the products of so-called conspiracy theories in the dark corners of the internet. They have come from members of Congress. *See, e.g.*, Tony Romm, *Facebook and Google to be quizzed on white nationalism and political bias as Congress pushes dueling reasons for regulation*, The Washington Post (April 8, 2019), https://www.washingtonpost.com/technology/2019/04/08/facebook-google-be-quizzed-white-nationalism-political-bias-congress-pushes-dueling-reasons-regulation/ (quoting members of Congress).

their immunity against civil liability. Thus, Atkinson has alleged sufficient facts to make at least an initial showing that Facebook have become impermissibly entwined with the government and enable his First Amendment claim to survive.

In his supplemental complaint, Atkinson alleges a similar and a far more overt entwinement between Facebook and state governments. State governments took extraordinary measures in the name of preventing the spread of coronavirus. In doing so, they prohibited all assemblies including those to protest their encroachments on constitutionally guaranteed liberties to freedom of speech and freedom of assembly. Facebook did not remain idle. At best, it reached out to state and local governments to ascertain the precise nature of these assemblies for engaging in protected political speech and censor any efforts at coordinating them. ER15, ¶¶ 10-11. At worst, Facebook is doing state governments' dirty work by censoring political speech that the state governments find politically inconvenient. ER15, ¶¶ 10-11. Atkinson alleged that Facebook was actively engaging in such a coordination with state governments, which would render it a state actor under the entwinement exception. ER15, ¶¶ 10-11. Despite Facebook's reference to the states that denied requesting it to censor anything, its denials do not cover all the states that Facebook appear to have coordinated with. Common sense also dictates that the states' denials cannot be given the presumption of truth as they would hardly admit that they violated the First Amendment and conspired with a so-called private actor to conceal their

violations. Atkinson also alleged that Facebook's censorship of his blog post was to cover up its actions in entwining itself with state governments and forfeiting any defense that it is not a state actor. ER16, ¶¶ 21, 23. Furthermore, Mr. Atkinson alleged, and Facebook provided no evidence to rebut, that it lacked a good-faith basis to censor his post even under its opaque community standards. ER16, ¶¶ 20-21. When Atkinson expressed his view that Facebook had been improperly cooperating with state and local governments to censor speech, Facebook sought to conceal that by silencing any suggestion that was the case. It is not an implausible inference by any means to infer that Facebook censored Atkinson's opinion to protect itself and the governments that it had been cooperating with to censor speech. In other words, Facebook had been caught with its hands in the cookie jar, and it cannot risk what discovery might reveal.

Thus, Atkinson has stated sufficient and plausible allegations to place his First Amendment claims within the entwinement exception for purposes of a motion to dismiss, and this Court should reverse the district court's dismissal of his First Amendment claims.

B. 47 U.S.C. § 230 creates a constructive public trust requiring Facebook to align with Congress's objective in promoting free speech on the internet in exchange for immunity.

No one owns the Internet, and no single person or organization can control the entire internet. *See* 47 U.S.C. § 230(a)-(b) (describing the internet as a separate concept from interactive computer services); *Zeran v. America Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) ("The Internet is an international network of interconnected computers…. *Reno v. ACLU*, 521 U.S. 844, 849 (1997)."). Still, the United States government as well as governments around the world have recognized the need to ensure integrity in the internet and maintain its orderly operation to enable public access. Thus, before 1998 and in recognition of the internet as an infinite public resource, the United States government itself maintained the domain name system (DNS). *See Memorandum of Understanding Between the U.S. Dep't of Commerce and Internet Corp. for Assigned Names and Numbers ("MOU")* https://www.ntia.doc.gov/page/1998/memorandum-understanding-between-us-department-commerce-and-internet-corporation-assigned- (Nov. 25, 1998). In 1998, the Department of Commerce formally recognized the Internet Corporation for Assigned Names and Numbers (ICANN) as the official nonprofit to privately manage access to the Internet through the domain name system under government supervision. *Id*. The Internet cannot function without the DNS, which brings order to the Internet as sort of a global phone directory. Thus, even though the Department of Commerce almost wholly removed itself from supervising ICANN in 2016, it did

not surrender control or regulation of the DNS to a private company but to a multi-stakeholder organization with participants from around the globe.

