IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ____

TWITTER, INC.

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO,

Respondent;

JARED TAYLOR; NEW CENTURY FOUNDATION,

Real Parties in Interest.

FROM THE SUPERIOR COURT FOR SAN FRANCISCO COUNTY, NO. CGC-18-564460
HAROLD KAHN, JUDGE (DEPT. 302, 415-551-3723)

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES [SUPPORTING EXHIBITS FILED SEPARATELY]

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ATTORNEYS FOR PETITIONER

STAY REQUESTED

(For Superior Court's July 11, 2018 Order Overruling In Part Petitioner's Demurrer)

Service on the California Attorney General and City and County of San Francisco District Attorney required by Cal. Bus. & Prof. Code § 17209

CERTIFICATE OF INTERESTED PARTIES

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party filing this certificate (Cal. R. Ct. 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. R. Ct. 8.208(e)(2)):

- Jared Taylor (plaintiff and real party in interest)
- New Century Foundation (plaintiff and real party in interest)
- Twitter, Inc. (defendant and petitioner)
- Superior Court of California, San Francisco County (respondent)

Dated: August 6, 2018 WILMER CUTLER PICKERING HALE AND DORR LLP

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INTRODUCTION

This case tests whether a private-sector Internet company may regulate the content posted on its platform and enforce rules to prevent the distribution of abusive, racist, or dangerous content online. Twitter, Inc. ("Twitter") adopted the rule at issue here—barring accounts belonging to or affiliated with violent extremist groups—out of concern that allowing violent extremists on its platform could "chill[]" the speech of "opponents and bystanders" and "have dangerous consequences offline." App'x 694. It then enforced the rule against Real Parties In Interest Jared Taylor and New Century Foundation ("Plaintiffs")—an individual and group described by public articles cited in their Amended Complaint as proponents of "crudely white supremacist" ideas. App'x 979. Specifically, Mr. Taylor "is the founder of" New Century Foundation, which "regularly publishes proponents of eugenics and blatant anti-black and anti-Latino racists." *Id.*

The right of Twitter and other Internet companies to adopt and enforce such community standards is guaranteed by Section 230 of the federal Communications Decency Act ("Section 230") and the First Amendment. Together, these federal laws protect Twitter's "exercise of editorial control and judgment" and safeguard Twitter's "choice of material" to disseminate through its platform. *Hurley v. Irish Am. Gay, Lesbian, & Bisexual Grp.*, 515 U.S. 557, 575 (1995); *see also Barrett v. Rosenthal*, 40 Cal. 4th 33, 43 (2006); 47 U.S.C. § 230.

The Superior Court's ruling guts these protections. Despite clear law to the contrary, the decision allows Plaintiffs to challenge Twitter's rule barring violent extremist groups based on novel and flawed state-law theories that, if accepted as a viable basis for litigation, would produce far-reaching and significant consequences for the ability of all Internet companies to adopt and enforce community standards and to protect users.

Allowing this suit to go forward would cause Twitter irreparable harm by eliminating Twitter's statutory immunity from the burdens of litigation. Section 230 confers that immunity precisely to protect and encourage Twitter's alleged conduct here—the exercise of editorial judgment and screening of objectionable content. The Superior Court's ruling that Twitter must face the burdens of litigation for exercising those very functions creates precisely the disincentives that Section 230 aims to avoid. And it chills protected First Amendment conduct by signaling to Internet-communications platforms that they should think twice before updating community standards or removing harassing or abusive content, lest they provoke a flood of copycat litigation building on the Superior Court's unprecedented and unsound theories. Twitter thus seeks immediate review of the Superior Court's order and a stay of all proceedings in the Superior Court pending this Court's adjudication of Twitter's petition for writ relief.

The Superior Court's clearly erroneous rulings on the issues of widespread interest and public importance presented in this case require this Court's intervention and warrant granting the writ. *See Omaha Indem. Co. v. Superior Ct.*, 209 Cal. App. 3d 1266, 1273-1274 (1989).

PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

I. The Parties

1. Petitioner Twitter, Inc. is a private-sector Internet communications platform that users can join and use for free. App'x 399 ¶ 16; App'x 417-418 ¶ 62.

2. Real Party In Interest Jared Taylor is a natural person well known for his "dissident" views regarding "mainstream thinking on race" relations, including his belief that members of racial groups have "the right to choose" to "remain[] the majority in their nation." App'x 406 ¶ 28; App'x 407, ¶ 37. Mr. Taylor created a Twitter account in March 2011. App'x 406 ¶ 29.

