C.A. No. 20-616

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES DOMEN, an individual, CHURCH UNITED,
a California not-for-profit corporation,

Plaintiffs–Appellants

vs.

VIMEO, INC., a Delaware for-profit corporation,

Defendant-Appellee.

APPELLANTS' OPENING BRIEF

Appeal from the Judgment of the United States District Court
for the Southern District of New York
D.C. No. 1:19-cv-08418-AT

TYLER & BURSCH, LLP
Robert H. Tyler, CA Bar No. 179572
rtyler@tylerbursch.com
Nada N. Higuera, CA Bar No. 299819
nhiguera@tylerbursch.com
25026 Las Brisas Road
Murrieta, California 92562
Tel: (951) 304-7583
Fax: (951) 600-4996
Attorneys for Appellants, JAMES DOMEN and CHURCH UNITED

CORPORATE DISCLOSURE STATEMENT, RULE 26.1

The Plaintiff/Appellant Church United is a California not-for-profit religious corporation. Church United operates under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and, as it has no stock, no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The outcome of this case will determine whether websites have blanket immunity to discriminate against customers, including outright banning customers from their website based on race, sexual orientation, religion and other protected classes. Under the District Court's ruling, discrimination that is unconscionable in any other business or consumer context, is allowed if it is committed by an interactive computer service.

The free ticket for internet platforms to discriminate is erroneously based on the Communications Decency Act, 47 U.S.C. § 230 ("CDA"), specifically Section 230(c)(1). The legislature created this immunity to ensure that providers of an interactive computer service would not be treated as publishers of third-party content and therefore liable for the content of others. However, as explained below, applying the CDA to shield websites from liability for banning protected classes of customers based on discriminatory intent goes far beyond both the plain language of the CDA and the legislative purpose.

The scope and applicability of the CDA has recently become a topic of national importance prompting intervention by the Executive Branch. On May 28, 2020, President Donald Trump issued Executive Order 13925[1] to address internet platforms "deleting content and entire accounts" of users for improper motives. "It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose…." The Second Circuit now has an opportunity to clarify that Section 230(c)(1) does not immunize internet platforms engaged in intentional unlawful discrimination.

In this case, Vimeo is attempting to hide behind the CDA for deleting the content of Church United and James Domen's account and banning them from its

[1] Available at https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship.

service because of Domen's sexual orientation and religion. The consequences of the District Court's misinterpretation of the CDA are dire: an internet site can be immune from liability under Section 230(c)(1) even if it decided to ban all African American or Latino users, Christian or Muslim users, and Gay or Lesbian users, regardless of the discriminatory purpose behind the ban.

Another provision of the CDA, Section 230(c)(2), provides immunity for websites attempting to police content and provide for child safety. Unlike (c)(1), Section (c)(2) requires websites to act in good faith when policing content. Vimeo is ineligible for immunity under (c)(2) because Church United and Domen sufficiently alleged that Vimeo acted in bad faith, intentionally banning Church United and Domen based on sexual orientation and religious discrimination. The District Court found that Vimeo was immune under (c)(1) irrespective of Vimeo's motives, and alternatively, Vimeo was immune under (c)(1) because it acted in good faith.

The District Court judgment granting Vimeo the right to deny access to individuals based on their sexual orientation and religion should be reversed and remanded for further proceedings.

JURISDICTIONAL STATEMENT

This appeal is from a final judgment that disposes of Plaintiffs/Appellants James Domen and Church United's claims in this action against the sole Defendant/Appellee Vimeo, Inc. The District Court for the Southern District of New York had subject matter jurisdiction based on diversity under 28 U.S.C. § 1332(a)(1).

On January 15, 2020, the District Court entered an Opinion and Order granting Vimeo's motion to dismiss Church United and Vimeo's claims in their entirety, without leave to amend. (A-4). Final judgment was entered in the court below on

January 17, 2020, dismissing the case with prejudice. Church United and Domen filed a timely notice of appeal on February 18, 2020. (A-29). Therefore, this Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

A. Whether Church United and Domen's claims are preempted under Section 230(c)(1) the CDA where the claims are based on the intentional and unlawful discriminatory acts of an interactive computer service and no third-party content is involved.

B. Whether Church United and Domen's claims are preempted under Section 230(c)(2) of the CDA where Church United and Domen alleged an absence of good faith on the part of Vimeo.

C. Whether the District Court erred in finding that Church United and Domen did not plausibly allege discriminatory intent under the California Unruh Act or the New York State Human Rights Law and denying Church United and Domen an opportunity to amend the complaint.

STATEMENT OF THE CASE

A. Procedural History

James Domen and Church United commenced this case in the U.S. District Court for the Central District of California. (A-31). The case arose out of the termination of Domen and Church United's account on Vimeo's video-sharing website, which account displayed (among others) videos of Domen, discussing his sexual orientation and religion. (A-36). Domen and Church United's complaint alleged that Vimeo terminated their account and banned them from using its services based on discriminatory animus in violation of the Unruh Civil Rights Act, Section 51, et seq. of the California Civil Code. (A-37).

