

**United States Court of Appeals
For the First Circuit**

No. 21-1582

RIAN G. WATERS,

Plaintiff - Appellant,

v.

FACEBOOK, INC.; GOOGLE LLC; AIDAN KEARNEY,

Defendants - Appellees,

**JEREMY HALEY; MARTHA SMITH-BLACKMORE; WILLIAM
HIGGINS; JIM DALTON; MAURA TRACY HEALEY; JOHN DOES (1-10),**

Defendants.

PETITION FOR EN BANC HEARING

STATEMENT OF REASONS FOR EN BANC REVIEW

1. The First Circuit should consider overturning or carefully distinguishing this case from its holdings in *Universal Communication Systems, Inc. v. Lycos, Inc.* , 478 F.3d 413, 420 (CA1 2007) and *Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322 (1st Cir. 2017) as to the limits of Section 230 liability protection. First, Section 230 should not apply because this case has a significant amount of state action, and the Tech Defendant's recklessly allow and facilitate conspiracies under the color of the law. (RA. 81 at 24) (BB 14-22) making the constitutional avoidance doctrine come in to play. (BB 49) Second, the defendants' algorithms are not neutral as they favor far right extremists, and Facebook is giving Kearney special privileges. (BB¹. 52) Third, the internet has changed significantly over the last 14 years and experience has taught the world that favoring one of congresses goals over the others has been disastrous. (BB 50) Forth, the Defendants were legally made aware of the schemes outside of the

¹ Appellant brief which is labeled Blue brief.

role of a publisher. (BB 51) Fifth, as currently interpreted, Section 230 is unconstitutional as it delegates too much power, is overly broad, and in effect is repulsive to the constitution. (BB 48) Sixth, Section 230 should not apply because Facebook has significant control over the Government. (BB 22)

2. This court should consider overturning *Pérez-Sánchez v. Public Building Authority*, 531 F.3d 104, (1st Cir. 2008), to allow Section 1985(3) relief for a politically motivated conspiracy. The Sixth circuit allows politically motivated conspiracies. Plus, when the Supreme Court decided that they were unsure if Section 1985(3) reached conspiracies other than racially based, they hinted that more evidence of congressional intent existed. “Lacking other evidence of congressional intention, we follow the same course here.” *Carpenters v. Scott*, 463 U.S. 825, 837 (1983) I offer irrefutable evidence that the 42nd congress intended to stop the Klu Klux Klan from politically motivated conspiracies. (ADD 13 & SRA 1-14)
3. I alleged that the Defendants have a “private conspiracy so massive and effective that it *supplants* those authorities and thus satisfies

the state action requirement.” Griffin v. Breckenridge, 403 U.S. 88, 98 (1971) This is seemingly a first impression in this circuit. (BB 15)

4. This case is of exceptional importance as the result will have a massive impact on the safety and wellbeing of our country and the world. The Tech Defendants are making decisions impacting billions of people with no oversight, while simultaneously wielding the power to decide who gets elected and what policies are discussed. (ADD 27-8) Kearney’s weaponized public shaming blog is forcing people to be career criminals (Exhibit A) while literally trying to start a civil war, and Kearney regularly brags not only about his ability to destroy peoples’ online presence, but also causes real world harm. (RA 19 at 94)
5. This case is also of exceptional importance because it deals with the extralegal use of social media by public institutions that the public puts its trust in.
6. Without an injunction, I am not going to be able to do a rehearing.

Argument

Broad distributor immunity in Lycos needs to be retired.

Justice Clarence Thomas specifically called out the First Circuit's decision in *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (CA1 2007) as "reading extra immunity into statutes where it does not belong" by "adopt[ing] [distributor immunity] as a categorical rule across all contexts." Malwarebytes, Inc. v. Enigma Software Grp. U.S., 141 S. Ct. 13, 15 (2020) (denial of cert.) "we need not decide today the correct interpretation of § 230. But in an appropriate case, it behooves us to do so." *Id.* At 18 "prior decisions by panels of this court may be overruled only by the full court sitting en banc, absent exceptional circumstances" *Talbott v. C.R. Bard, Inc.*, 63 F.3d 25, 31 (1st Cir. 1995)

"The sweeping interpretation of Section 230(c)(1) advanced by the [First Circuit] effectively reads Section 230(c)(2) out of the statute. If Section 230(c)(1) immunizes an interactive computer service from liability anytime third-party content is involved or anytime the claim 'stems,' 'derives,' or 'arises' from third-party content, then an interactive computer service is inevitably immune from any action taken with respect to third-party content. There would be no need to ever determine whether, under Section 230(c)(2), the interactive computer service had a 'good faith' basis for taking down the third-party content or whether that

content was ‘obscene’ or ‘lewd’ or ‘otherwise objectionable...’ It is axiomatic that a statutory provision should not be read so broadly as to swallow and render meaningless another provision of the same statute.” (petition in *Jane Doe V. Facebook* US 21-459) see *Malwarebytes*, 141 S. Ct. at 16-7.