Thus, the government's actions have been to recognize and perpetuate the concept of the Internet being a global public resource. To preserve access to the Internet as a public resource, Congress sought to protect companies that offered services that make it easy for people to access the Internet — preempting, through 47 U.S.C. § 230, state law that would hold them liable for the public's speech. Even so, Congress recognized the important features of the Internet that make it a public resource: (1) the increased availability of educational and informational resources; (2) the degree of control over information that users received; and (3) its value as a forum for diverse political discourse, cultural development, and countless other opportunities for intellectual activity. 47 U.S.C. § 230(a). Congress then stated that its policy in providing immunity was to promote the continued development of these features. 47 U.S.C. § 230(b)(1). This connection demonstrates that the government did not intend to extend costless immunity to anyone.

If the government did not extend costless immunity, what did it do? The government's provision of immunity to interactive computer service providers such as Facebook creates a constructive public trust between the government and interactive computer service providers such as the Defendants.

The public trust doctrine traces its lineage back to the Byzantine Empire's Justinian Code, and its primary use has been in natural resources. Charles F. Wilkinson, The Headwaters of the Public Trust: Some of the Traditional Doctrine, 19 Envtl. L. 425, 458- 62 (1989). Its appearance in American law came in colonial ordinances that preserved the public's right to access the ocean for various purposes. That said, early American law did not specifically limit the public trust doctrine to natural resources. *See, e.g.*, *Arnold v. Mundy*, 6 N.J.L. 1, 49 (N.J. Super. Ct. 1821) ("Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth."). Things that did not fall under individual property rights belonged to the nation, and were called public property. *Id*. The early doctrine then distinguished between the property of the state and common property:

> Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called 'the domain of the crown or of the republic'; others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called common property.

Id. at 49. Natural resources fell into the category of common property, and early American courts did not elaborate on the property of the state. *Id*. at 49.

The Supreme Court adopted the public trust doctrine and elaborated on the property of the state in *Illinois Cent. R.R. v. Illinois* in describing underwater lands comprising the entire Chicago waterfront:

> But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

146 U.S. 387, 453 (1892).

There has been little to no evolution from the public trust doctrine articulated by *Illinois Central*. Even so, the principle is clear. There are some resources that the government must take charge of to allow its citizens to benefit from. The Internet is one of those resources, and the government's historical involvement in its development has confirmed its recognition of its responsibility to safeguard citizens' rights to access it. At the same time, Congress realized that its citizens could not access the resource known as the Internet without assistance, which is why it enacted 47 U.S.C. § 230 to encourage that private parties to facilitate access to the internet.

The exchange of immunity for access facilitation functions not as an enabling tool but as a protective one for all citizens. Congress's interest is to prevent a certain select number of citizens from shutting down access to the Internet at the expense of all other citizens. Thus, it immunized interactive service providers from liability for acts that they do not commit — creation of content and the restriction of access to obscene material - to ensure the development of access to the Internet. 47 U.S.C. § 230(c). At the same time, Congress emphasized that the importance of this immunity

was to enable interactive service providers to facilitate access to the internet in order to promote the tremendous importance of free speech and the Internet's vast potential for the communication of information. 47 U.S.C. § 230(a). Thus, the extension of immunity cannot not be decoupled from the Congress's objective in promoting public access to the internet to engage in free speech, thus creating a constructive public trust.

While 47 U.S.C. § 230(c)(2) does allow Facebook to censor material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected…," it does not give it carte blanche to censor political speech simply because its owners and operators disagree with it and are intent on perpetuating their own political narratives. Facebook's actions have encroached on the purposes of granting the immunity and have violated the constructive public trust established by 47 U.S.C. § 230(c)(2). Thus, the Court reverse the district court's decision to dismiss Atkinson's claim under 47 U.S.C. § 230.