Vimeo moved to dismiss the case for improper venue under Fed. R. Civ. P. 12(b)(3) or 28 U.S.C. § 1406(a), or in the alternative to transfer to New York state

pursuant to 28 U.S.C. § 1404(a), based on forum-selection clause in the Vimeo Terms of Service. (A-12). The Central District of California granted Vimeo's motion and transferred the case to the District Court for the Southern District of New York and denied the motion to dismiss for improper venue. *Domen v. Vimeo, Inc*., No. 819CV01278SVWAFM, 2019 WL 4998782, at *3 (C.D. Cal. Sept. 4, 2019).

Upon transfer to the District Court for the Southern District of New York, this case was assigned to District Judge Analisa Torres. On October 1, 2019, the parties consented to conducting all proceedings before Magistrate Judge Stewart D. Aaron. (A-45). On October 4, 2019, Domen and Church United filed a First Amended Complaint ("Complaint") and added a "Sexual Orientation Non-Discrimination Act" claim under New York Executive Law § 296. (A-47).

On October 11, 2019, Vimeo filed the motion to dismiss at issue in this appeal. (A-64). Judge Aaron granted Vimeo's motion and ordered that this case be dismissed with prejudice. (A-4). Judgment dismissing this case was entered on January 17, 2020. (A-27).

B. Factual Background

Church United is a California not-for-profit religious corporation. (A-48 ¶ 6). James Domen is a California resident and the founder and president of Church United. (A-49 ¶ 13). Domen has a "masters of divinity degree." (A-49 ¶ 13). Church United's mission is to equip faith leaders to positively impact the political and moral culture in their communities. (A-49 ¶ 8). "Church United and its affiliated pastors desire to positively impact the State of California and the nation with hope and to preserve their individual rights as pastors to exercise their faith without unlawful infringement." (A-49 ¶ 12).

For three years Domen was a homosexual. (A-49 ¶ 15). However, because of his decision to pursue religion as a Christian, he began to self-identify as a "former homosexual." (A-49 ¶ 15). In July 2009, Domen married his wife. (A-49 ¶ 16).

Together, they have three biological children. (A-49 ¶ 16). It may be an unpopular and minority belief that one can transition from homosexuality to heterosexuality, but that is the reality in Domen's personal experience with his sexual orientation.

Vimeo is an online forum that "allows users to upload, view, share, and comment on videos." (A-50 ¶ 24). Vimeo expressly invites the general public to use its website as a platform to express themselves, and it holds itself out as a safe place for users to disagree and provide critical feedback to other users. (A-50 ¶¶ 25-26). More than 90,000,000 video creators use Vimeo's website. (A-50 ¶ 27).

In October 2016, Church United and Domen obtained a joint account with Vimeo for the purpose of hosting various videos, including videos addressing sexual orientation as it relates to religion. (A-51 ¶¶ 29-30). From October 2016 to November 2018, Church United and Domen used Vimeo's video hosting service to publish approximately eighty-nine (89) videos. (A-51 ¶ 30).

On November 23, 2018, Vimeo sent an email to Church United citing five of those videos and explaining that "Vimeo does not allow videos that promote Sexual Orientation Change Efforts (SOCE)." (A-60). The five videos flagged by Vimeo as problematic centered on Domen's sexual orientation as a former homosexual and his religion. (A-52 ¶ 40). The five videos include the following:

1) A video "wherein [Domen] briefly explained his life story, his preferred sexual orientation, the discrimination he faced, and his religion." (A-51 ¶ 34; A-141);

2) A "promotional video for Freedom March Los Angeles. Freedom March is a nationwide event where individuals like [Domen], who identify as former homosexuals, former lesbians, former transgenders, and former bisexuals, assemble with other likeminded individuals." (A-52 ¶ 35; A-141);

3) An "NBC produced documentary segment titled, Left Field, which documented and addressed SOCE." (A-52 ¶ 36; A-141);

4) A "press conference with Andrew Comiskey, the founder of Desert Stream, relating to his religion and sexual orientation." (A-52 ¶ 37; A-141);

5) An "interview with Luis Ruiz, a survivor of the horrific attack at the Pulse Nightclub in Florida in March 2018. In the video, Luis Ruiz shares his background as a former homosexual and his experience as a survivor of the attack." (A-52 ¶ 38; A-141).

On December 6, 2018, Vimeo sent an email to Church United advising that Church United and Domen's account had been removed by Vimeo staff for violating Vimeo's "Guidelines." (A-62). Not only were the five videos banned, but Church United and Domen were banned from re-registering with Vimeo in the future. (A-98). The email states as the reason for removal: "Dear Church United, . . . Vimeo does not allow videos that harass, incite hatred, or include discriminatory or defamatory speech." (A-62). Vimeo's Terms of Service, which are referenced in the Complaint (A-48 ¶ 3), prohibit, among other things, content that "[c]ontains hateful, defamatory, or discriminatory content or incites hatred against any individual or group." (A-98).

None of Church United and Domen's 89 videos, harass, incite hatred, or include discriminatory or defamatory speech. (A-53 ¶ 43). Vimeo may classify Domen's journey from homosexuality to heterosexuality as violative of this standard, however, none of the videos or any statements made by Church United or Domen illustrated harassment, hatred, discriminatory or defamation toward the LGBTQ community. (A-53 ¶ 43).

Vimeo denied Church United and Domen equal accommodations, advantages, privileges, and services because of Domen's sexual orientation and religion. (A-55 ¶ 59). Vimeo did not merely delete the five flagged videos allegedly based on Sexual Orientation Change Efforts ("SOCE"), it cancelled Church United and Domen's entire account, deleted all 89 videos, and permanently banned them from using its

service. (A-53,55 ¶¶ 43, 59). The Complaint alleges that Church United and Domen's videos were restricted and deleted whereas videos on similar subjects, were not, further evidencing Vimeo's discrimination against their protected class. (A-53 ¶ 44-46).