3. Real Party In Interest New Century Foundation is a 501(c)(3) organization founded by Mr. Taylor in 1994. App'x 398-399 ¶ 13. It conducts the activities of *American Renaissance*, a publication founded by Mr. Taylor to advance his views on race. *Id*. New Century Foundation created a Twitter account in June 2011. App'x 406 ¶ 32.

4. According to materials cited in their Amended Complaint, Plaintiffs disseminate "crudely white supremacist" views. App'x 979. Their gatherings are "typically banned from hotels and conference rooms as soon as the proprietors find out about [their] racist mission." App'x 983.

II. Factual Background

5. Twitter is a free online communications platform. Its hundreds of millions of users use the platform to share their views, keep informed about current events, and learn from others. App'x 399 ¶ 16; App'x 417-418, ¶ 62. Twitter users stay connected by posting and reading "Tweets," short messages limited to a certain number of characters. App'x 399 ¶ 16

6. Twitter's services are free, but users must agree to Twitter's User Agreement, including Twitter's Terms of Service and the Twitter Rules. App'x 399 ¶ 16; App'x 401-402 ¶ 19; App'x 523-527; *see also* App'x 1004-1011. Together these documents establish guidelines for who may maintain an account and what type of content can be shared. App'x 430-431 ¶¶ 97-98.

7. An overarching goal of these community standards is to protect user safety online. While Twitter aims to give "everyone … the power to create and share ideas instantly, without barriers," Twitter also recognizes that "freedom of expression and open dialogue … mean[] little

as an underlying philosophy if voices are silenced because people are afraid to speak up." App'x 1005, 1007.

8. At the time Plaintiffs joined the platform in June 2011, Twitter's Terms of Service "reserve[d] the right at all times … to remove or refuse to distribute any Content on the Services and to terminate users or reclaim user names." App'x 993, 1000. Later versions of the Terms of Service included an additional, overlapping provision stating that "[w]e may suspend or terminate your accounts or cease providing you with all or part of the Services at any time for any or no reason." App'x 430-431 ¶ 97; *e.g.*, App'x 611, 668.

9. As of June 2011, the Twitter Rules—a three-page, plain-English document—stated that Twitter "will not censor user content, except in limited circumstances" described in a list of exceptions that, at the time, did not include affiliation with a violent extremist group as a basis for suspension. App'x 524-526. The very next paragraph after that statement, however, said that to "make Twitter a better experience for all … [w]e may need to change these rules from time to time and reserve the right to do so. Please check back [to the webpage hosting the Rules] to see the latest." App'x 524.

10. On November 17, 2017, Twitter announced "updated … rules around abuse and hateful conduct as well as violence and physical harm," to be enforced "starting December 18." App'x 986; *see also* App'x 687-

695. This update added the Violent Extremist Group Rule, which states that users "may not affiliate with organizations that—whether by their own statements or activity both on and off the platform—use or promote violence against civilians to further their causes." App'x 694. Twitter explained that this rule against violent extremist groups was necessary because allowing violent extremists on its platform could "chill[]" the speech of "opponents and bystanders" and "have dangerous consequences offline." *Id.*

11. The Amended Complaint alleges that on December 18, 2017, Twitter suspended Plaintiffs' Twitter accounts and informed them that the accounts were permanently suspended "because the accounts were 'found to be violating … the Twitter Rules against being affiliated with a violent extremist group.'" App'x 410-411 ¶¶ 45-46.

III. Procedural History

12. Plaintiffs filed this suit in February 2018 and amended their complaint a month later. They seek a broad injunction, purportedly "on behalf of themselves, others similarly situated, and the general public," ordering Twitter to reinstate their accounts, to cease enforcing "its facially overbroad policy on 'Violent Extremist Groups,'" and to cease "suspend[ing] or ban[ning] users based on the user's viewpoint or perceived affiliations." App'x 395; App'x 409.

13. The Amended Complaint raised three claims. First, it asserted that Twitter violated Plaintiffs' rights of speech and association under the California Constitution by suspending Plaintiffs' accounts based on Plaintiffs' political views. App'x 415-427 ¶¶ 58-84. Second, it alleged that Twitter violated the Unruh Civil Rights Act by "intentionally target[ing]" Plaintiffs' accounts based on "their controversial political views" and "perceived political affiliations (*e.g.*, as 'far right,' 'alt right,' and 'extremist')." App'x 427-430 ¶¶ 85-94. Finally—in the claim at issue here—it asserted that Twitter violated California's Unfair Competition Law, which prohibits "unlawful, unfair, or fraudulent business acts or practices," Cal. Bus. & Prof. Code § 17200, by allegedly "inserting unconscionable terms in its [user agreement] and deceptively advertising itself as a forum for free speech." App'x 415 ¶ 57; App'x 430-435 ¶¶ 95-111.