C. This Court's decision in *Barnes* clearly establishes that Section § 230 does not bar contract or unfair trade practices claims.

The district court dismissed Atkinson's state law claims and denied him leave to amend his complaint to state a claim under California's Unfair Practices Act because it concluded that 47 U.S.C. § 230 serves as a categorical bar for every lawsuit against a "publisher or speaker" with the definition of § 230. ER1, n.1.; ER8-

11. In doing so, the district court devoted a single paragraph to explaining why it thought that a single term this Court's decision in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009) does not interpret § 230 so as to allow contract claims. ER10-11.

In *Barnes*, this Court adopted a functional approach for defining a publisher under § 230(c)(1):[5] "[A] publisher reviews material submitted for publication, perhaps edits it for style or technical fluency, and then decides whether to publish it." *Barnes*, 570 F.3d at 1102; *see also Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1097-98 (9th Cir. 2019). The *Barnes* test aligns with the statutory meaning and purpose of § 230(c)(1) in the specific contexts of the type of cases that it is employed in: tort claims that seek to hold an internet service provider liable for the injuries caused by a third party's speech. *Barnes*, 570 F.3d 1096; *Dyroff*, 934 F.3d 1093.

Barnes devoted substantial time to explaining this distinction. It described the *Barnes* plaintiff as not seeking "to hold Yahoo liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached." *Barnes*, 570 F.3d at 1107. Thus, even though Yahoo did promise to engage in "quintessential publisher conduct" by promising "to take down third-party

[5] Since Atkinson has never painted Facebook as speakers for purposes of his claims, the applicable portion of the *Barnes* holding is its test for defining a publisher.

content from its website," this Court drew a crucial distinction between promising to do something and doing something:

> Promising is different because it is not synonymous with the performance of the action promised. That is, whereas one cannot undertake to do something without simultaneously doing it, one can, and often does, promise to do something without actually doing it at the same time. Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication. Contract law treats the outwardly manifested intention to create an expectation on the part of another as a legally significant event. That event generates a legal duty distinct from the conduct at hand, be it the conduct of a publisher, of a doctor, or of an overzealous uncle.

Id. at 1107.

Thus, this Court clearly established that § 230 does not bar claims that seek redress from broken promises. *Id*. at 1108.

The district court's reading of Atkinson's claim for a breach of the implied covenant of good faith construed his factual allegations and legal claims in a decidedly unfavorable light. ER10-11 ("Though Atkinson's claim is styled as a contract cause of action, he is really accusing Facebook of utilizing its community standards to make classic publishing decisions"). This reading plainly contradicts Atkinson's complaint and supplemental complaint where he articulated that his breach of the implied covenant of good faith was directed at broken promises that Facebook made to every user of its platform.

The implied warranty of "good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*." *Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317, 349 (2000) (internal quotation marks and citation omitted). The warranty "is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement." *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 36 (1995). "Breach of the covenant of good faith and fair dealing gives rise to a contract action… or, in limited contexts, a tort action with the tort measure of compensatory damages and the right to recover punitive damages." 1 Witkin, Summary of Cal. Law, Contracts, § 800, p. 894 (10th ed. 2005). Finally, "a defendant's implied duty of good faith and fair dealing may be entirely independent of the plaintiff's duty to perform under the contract." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1369 (2010).

The fact that a contract existed between Atkinson and Facebook is not disputed. Thus, the only issue is whether Atkinson has alleged sufficient facts to state a plausible claim that Facebook has unfairly frustrated his right to receive the benefits of the agreement actually made between them.