SUMMARY OF ARGUMENT

Vimeo's motion to dismiss was improperly granted based on immunity under the CDA and based on failure to plausibly allege discriminatory intent. (A-4).

First, the immunity provision under Section 230(c)(1) is inapplicable here because Vimeo is not being sued for a third-party's actions. Section 230(c)(1) effectively prevents any lawsuit against an interactive computer service where a plaintiff seeks to hold an interactive computer service liable as a publisher of third-party content. *FTC v. Leadclick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016). A classic example of this is where an interactive computer service is sued as the publisher of a libelous comment posted by a third-party, which is the fact pattern of the case that lead to Congress to passing Section 230. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *Force v. Facebook, Inc.*, 934 F.3d 53, 64 & n.16 (2d Cir. 2019), *cert. denied*, No. 19-859, 2020 WL 2515485 (U.S. May 18, 2020) (explaining the primary objective of Section 230(c)(1) was to "overrule Stratton").

A third-party is required under the plain language and purpose of Section 230 (c)(1), and no such party exists here. Vimeo may not shield itself from liability by attempting to classify itself as a publisher rather than a business establishment engaging in sexual orientation and religious discrimination. Church United and Domen are not seeking to hold Vimeo liable for the conduct of a third-party, which is the scope and purpose of Section 230(c)(1) immunity.

Vimeo is also ineligible for immunity under Section 230(c)(2) because Church United and Domen's content is not obscene, pornographic, or objectively

harmful content as defined by the statute. 47 U.S.C. Section 230(c)(2)(A). Section 230 (c)(2)(A) requires that the interactive computer service act in "good faith" in removing content, which is not the case here. *Id*.

Vimeo targeted Church United and Domen and deleted their entire account of 89 videos and banned them from using its service. As Church United and Domen allege, this case addresses the denial of a business service based on discriminatory animus based on sexual orientation and religion. There is no good faith involved, nor is there harmful content as defined by the statute.

Finally, Church United and Domen alleged sufficient facts to state cognizable claims for legal relief under both California's Unruh Act and the New York's Sexual Orientation Non-Discrimination Act. A complaint "does not need detailed factual allegations," but only factual allegations that are "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In the Complaint, Domen and Church United specifically allege that Vimeo acted in bad faith by cancelling Church United and Domen's entire library of videos and canceling the account. (A-52 ¶ 39; A-53 ¶ 44). By permanently banning Church United and Domen from Vimeo's platform and deleting their entire account, as opposed to censoring the five videos, it is evident that Vimeo discriminated not merely against a message, but against Church United and Domen based on sexual orientation and religion. (A-53 ¶¶ 43-47). The Complaint also alleges disparate treatment and lists similar videos about sexual orientation and religion that were not deleted, further evidencing Vimeo's discrimination. (A-53 ¶¶ 44-46). Vimeo failed to provide "an explanation for the distinction between Church United and Domen's videos relating to sexual orientation" and religion and similar videos on its platform. (A-53 ¶ 46). At a minimum, Church United and Domen should have been given leave to amend to allege additional facts.

STANDARD OF REVIEW

This Court reviews the granting of a motion to dismiss on the pleadings *de novo*. *See Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2d Cir. 2005) ("We apply a *de novo* standard of review to the grant of a motion to dismiss on the pleadings..."); *see also, Ehrenfeld v. Mahfouz*, 489 F.3d 542, 547 (2d Cir 2007) (question of statutory interpretation is subject to *de novo* review). In addition, all allegations in the complaint must be accepted as true and all inferences drawn in Church United and Domen's favor. *Allaire Corp. v. Okumus,* 433 F.3d 248, 249-250 (2d Cir. 2006).

When reviewing under a *de novo* standard, the Second Circuit reviews the issues as if the lower court had not decided the matter. *Wholean v. CSEA SEIU Local 2001*, 955 F.3d 332, 334 (2d Cir. 2020). Therefore, the Second Circuit gives no deference to the district court when evaluating the district court's ruling. *Shahriar v. Smith & Wollensky Rest. Grp., Inc*., 659 F.3d 234, 251 (2d Cir. 2011).

ARGUMENT

As a business establishment, Vimeo is required to abide by the law and refrain from treating individuals unequally based on their sexual orientation or religion. Vimeo is attempting to get around full equality by erroneously alleging immunity in order to discriminate against whomever it pleases. California and New York state law prohibit private business establishments from discriminating based on sexual orientation and religion. *See* Cal. Civ. Code § 51(b); N.Y. Exec. 296(2)(a).

The District Court's grant of immunity to Vimeo stems from a fundamental misapplication of the Communications Decency Act, which was never meant to exempt internet companies from state nondiscrimination laws. Church United and Domen have sufficiently plead claims for sexual orientation and religious discrimination under state law, and therefore, they must be given the opportunity to prosecute their claims.

I. Appellants' Claims are not Preempted under the Federal Communications Decency Act of 1996

The CDA was written to broadly apply to an "interactive computer service" as defined by 42 U.S.C. § 230(f)(2). This includes social media platforms like LinkedIn, Facebook, and Twitter. *Force*, 934 F.3d at 64. The immunity for interactive computer services is not limited to social media services, but extends to include online sellers, service providers and other varieties of companies like Amazon,[2] eBay,[3] YouTube,[4] AOL,[5] Yelp,[6] Google, Yahoo,[7] and more.