14. Specifically, Plaintiffs alleged that Twitter acted fraudulently in violation of the UCL by publicly portraying itself as a wide-open haven for free speech (such as by describing itself as "the free speech wing of the free speech party"), informing users in the June 2011 Twitter Rules that it "w[ould] not censor user content" except in limited circumstances, and promising that it would not make "retroactive" changes to its policies. *E.g.*, App'x 395 ¶ 1; App'x 434 ¶ 109.

15. Plaintiffs also alleged that Twitter's user agreement was unlawful under the UCL because it violated the Consumer Legal Remedies Act's ("CLRA") prohibition against "'[i]nserting an unconscionable provision in [a] contract.'" App'x 431 ¶¶ 99-100. Plaintiffs identified no theory of unlawfulness under the UCL other than the alleged violation of the CLRA.

16. On April 24, 2018, Twitter filed a demurrer arguing that Section 230 of the CDA and the First Amendment each bar Plaintiffs' claims at the threshold and that Plaintiffs' claims fail to state a claim on their own terms. Specifically, Twitter contended that Section 230 barred Plaintiffs' three claims because they all sought to hold Twitter liable for blocking user-generated content. App'x 956-957; *see also Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1170-1171 (9th Cir. 2008) (en banc) ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."). And Twitter explained that the First Amendment also bars all of Plaintiffs' claims because they impinge on Twitter's right to

exercise editorial control in creating a safe environment for its user. App'x 957-960.[1]

17. Twitter's demurrer also explained that all of Plaintiffs' claims also failed on their face, as a matter of California law. With respect to the UCL claim that is the focus of this petition, Twitter demonstrated that each of the theories for a UCL violation pleaded in the Amended Complaint—one based on alleged fraud by Twitter, the other based on alleged unlawfulness in the Twitter user agreement—was fatally defective.

18. With respect to Plaintiffs' UCL's fraud theory, Twitter's demurrer explained that the Amended Complaint failed to identify any specific statements by Twitter indicating its general support for free speech on its platform amounted to a factual representation that the company would never ban specific users. App'x 966-969. As for the statement in the 2011 Rules about the circumstances in which Twitter will censor user content, the demurrer pointed out that there was nothing false about that statement, either when it was written or more generally. App'x 966.

19. Twitter's demurrer also explained that the Plaintiffs' UCL unconscionability theory failed as a matter of California law. The only

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[1] Twitter also filed an anti-SLAPP motion, which was denied on the ground that Plaintiffs' suit fell within the public-interest exception to anti-SLAPP challenges in California Code of Civil Procedure § 425.17(b). App'x. 1334-1335. Twitter does not challenge that ruling here.

purported unlawful act discussed in the Amended Complaint was an alleged violation of the CLRA's prohibition on unconscionable terms in certain types of contracts. App'x 966. The demurrer argued that this case does not even implicate the CLRA because Twitter offers a free service and the CLRA extends only to "'acts or practices undertaken by any person in a transaction intended to result or that results *in the sale or lease of goods or services* to any consumer.'" *Id.* (quoting Cal. Civ. Code § 1770(a)). Moreover, Twitter explained that it had not made a retroactive change to its user agreement. As one of Plaintiffs' own exhibits stated, the Violent Extremist Group Rule was announced the month before it took effect. App'x 967 (citing App'x 687-692).

20. The Superior Court held a hearing on Twitter's demurrer on June 14, 2018. At the beginning of the hearing, the court issued a brief oral tentative ruling. App'x 1334-1336.

21. The Superior Court sustained Twitter's demurrer without leave to amend as to Plaintiffs' California Constitution and Unruh Act claims, holding them barred by Section 230(c)(1) of the CDA. App'x 1335. Plaintiffs did not object to this ruling. App'x 1336.