In both his original complaint, Atkinson alleges that Facebook held itself "out to the world as fostering a means by which the people of the world can communicate

with one another." ER36, ¶ 54. He then alleges that "[t]he Defendants further represent that they will foster communication without censorship of participants based on the content of the participants' ideas and opinions." ER36, ¶ 55. These representations were Atkinson's expected benefits from Facebook's platform. ER29, ¶ 10; ER33, ¶ 35; ER35, ¶ 46-47; ER36, ¶ 56-57; ER37, ¶ 63(b); ER38, ¶ 64; ER38, ¶ 69. He relied on them to his detriment, and he alleges that Facebook unilaterally changed the terms of its contract with him without notice. ER38-39, ¶¶ 69-70. Atkinson also alleges that Facebook insisted on a vague "community standards" policy in "a politically-motivated, ideologically-driven way, silencing both right-wing and left-wing speech that threaten[ed] to disrupt the carefully crafted narrative around the attempt to impeach President Donald Trump." ER32, ¶ 30. Facebook' motivations had nothing to do with whether Atkinson's speech was inappropriate based on objective standards of decency. Facebook's motivations were purely political and ideological. Thus, Facebook's purely political and ideological decisions to censor were made in bad faith, and its actions breached the implied warranty of good faith and fair dealing by depriving Atkinson of the benefit of his contract with Facebook.

In his supplemental complaint, Atkinson alleges that Facebook actively coordinated with state governments to censor political speech — anti-COVID-19 shutdown restriction protests. ER29, ¶¶ 10-11. He also alleges that he sought to

express his opinion that they were doing so and that Facebook completely censored his attempt to do so. ER29-31, ¶¶ 14-23. Atkinson alleges that they did so to conceal its own public relations blunder and mitigate self-inflicted damages without even considering whether its speech violated any of its vague community standards. ER31, ¶¶ 20, 23. Facebook's conduct was entirely self-serving to Atkinson's detriment, and it is no implausible allegation to state that Facebook did so "to conceal their shady dealings with governments to censor speech." ER35, ¶ 46. Once again, the benefit that Atkinson received through his contract with Facebook was the free use of Facebook for purposes of free and open communication with others. ER29, ¶ 10; ER33, ¶ 35; ER35, ¶ 46-47; ER36, ¶ 56-57; ER37, ¶ 63(b); ER38, ¶ 64; ER38, ¶ 69. Atkinson relied on Facebook's representations to his detriment, and Atkinson alleges that Facebook unilaterally changed the terms of its contract with him, thus depriving him of his benefits. ER38-39, ¶¶ 69-70.

These factual allegations point at the same thing that the factual allegations in *Barnes* did: a promise. This Court held in *Barnes* that § 230 does not bar contract actions to recover damages for broke promises. Atkinson presents precisely such a claim, and the district court's cursory conclusion that he is really complaining of Facebook's editorial publishing decisions rather than its broken promises to him is not only an unreasonably unfavorable construction of his allegations, but also an

entirely implausible one that transforms his claims into a vehicle that he did not build.

These same allegations will also support the California Unfair Trade Practices claim that Atkinson indicated that he would move to include by way of amendment. ER1, n.1. Just like the breach of the implied covenant of good faith claim, Atkinson's Unfair Trade Practices claim – discussed below – would target broken promises, not Facebook's editorial publishing decisions.

Atkinson clearly pled state law claims that targeted Facebook's breaking of promises to him. *Barnes* forecloses any argument that § 230 categorically bars those claims. Thus, the district court erred in concluding that § 230 barred his state law claims, and this Court should reverse its dismissal of his state law claims.

II. The District Court Abused Its Discretion In Denying Atkinson Leave To Amend His Complaint To State A Claim Under California's Unfair Practices Act Because It Concluded That He Cannot Allege That He Has Lost "Money Or Property."

Without waiting for Atkinson to submit a motion or briefing on whether he could state a claim under California's Unfair Practices Act, the district court denied him permission to amend his complaint on two bases: (1) it concluded that he could not allege that he lost "money or property" – a statutory prerequisite to standing and (2) its general conclusion that § 230 barred his state law claims. ER1, n.1. Both conclusions constitute a gross abuse of discretion.