There are two relevant sections of the CDA: Section 230(c)(1) and section 230(c)(2). Section 230(c)(1) was intended to prevent chatrooms (the earliest of social media platforms) from being held liable for defamatory statements written online against one user by another third-party user. *See Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003) (In the absence of the protection afforded by section 230(c)(1), one who published or distributed speech online "could be held liable for defamation even if he or she was not the author of the defamatory text, and ... at least with regard to publishers, even if unaware of the statement"). In contrast, section 230(c)(2) was written for the purpose of providing immunity to covered websites when filtering inappropriate content with a "good faith" reason for doing so. *Id*. at 1028 (Section 230(c)(2) was enacted "to encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material, so as to aid parents in limiting their children's access to such material").

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[2] *Oberdorf v. Amazon.com Inc*., 930 F.3d 136 (2019) (en banc review pending).
[3] *Gentry v. eBay, Inc*., 99 Cal. App. 4th 816 (Cal. Ct. App. 2002).
[4] *Song fi Inc. v. Google, Inc*., 108 F. Supp.3d 876, 883–84 (N.D. Cal. 2015).
[5] *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).
[6] *Levitt v. Yelp!, Inc.*, Nos., 2011 U.S. Dist. LEXIS 124082, 2011 WL 5079526 (N.D. Cal. Oct.
26, 2011).
[7] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

Congress's stated purpose for section 230(c)(2) was to encourage websites to filter pornography and other objectionable content in order to protect children. (*Id*.) Although the District Court granted immunity under both sections, based on the background and purpose of the CDA, neither sections are applicable here.

A. Background & Purpose of the CDA

The primary purpose of the Communications Decency Act "was to protect children from sexually explicit internet content." *LeadClick Media, LLC,* 838 F.3d at 173 (citing 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon)). Section 230, however, was added as an amendment to the CDA bill, and its purpose was "to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997))

Section 230 was Congress' response to two court cases decided in New York in the early 1990's that had conflicting results. *LeadClick Media, LLC*, 838 F.3d at 173 (explaining that Section 230 "assuaged Congressional concern regarding the outcome of two inconsistent judicial decisions," *Cubby, Inc. v. CompuServe, Inc*., 776 F. Supp. 135 (S.D.N.Y. 1991) and *Stratton Oakmont*, 1995 WL 323710, both of which "appl[ied] traditional defamation law to internet providers").

The first case involved CompuServe, which in the early days of the Internet hosted "an online general information service" through which subscribers could access thousands of outside sites and around 150 special-interest forums. *CompuServe, Inc*., 776 F. Supp. at 137. When a columnist for one of the special-interest forums posted defamatory comments about a competitor, the competitor sued CompuServe for libel. *Id*. The court found CompuServe could not be held liable as the columnist's distributor because CompuServe did not review any of the content

on the forums before it was posted. *Id*. at 140. Without knowledge of the libel, CompuServe could not be held responsible for it. *Id*.

However, the second case, *Stratton Oakmont, Inc. v. Prodigy Servs. Co*., took a different approach and imposed liability where a service provider filtered its content to block obscene material. *Stratton Oakmont*, 1995 WL 323710. Prodigy was a web services company with two million subscribers that hosted online bulletin boards, including the popular site, MoneyTalk. *Id.* Because Prodigy moderated its online message boards and deleted some messages for "offensiveness and 'bad taste,'" the court found that it had become akin to a publisher with responsibility for defamatory postings that made it onto the site. *Id.* To avoid liability, the company would have to give up moderating altogether and simply act as a blind host, like CompuServe. *Id.*

In Congress, several legislators reacted to the *Stratton Oakmont* decision with alarm. 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995 (statement of Rep. Cox). The prospect of liability for other users' posts would have a chilling effect on internet companies, resulting in severe restrictions on what and where internet users could post. *LeadClick Media, LLC*, 838 F.3d at 173. The amendment specifically made sure that "providers of an interactive computer service" would not be treated as publishers of third-party content. *Id*. "Congress passed Section 230 because the First Amendment did not adequately protect large online platforms that processed vast amounts of third-party content." Kosseff, Jeff. *The Twenty-Six Words That Created the Internet. Cornell University Press*, 2019. Unlike publications like newspapers that are accountable for the content they print, online computer services would be relieved of this liability.

The secondary purpose of the Section 230 amendment, accomplished by 230(c)(2)(A), was "to encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material, so as

to aid parents in limiting their children's access to such material." *Batzel*, 333 F.3d at 1028 (citing 141 Cong. Rec. H8469–70 (Statements of Representatives Cox, Wyden, and Barton)). Section 230(c)(2) states that interactive service providers and users, as well as services like ad-blockers that provide the "technical means" to filter content online, may not be held liable for voluntarily acting in good faith to restrict access to objectionable material. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009).

Consequently, as the Seventh Circuit described, Section 230(c)(2) applies when a service provider "does filter out offensive material," while Section 230(c)(1) applies when providers "refrain from filtering or censoring the information on their sites." *Doe v. GTE Corp.*, 347 F.3d 655, 662 (7th Cir. 2003).