22. Over Twitter's objections, the Superior Court overruled Twitter's demurrer as to Plaintiffs' UCL claim. *See* App'x 1335; App'x 1343-1366. Regarding Twitter's threshold federal-law defenses, the court concluded that Section 230 does not apply to a UCL claim. App'x 1335;

App'x 1350-1353; App'x 1360. Although the court recognized that Section 230(c)(1) "covers precisely the allegations in the first and second causes of actions," App'x 1335—*i.e.*, the claims that directly challenged Twitter's actions in banning Plaintiffs allegedly on the basis of their political views—the court thought the UCL claim "has nothing to do with viewpoint discrimination," but instead concerns only "contract principle[s]" against unconscionability and deception, which the court viewed as outside the scope of Section 230. App'x 1350; App'x 1353; App'x 1360. For similar reasons, the court held that the First Amendment also does not bar the UCL claim, suggesting that the First Amendment does not allow Twitter to reserve the right in its user agreement to remove users based on their views or objectionable content. App'x 1335.

23. The Superior Court also held, over Twitter's objections, that Plaintiffs' UCL claim states a viable cause of action under state law. With respect to the contention that Twitter acted fraudulently in violation of the UCL, the court concluded that Plaintiffs had stated a viable claim that Twitter made misleading or deceptive statements by suggesting that its platform "is open to everybody of all viewpoints" subject only to limited enumerated exceptions. App'x 1359. In support of that claim, Plaintiffs identified only one allegedly fraudulent statement that was neither a statement of opinion nor a generalized statement that no reasonable person could possibly be misled by, *see* App'x 1362-1364 (citing App'x 408-409 ¶

40 & App'x 523-527)—namely, Twitter's statement in the June 2011 Twitter Rules, quoted in the Amended Complaint, that:

> Our goal is to provide a service that allows you to discover and receive content from sources that interest you as well as to share your content with others. We respect the ownership of content that users share and each user is responsible for the content that he or she provides. Because of these principles, we do not actively monitor user's content and will not censor user content, except in the limited circumstances described below.

App'x 408 ¶ 40 (citing App'x 524). The court found that statement to be a sufficient basis for pleading a "fraudulent" act under the UCL because the enumerated exceptions to the alleged promise "not [to] censor user content" did not at the time include the Violent Extremist Group Rule and thus, in the court's view, did not "cover viewpoint discrimination" of the type Plaintiffs allege. App'x 1365.

24. Twitter pointed out that the *very next paragraph* of the 2011 Twitter Rules, immediately following the statement quoted in the Amended Complaint and relied on by the Superior Court, stated that "[w]e may need to change these rules from time to time and reserve the right to do so. Please check back here to see the latest." App'x 524; *see* App'x 1364. Twitter also pointed out that the same three-page document informed users that "Twitter reserves the right to immediately terminate your account, without further notice, in the event that, in its judgment, you violate these

rules or the terms of service." App'x 1364 (quoting App'x 526); *see also* App'x 1359-1360.

25. The Superior Court determined that it could not consider Twitter's counter-points. The court stated that on a demurrer it was "only allowed to look at the first amended complaint" itself and could not consider "material[s]" outside the text of the Amended Complaint unless they were judicially noticeable, App'x 1360-1361—including the additional language in the June 2011 Twitter Rules on which Twitter asked the court to focus. Thus, even though that language was set forth in an exhibit Plaintiffs had attached to their Amended Complaint, the court held that it had to be ignored at this stage. App'x 1364-1366 ("We're only on a demurrer.").

26. Regarding Plaintiffs' alternative theory that Twitter's user agreement is unlawful under the UCL because it includes an allegedly unconscionable provision in violation of the CLRA, the Superior Court recognized that Twitter was "probably right" that the Amended Complaint does not allege a viable CLRA/unlawfulness claim. App'x 1344. But rather than reach that issue, the court identified—and found that Plaintiffs could proceed on—*different* unconscionability theories (untethered to the CLRA) that the court acknowledged were not even mentioned in the Amended Complaint. *Id.* Focusing on "certain aspects of th[e] claim that the plaintiffs themselves did not identify," App'x 1343, the court held the

Amended Complaint could be understood to assert a viable claim that Twitter's user agreement violates either California Civil Code § 1670.5's bar on unconscionable contract provisions or at least "common law" unconscionability principles. App'x 1335; App'x 1345.

27. Specifically, the court reasoned that the provision of the current Twitter user agreement—which the Court described as a "prolix" document—allowing Twitter to suspend a user's account for "any or no reason" is arguably unconscionable, both procedurally and substantively. The court found the provision to be arguably procedurally unconscionable because Twitter, while allegedly knowing its platform to be a highly important medium for public discourse, nonetheless imposed the "any or no reason" provision on a take-it-or-leave-it basis. App'x 1348-1349. The court further found it to be arguably substantively unconscionable for Twitter "to deprive people of the most important platform to speak and to be able to seek redress of their legislators." App'x 1348.