To state a claim under the California Unfair Practices Act, a plaintiff must allege that a defendant's act or practice is "unlawful, unfair, or fraudulent" or that its advertising is "unfair, deceptive, untrue, or misleading." *Searle v. Wyndham Internat., Inc.*, 102 Cal.App.4th 1327, 1333 (2002); Cal. Bus. & Prof. Code § 17200. This is a strict liability standard as well, and plaintiffs do not need to plead and prove the elements of an intentional tort. *Searle*, 102 Cal.App.4th at 1333. Instead, plaintiffs only need to show that "members of the public are likely to be deceived." *Id*. at 1333.

Atkinson more than crosses the threshold for this standard. In his original complaint, Atkinson alleges that Facebook held itself "out to the world as fostering a means by which the people of the world can communicate with one another." ER36, ¶ 54. He then alleges that "[t]he Defendants further represent that they will foster communication without censorship of participants based on the content of the participants' ideas and opinions." ER36, ¶ 55. Atkinson also alleges that Facebook then imposed on a vague "community standards" policy in "a politically-motivated, ideologically-driven way, silencing both right-wing and left-wing speech that threaten[ed] to disrupt the carefully crafted narrative around the attempt to impeach President Donald Trump," thus censoring users based on the content of their ideas and opinions. ER32, ¶ 30 These factual allegations are clear claims of deceptive advertising and fraudulent trade practices.

Rather than contend with whether Atkinson could plead enough facts to support a fraudulent trade practices claim or a deceptive or misleading advertising claim, the district court cursorily concluded that there was no way that Atkinson could allege that he lost "money or property" without even seeing what he would plead or obtaining briefing on the matter.

Atkinson can, and will, allege a loss of property. This Court has already recognized that people have a privacy interest in their internet browsing data. *In re Facebook, Inc. Internet Tracking Litigation*, 956 F.3d 589, 598 (9th Cir. 2020). It also reinstated a California common law claim for trespass to chattels, statutory larceny, fraud, and other state law claims because browsing histories and data carry financial value and that people have a property interest in them. *Id*. at 599-600.

The property that Atkinson lost to Facebook is his browsing data on Facebook, which he gave it the right to use in exchange for the right to use Facebook freely. Atkinson actually alleged that fact in his complaint – albeit under his fraud claim.[6] ER36-37. The district court, however, completely ignored what Atkinson had already alleged and what he would allege again to cursorily conclude that he could not allege a loss of property. Its decision contradicts this Court's precedent, California law, and common sense, and it constitutes a gross abuse of discretion.

[6] Atkinson did indicate that he would withdraw his fraud claim against Facebook. He did not, however, indicate that he would withdraw the factual allegations supporting it, which also support the Unfair Practices Act claim.

Finally, as discussed above, § 230 does not bar Atkinson's Unfair Practices Act claims because his claims target broken promises, not the specific act of publishing decisions. This Court will review the district court's interpretation of § 230 de novo for Atkinson's contract claim, and its *Barnes* decision will make clear that the district court abused its discretion in denying Atkinson leave to amend to add a California Unfair Practices Act claim on the basis that § 230 categorically bars it. Thus, Atkinson respectfully asks this Court to reverse the district court's denial of leave to amend his complaint.

CONCLUSION

For these reasons, the Appellant, Cameron L. Atkinson, respectfully asks this Court to reverse the district court's dismissal of his claims and its denial of leave to amend.

Dated: April 2, 2021

/s/ Norman A. Pattis /s/
Norman A. Pattis

CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because this brief contains 7,289 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, rule 32(f).
2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure, rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

Dated: April 2, 2021

/s/ Norman A. Pattis /s/
Norman A. Pattis

ADDENDUM A

INDEX TO ADDENDUM A

47 U.S.C. § 230

(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).

(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 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.

(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.

(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.

CERTIFICATE OF SERVICE

I hereby certify that, on April 2, 2021, an electronic PDF of BRIEF FOR APPELLANT was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Dated: April 2, 2021

/s/ Norman A. Pattis /s/
Norman A. Pattis