In stark contrast to the language of Section 230 and its legislative purpose of promoting free speech and protecting child safety, courts have misinterpreted the CDA to immunize innumerable websites from discriminatory acts toward users, including not only censorship, but outright bans toward protected classes of people. "Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike." Executive Order 13925.[8] This case presents a critical opportunity for this Court to clarify and correct the scope of immunity of Section 230.

B. Vimeo is not Entitled to Immunity Under Section 230(c)(1)

Based on both the plain language of the CDA and the legislative history explained above, immunity under Section 230(c)(1) is only applicable where a plaintiff seeks to hold the interactive computer service liable for publishing the

[8] Available at https://www.federalregister.gov/documents/2020/06/02/2020-12030/preventing-online-censorship.

content of a third-party. It is not applicable where the interactive computer service removes the plaintiff's content based on discriminatory animus.

Section 230(c)(1) states the following: "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**." 47 U.S.C. Section 230 (emphasis added). Therefore, immunity under Section 230(c)(1) applies to a defendant if the defendant: "(1) is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information." *LeadClick Media, LLC*, 838 F.3d at 173 (citations and internal quotation marks omitted). Here, the second element is not met because the claim is not based on information provided by a third-party; it is based on Vimeo's discriminatory ban of Church United and Domen. Likewise, the third element is not met because Domen and Church United are not attempting to treat Vimeo as the publisher or speaker of any content.

In *Force*, 934 F.3d at 53, this Court correctly applied Section 230(c)(1). The plaintiffs in *Force* were victims of Hamas terrorist attacks in Israel, and they were suing Facebook on the basis that Facebook provided a communications platform which enabled the terrorists to commit the attacks. *Id*. at 57. This Court found that Facebook was an interactive computer service, the claim was based on information provided by the third-party Hamas, and plaintiffs were attempting to treat Facebook as the speaker of Hamas. *Id*. at 67.

Unlike *Force*, Church United and Domen are not attempting to treat Vimeo as the speaker of any third-party message. They are seeking to hold Vimeo liable for denying a service based on sexual orientation and religion. Therefore, immunity under Section 230(c)(1) is not applicable here.

This Court correctly denied immunity under Section 230(c)(1) in *LeadClick Media, LLC*, 838 F.3d at 158. There, the Federal Trade Commission and the State of Connecticut sought to hold LeadClick liable for its role in the use of deceptive websites to market weight loss products. *Id*. at 162. LeadClick managed a network of advertising companies, and some of those companies created deceptive websites, falsely claiming that independent testing confirmed the efficacy of the products. *Id*.

Leadclick attempted to assert immunity under Section 230(c)(1). *Id*. at 175. However, this Court held that Leadclick's actions were outside the scope of Section 230(c)(1), which immunizes defendants from being "held liable as a publisher or speaker of another's content." *Id*. at 176. This Court explained that the plaintiff's theory of liability was based on Leadclick's "own deceptive acts or practices" rather than for publishing deceptive content created by another. *Id*. at 177.

The Ninth Circuit likewise correctly denied immunity under Section 230(c)(1) when the claims did not seek to hold a defendant liable for content of a third-party. *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1189 (9th Cir. 2008) (en banc). The plaintiff, a county fair housing council, sued defendant, a website operator, alleging violations of the federal and state housing discrimination laws. *Id.* at 1162. Before subscribers could search listings or post housing opportunities on the defendant's website, they had to create a profile that required them to answer a series of questions regarding their sex, sexual orientation, and family status. *Id.* at 1161. Subscribers had to select from answers created by defendant and were unable to skip the questions or refuse to answer. *Id.*

The Ninth Circuit found that Section 230(c)(1) was not applicable because defendant "created the questions and choice of answers and designed its website registration process around them." *Id*. at 1164. Roomates was "much more than a passive transmitter of information provided by others," and therefore, 230(c)(1) immunity was inapplicable. *Id*. at 1166. The Ninth Circuit further explained that the

CDA "was not meant to create a lawless no-man's-land on the Internet," where conduct that is illegal offline is now legal online. *Id*. at 1167. "If such screening is prohibited when practiced in person or by telephone, we see no reason why Congress would have wanted to make it lawful to profit from it online." *Id*.

Here, like *Leadclick* and *Fair Housing*, Church United and Domen are attempting to hold Vimeo accountable for Vimeo's own unlawful discriminatory acts and practices, rather than for publishing content created by another. In this case, the liability is not based on Vimeo being a passive transmitter of information provided by others. Liability is based on Vimeo refusing to provide service to a user based on intentional sexual orientation and religious discrimination. Such discrimination is prohibited when practiced in person at a business establishment, and the CDA does not give the green light for discrimination online.