Recently two of three judges in a panel urged their circuit to reconsider en banc “the scope of section 230 immunity” especially “to the extent that it holds that section 230 extends to the use of machine-learning algorithms to recommend content and connections to users.” *Gonzalez v. Google LLC*, 2 F.4th 871, 913 (9th Cir. 2021) (BERZON, concurring) (“neither the text nor the history of section 230 supports a reading of “publisher” that extends so far as to reach targeted, affirmative recommendations of content or of contacts by social media algorithms. BUT: As the majority opinion explains, our case law squarely and irrefutably holds otherwise. There is just no getting around that conclusion, as creatively as Judge Gould's dissent tries to do so.”) *Id.* 915 “[I]f *Dyroff* cannot be fairly distinguished, then our circuit should take this case en banc to modify or clarify the rule that machine-learning algorithms can never produce content within the meaning of Section

230,” I.D. at 925 (GOULD, concurring in part and dissenting in part) (“where terrorist organizations like ISIS have obviously played Google and YouTube like a fiddle, then in my view we should take these or other related cases en banc to give a full review.”) id. 937 Gould also encouraged the court to adapt common law principles to hold Google accountable, but the court did not agree the elements were adequately alleged. Id at 912 In this case both the product liability claim and gross negligence claim were alleged prior to, (RA 86-89) and re-alleged within the section 1983 claim. (RA 100 at 137) Because of the structure of the complaint and the unique facts of this case this court should interpret Section 230 and Section 1983 in a way that makes both statues effective.

Kearney did not cause Facebook’s algorithms to favor extremist content. Kearney did not make the decision to allow himself to post more offensive content than most other Facebook users. Kearney did not make the decision decide for Facebook to allow himself to flagrantly break their rules and post commercially on 4 Facebook pages, and to use at least 30 other profiles for harassment and boosting engagement. Most

importantly, Kearney did not force Facebook to allow him to continue flagrantly breaking their rules

Constitutional avoidance could potentially require overruling Lycos. This case has more state action than previous cases deciding whether an internet service provider is liable under Section 1983, and Facebook and Google made it impossible to inform them that state actors were exploiting their platform without starting a legal action, and after receiving legal notice they've continued to facilitate and provide substantial assistance to the conspiracy. RA 81 at 24

Politically motivated conspiracies

The Court arguably only decided that § 1985(3) did not reach conspiracies motivated by economic or commercial animus, and the Sixth Circuit has since reaffirmed that animus based on political affiliation is entitled to protection under § 1985(3). See *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987) (holding that Cameron's extension of § 1985(3) protection to political affiliation is still available post- *Scott*). The Sixth Circuit, however, stands alone on this question. Every other circuit to

reach the issue has decided otherwise. *Pérez-Sánchez v. Public Building Authority*, 531 F.3d 104, 108 (1st Cir. 2008) 1. “[T]he Sixth Circuit has since reaffirmed that animus based on political affiliation is entitled to protection under § 1985(3). See *Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987)... The Sixth Circuit, however, stands alone on this question.” *Pérez-Sánchez v. Public Building Authority*, 531 F.3d 104, 108 (1st Cir. 2008)

Exceptional Importance

“[T]he Appellate Rules do not provide a definition of what is a “question of exceptional importance,” the issues alleged in this appeal are undoubtedly quintessential “questions of exceptional importance” because they implicate fundamental constitutional, civil and political rights of the millions of United States citizens” *Igartúa v. U.S.*, 654 F.3d 99, 102 (1st Cir. 2011) (TORRUELLA dissenting)

The Whistle blowers statement to congress is probably the best evidence of exceptional importance (ADD 23-26) One of Aidan Kearney’s primary goals is to start a civil war, (RA 76 at 26) and he instigates this goal by using weaponized social media to devastate the lives of moderate republicans, democrats, and anyone that says or tries to do something to

make the world a better place (“social justice warriors.”) RA 126 “[I]n connection with 21st-century political elections, some commenters have expressed concerns that social media has the ability to distort and tribalize public opinion, to spread falsehoods as well as truth, and to funnel like-minded news reports to groups in a way that makes them think there are "alternative facts" or "competing realities" that exist, rather than recognize more correctly that there are "truth" and "lies." Supra Gonzalez dissent at 936

This case is also “of exceptional importance because of the light [it] cast on our public institutions... while not always directly affecting as broad a segment of the population, are nevertheless exceptionally important by virtue of what they demonstrate about the trust that we—for better or worse—place in those institutions.” *Donahue v. U.S.*, 660 F.3d 523, 524-25 (1st Cir. 2011)

NOTE ON IMPAIRMENT

I intend to file a motion for an injunction pending appeal in this case, and if this court does not provide the required relief I will file for an injunction against Kearney in the State case that was reversed in my

favor... so either way the status quo will likely improve over the next couple months.

CONCLUSION

For the reasons just stated, this court should hear the case en banc.

Respectfully submitted by:

Pro Se /s/ Rian Waters 11/14/2021

199 Allen ST. E. Longmeadow MA 01028

watersrian@gmail.com

(530) 739-8951

Certificate Of Service

I, Rian Waters, hereby certify that on November 14th 2021, I served the attached Petition, on Facebook, Google, Aidan Kearney, and Katherine Peter by Electronic filing for attorneys of record, and by emailing: bristolturtlechick@gmail.com;

Subscribed under the penalties of perjury.

/s/ Rian Waters

Dated November 14th 2021