As this Court acknowledged in *Leadclick*, it has "had limited opportunity to interpret Section 230." *Leadclick Media, LLC,* 838 F.3d at 173. However, several other courts have had the opportunity to correctly grant Section 230(c)(1) immunity in accordance with both the plain language and legislative purpose, *e.g.*:

- *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (Section 230(c)(1) precludes plaintiff's claim against Facebook CEO Mark Zuckerberg for failure to remove the Third Palestinian Intifada's account quickly);
- *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) (Section230(c)(1) immunity bars plaintiff's claim against Consumeraffairs.com for failure to delete allegedly false negative reviews by third-party about plaintiff);
- *Jane Doe No. 1 v. Backpage.com, LLC,* 817 F.3d 12 (1st Cir. 2016) (Section230(c)(1) immunity bars plaintiff's sex trafficking claims against Backpage, wherein plaintiff sought to hold Backpage liable for allowing sex traffickers to post advertisements on its site);

- *Barnes v. Yahoo!, Inc*., 570 F.3d 1096 (9th Cir. 2009), as amended (Sept. 28, 2009) (Yahoo! was granted Section230(c)(1) immunity where the plaintiff sought to hold Yahoo! liable for negligence in its failure to remove profiles created by plaintiff's ex-boyfriend involving indecent photos of plaintiff); and
- *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc*., 519 F.3d 666 (7th Cir. 2008), as amended (May 2, 2008) (Craigslist had (c)(1) immunity based on plaintiff's claim that Craigslist violated Fair Housing Act by allowing discriminatory phrasing in posts for housing made by third parties).

Each of these cases is all in accordance with plain language and purpose of Section 230(c)(1), and the provider of an interactive computer service was not liable as publisher or speaker of any information provided by another information content provider. Unfortunately however, other courts have collapsed the distinctions between Section 230(c)(1) immunity and Section 230(c)(2)(B), resulting in blanket immunity for website providers engaged in unlawful activity even when the website providers are being sued for their own bad faith conduct as opposed to the content of a third-party.

i. The District Court Improperly Conflated the Two Distinct Immunity Provisions of Section 230

The District Court erred in applying case law, mostly decisions originating in California, that misconstrue the CDA and conflate the immunity provisions of (c)(1) and (c)(2). The cases the lower court relied on disregard both the plain language and the clear legislative intent that Section 230(c)(1) is intended only to shield websites from being held liable as the speaker of a third-party's content:

- *Lancaster v. Alphabet Inc.*, No. 15-CV-05299 (HSG), 2016 WL 3648608 (N.D. Cal. July 8, 2016) (Northern District of California applied Section 230(c)(1) immunity to the decision by YouTube, LLC to remove plaintiff's YouTube videos);

- *Ebeid v. Facebook, Inc.*, No. 18-cv-07030-PJH, 2019 WL 2059662, at *4-5 (N.D. Cal. May 9, 2019) (Northern District of California applied Section 230(c)(1) immunity to Facebook's "decision to remove plaintiff's posts" and "Facebook's on-and-off again restriction of plaintiff's use of and ability to post on the Facebook platform");
- *Mezey v. Twitter, Inc.*, No. 18-CV-21069 (KMM), 2018 WL 5306769, at *2 (S.D. Fla. July 19, 2018) (applying Section 230(c)(1) immunity to Twitter for decision to suspend plaintiff's Twitter account); and
- *Riggs v. MySpace, Inc.*, 444 F. App'x 986, 987 (9th Cir. 2011) (dismissing under Section 230(c)(1) claims "arising from MySpace's decisions to delete [plaintiff's] user profiles on its social networking website").

None of these cases discussed the legislative intent of the CDA or the two types of immunity granted by the CDA. In fact, none even mentioned Section 230(c)(2). The Ninth Circuit case, *Id*. 444 F. App'x at 986, had no analysis of the CDA and concluded in one single solitary sentence that MySpace was immune. Ironically, *Riggs*' one sentence cited *Fair Housing*, 521 F.3d at 1157 where immunity under Section 230(c)(1) was denied because the plaintiff's claims did not seek to hold a defendant liable for content of a third-party. The implication of misapplying Section 230(c)(1) is that all internet service companies will be immune even if they intentionally refuse to provide a business service to a user based on their status in a protected class.

President Trump directly addressed the consequences of misapplication of (c)(1) in situations where websites are "deleting content and entire accounts" for improper motives. In Executive Order 13925 of May 28, 2020,[10] President Trump declared the following:

> It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and

> purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.

The immunity available under (c)(1) is distinct, specific, narrow, and clear: it shields interactive computer service providers from liability for publishing the content of a third-party. It is not applicable to this case, where Church United and Domen seek to impose liability on Vimeo for refusing to allow them to use Vimeo's services based on sexual orientation and religious discrimination. Vimeo is not entitled to complete immunity against a pastor's claim for sexual orientation and religious discrimination that is normally prohibited by state laws against discrimination. The effect of the Court's interpretation of the CDA is that a company like Vimeo, YouTube, or even Amazon could decide that it will not allow someone to hold an account with their site just because they are black, Asian, a former homosexual, or of a particular religion.

ii. The District Court Misinterpreted the CDA Resulting in the Immunity in (c)(1) Swallowing the More Specific Immunity in (c)(2)

The District Court holding and the cases it relied on collapse the distinctions between the two immunity provisions of the CDA. Section 230(c)(2) grants immunity only for actions "taken in good faith," while Section 230(c)(1) contains no similar requirement. 42 U.S.C. Section 230(c)(2)(A). In this sense, Section 230(c)(2) immunity is narrower than Section 230(c)(1). If an internet provider were immune under (c)(1) for refusing to provide a business service to a user based on a protected class, then (c)(2) requiring good faith for the same action would be meaningless. It is well-settled that courts should avoid statutory interpretations that render provisions superfluous: "It is our duty to give effect, if possible, to every

clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (additional internal quotation omitted)); *see also Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing rule against surplusage as a "cardinal principle of statutory construction").

In *e-Ventures Worldwide, LLC v. Google, Inc*., 188 F. Supp.3 d 1265 (M.D. Fla. 2016) and 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017), the court rejected Google's motion to dismiss as well as a motion for summary judgment, based on allegations (and, later, circumstantial evidence) that Google removed plaintiff's websites from its search results for anticompetitive reasons. *Id*. at 1265,1277. In so doing, the court also expressly rejected the defendant's insistence that its intent, no matter how maliciously or unlawfully motivated, was irrelevant under Section 230(c)(1):

> Interpreting the CDA this way results in the general immunity in (c)(1) swallowing the more specific immunity in (c)(2). Subsection (c)(2) immunizes only an interactive computer service's 'actions taken in good faith.' If the publisher's motives are irrelevant and always immunized by (c)(1), then (c)(2) is unnecessary. The court is unwilling to read the statute in a way that renders the good-faith requirement superfluous.

2017 WL 2210029 at *3; *see also Fair Housing,* 521 F.3d at 1165 ("The CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate's own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them.").

Here, the District Court held that an interactive computer service may delete a plaintiff's entire account under Section 230(c)(1) for any reason whatsoever, and the provider's motives are irrelevant. (A-17). The District Court discussed the

surplusage argument by stating that "there are situations where (c)(2)'s good faith requirement applies, such that the requirement is not surplusage." (A-17).

It then gave the hypothetical from *Barnes* 570 F.3d at 1096 wherein an interactive computer service could not take advantage of subsection (c)(1) because it developed the content at issue. (A-17). Because (c)(1) only applies to third-party content, this is an accurate application of (c)(1). Likewise, an interactive computer service that choses to delete a user's videos and bans them from using the service, is not immune under (c)(1) because they are not being sued for a third party's conduct. Nonetheless, the District Court still conflated (c)(1) and (c)(2) and ignored the good faith requirement of (c)(2). If Vimeo's motives are irrelevant and it is always immunized by (c)(1) for deleting a user's account, then (c)(2) is unnecessary. This would render (c)(2) superfluous.

Where an interactive computer service is not being sued based on third-party content, but rather based on policing the plaintiff's content, (c)(2) is the relevant immunity provision.

C. Vimeo is not Entitled to Immunity Under Section 230(c)(2)(A)

Vimeo is not entitled to § 230(c)(2)(A) immunity at the motion to dismiss stage because Domen and Church United alleged Vimeo acted in bad faith by banning them based on unlawful sexual orientation and religious discrimination. Section 230(c)(2)(A) of the CDA provides in relevant part that "[n]o provider . . . of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . .." 47 U.S.C. Section 230(c)(2)(A). The purpose of Section 230(c)(2)(A) is to encourage interactive computer services and users of such services to self-police the internet for obscenity and inappropriate material, so as to aid parents in limiting their children's access to such material. See

Section 230(b)(4); *see also* 141 Cong. Rec. H8469–70 (Statements of Representatives Cox, Wyden, and Barton). Here, Vimeo restricted access and availability of Church United and Domen's videos when it cancelled their account. Therefore, (c)(2) is expressly applicable as opposed to (c)(1).

Good faith is a requirement for any attempt to invoke the immunity extended under Section 230(c)(2)(A). *See generally Perez-Guzman v. Lynch*, 835 F.3d 1066, 1074 (9th Cir. 2016), *cert. denied sub nom*. *Perez-Guzman v. Sessions*, 138 S. Ct. 737 (2018). It is beyond question that Congress did not intend to recognize an entity acting in bad faith as a "Good Samaritan," let alone to confer immunity on bad faith conduct. *See Fair Housing*, 521 F.3d at 1157. Section 230(c)(2)(A) immunity is not available to restrict appropriate content simply because the provider has a motive to unreasonably designate that material "otherwise objectionable" or "harassing" for purely discriminatory goals. Indeed, the CDA was not intended to and should not extend immunity to a party that "abuse[s] the immunity" by unilaterally "block[ing] content for anticompetitive purposes or merely at its malicious whim, under the cover of considering such material 'otherwise objectionable.'" *Zango Inc.*, 568 F.3d at 1178.

In *Zango*, the Ninth Circuit recognized that Section 230(c) establishes a subjective standard whereby internet users and software providers decide what online material is objectionable. *Id*. at 1173. Although "otherwise objectionable" of Section 230 (c)(2)(A) was read broadly in *Zango*, the Ninth Circuit subsequently explained that "otherwise objectionable" does not include unlawful purposes, such as for anticompetitive animus. *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc*., 946 F.3d 1040, 1054 (9th Cir. 2019) (explaining "*Zango* did not define an unlimited scope of immunity under § 230, and immunity under that section does not extend to anticompetitive conduct"). The court held that Section 230(c)(2) did not

immunize the defendant because anticompetitive animus "appears contrary to [the statute's] history and purpose." *Id*. at 1050.

The District Court did not "accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2d Cir. 2009). Instead, the District Court ruled that Domen and Church United "set forth no facts to support" the allegation that Vimeo acted in bad faith. (A-19). In the Complaint, Domen and Church United specifically allege that Vimeo acted in bad faith by cancelling Church United and Domen's entire library of videos. (A-52 ¶ 39). Vimeo did not just censor certain videos, but instead banned Church United and Domen from its platform, evidencing discrimination based on Domen's sexual orientation and religion, as opposed to mere speech. (A-52 ¶ 39; A-98). The Complaint also alleges disparate treatment and lists similar videos about sexual orientation and religion that were not deleted, further evidencing Vimeo's discrimination against Church United and Domen. (A-53 ¶¶ 44-46). Vimeo failed to provide "an explanation for the distinction between Church United and Domen's videos relating to sexual orientation" and religion. (A-53 ¶ 46). None of Church United and Domen's videos contained obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable material. (A-53 ¶ 43). The five videos flagged by Vimeo as problematic centered on Domen's sexual orientation as a former homosexual and his religion. (A-52 ¶ 40).

Based on the allegations of discrimination, Vimeo should not be entitled to immunity at the motion to dismiss stage, prior to an opportunity to uncover facts negating its good faith defense. As the Ninth Circuit explained in *Enigma*, "otherwise objectionable" content should not include material that discriminates based on sexual orientation and religion. This Court should not immunize Vimeo because this discriminatory animus, just like the anticompetitive animus in *Enigma*,

is contrary to the CDA's history and purpose. Vimeo may not merely claim subjective good faith at the motion to dismiss stage before further evidence of their discriminatory intent could be uncovered in discovery. Church United and Domen should have the opportunity to prove Vimeo's claim regarding SOCE is a pretext for unlawful discrimination. Moreover, Section 230(c)(2)(A) immunity does not exist for a state law discrimination claim, given that Section 230 states that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C. § 230(e)(3).

Section 230(c)(2) immunity should not be used to give Vimeo a license to unlawfully discriminate against Church United and Domen. As Domen and Church United properly plead, there is a complete absence of good faith on behalf of Vimeo, and therefore, it does not qualify for 230(c)(2) immunity.

II. Appellants' Stated a Claim Under the California Unruh Act and New York State Human Rights Law

The lower court erred in finding that Church United and Domen failed to state a claim under the California Unruh Act or New York State Human Rights Law because Vimeo removed Church United and Domen's account because of the content of Church United and Domen's videos, not based upon Domen's sexuality or religion. (A-22). As an initial matter, at the pleading stage, Church United and Domen do not have to disprove Vimeo's alternative explanation or negate the defense of immunity under the CDA; they need only show a minimal inference of discrimination. *Menaker v. Hofstra Univ.*, 935 F.3d 20, 30 (2d Cir. 2019) (explaining that "it is often difficult to obtain direct evidence of discriminatory intent" to determine "the elusive factual question of intentional discrimination"). Accordingly, to survive a motion to dismiss, "allegation of facts supporting a minimal plausible inference of discriminatory intent suffices as to this element of the claim." *Doe v. Columbia Univ.*, 831 F.3d 46, 55 (2d Cir. 2016). "[A] well-pleaded complaint may

proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556.

Here, instead of accepting the Complaint's factual allegations as true and drawing plausible inferences from them, the District Court erroneously treated Church United and Domen's discrimination claims as conclusory. However, the Complaint contains specific factual allegations supporting an inference of sexual orientation and religious discrimination. The Complaint alleges that Vimeo acted intentionally and discriminated against Church United and Domen when it deleted their entire library of videos and canceled their account. (A-52 ¶ 39; A-53 ¶ 44). By permanently banning Church United and Domen from its platform, as opposed to censoring the five videos, it is evident that Vimeo discriminated not merely against a message, but against Church United and Domen based on sexual orientation and religion. (A-53 ¶¶ 43-47).

The Complaint also alleges disparate treatment and lists similar videos about sexual orientation and religion posted by other users that were not deleted, further evidencing Vimeo's discrimination. (A-53 ¶¶ 44-46). Vimeo failed to provide an explanation for the distinction between Church United and Domen's videos relating to sexual orientation and religion and similar videos by other users on its platform. (A-53 ¶ 46). If Domen were a heterosexual turned homosexual would Vimeo banned Church United's account? Based on the allegations in the First Amended Complaint, the answer is a resounding "no," indicating discriminatory intent. (A-53 ¶¶ 44-46). Therefore, Church United and Domen have set forth sufficient facts to establish a plausible inference that Church United and Domen are the victims of unlawful discrimination pursuant to California's Unruh Act and New York's Sexual Orientation Non-Discrimination Act. At the very least, Church United and Domen should be given a chance to amend the Complaint as necessary.

CONCLUSION

For the reasons set forth above, the Judgment of the District Court should be reversed, and the case should be remanded for further proceedings.

DATED: June 15, 2020 TYLER & BURSCH, LLP

By: s/ Robert H. Tyler
Robert H. Tyler, Esq.
Nada N. Higuera, Esq.
Attorneys for Appellants, JAMES DOMEN and CHURCH UNITED

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (New Times Roman) of 14 points, and contains 7636 words (excluding, as permitted by Fed. R. App. P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

Dated: June 15,2020

s/ Robert H. Tyler
Robert H. Tyler, Esq.

CERTIFICATE OF SERVICE

I am employed in the county of Riverside, State of California. I am over the age of 18 and not a party to the within action. My business address is 25026 Las Brisas Road, Murrieta, California 92562.

☒ I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on June 15, 2020.

APPELLANTS' OPENING BRIEF

Executed on June 15, 2020, at Murrieta, California.

☒ (Federal) I declare that I am a member of the Bar of this Court at whose direction the service was made.

s/ Robert H. Tyler

Email: rtyler@tylerbursch.com