28. Because these unconscionability theories had not been presented in any filings, Twitter repeatedly requested the opportunity to submit supplemental briefing addressing them. App'x 1344; App'x 1345; App'x 1351. The Superior Court denied the request. *E.g.*, App'x 1345.

29. On July 11, 2018, the Superior Court issued a formal order on Twitter's demurrer, which duplicated its tentative ruling.

IV. Basis For Relief

30. The Superior Court committed multiple clear errors of law when it overruled Twitter's demurrer to Plaintiff's Amended Complaint. In doing so, the Superior Court laid out a roadmap for any litigant seeking to circumvent the rights of an online platform under Section 230 and the First Amendment: Simply file an Unfair Competition Law (UCL) suit claiming either that (A) the litigant was deceived into believing that the platform's community standards would remain static from the moment the litigant first joined the platform or (B) it is unconscionable for the platform to have memorialized its rights under Section 230 and First Amendment to adapt its rules over time.

31. This approach cannot be squared with Section 230 or the First Amendment. The gravamen of Plaintiffs' UCL claim is that Twitter cannot reserve its right as a publisher to establish, modify, and enforce rules governing the content it disseminates. The First Amendment protects Twitter's editorial discretion to do exactly that, and Section 230 immunizes Twitter from liability and litigation—regardless of how the claims are styled—concerning Twitter's exercise of that discretion. The Superior Court correctly recognized these principles in dismissing Plaintiffs' California Constitution and Unruh Act claims under Section 230. The Superior Court's failure to dismiss the UCL claims based on these same federal law principles constituted grave legal error.

32. Even as a matter of state law, the Superior Court's rulings with respect to Plaintiffs' UCL claim were incorrect. It cannot possibly be fraudulent for a private-sector Internet company to maintain rules regulating its platform and to adjust those rules as needed to account for new or changing circumstances—particularly where that company, like Twitter, has consistently advised users that it "may need to change these rules from time to time." App'x 524; *see also* App'x 1005. And it cannot possibly be unconscionable for a contractual provision to restate a background legal right that one party already enjoys. But under the Superior Court's reasoning, Twitter's ability to control the content distributed through its platform—control that enables Twitter to protect users from outrageous or disruptive content—would be forever frozen in place by the particular rules in place at the moment a particular user joined the platform, even though Twitter expressly advised users that it could change the rules.

V. Satisfaction Of General Grounds For Writ Review and Grounds For A Stay of Proceedings

33. Twitter would suffer irreparable injury if the writ were not issued. Specifically, Twitter's immunity from suit conferred under Section 230—immunity intended to protect it from the burdens of litigation—would be rendered meaningless if it were forced to wait for a final judgment before appealing. Moreover, if the Superior Court's denial of

immunity were left in place, the decision would provide—and indeed has already begun to provide—a template for copycat suits against Twitter and other Internet companies, further undermining Twitter's immunity from suit.

34. Many of the traditional factors that favor granting a writ are met here. *First*, this case involves an issue of widespread public interest because the Superior Court's novel reasoning would apply to any communications platform based in California that hosts third-party content. *Second*, this case presents an issue of the first impression for this Court and one on which the only two superior courts to consider the question have split. *Third*, granting the writ would finally dispose of this case, saving both the parties and the courts from expending further time and resources on meritless litigation.

35. Moreover, an extraordinary writ is necessary because there is no "plain, speedy, and adequate remedy, in the ordinary course of law." Cal. Civ. Proc. Code § 1086. Twitter is barred from appealing the trial court's order overruling its demurrer as to Plaintiffs' UCL claim until final judgment is entered. *See* Cal. Civ. Proc. Code §§ 901-914; *see also Bank of Am. Nat'l Tr. & Sav. Ass'n v. Superior Ct.*, 20 Cal. 2d 697, 701 (1942).

36. Petitioner Twitter has a "beneficial interest[]" in the lawsuit, Cal. Civ. Proc. Code § 1086, because the Superior Court's ruling directly affects its ability to control the speech disseminated on its platform, *see*

California Hosp. Ass'n v. Maxwell-Jolly, 188 Cal. App. 4th 559, 569 (2010).

37. This petition is timely because it is filed 26 days after entry of the Superior Court's order, well under the 60-day presumptive time limit for writ relief. *E.g.*, *Volkswagen of Am., Inc. v. Superior Ct.*, 94 Cal. App. 4th 695, 701-702 (2001).

38. Twitter also satisfies the criteria for obtaining a temporary stay of all proceedings in the Superior Court while this Court considers this petition for writ relief. *See* Cal. R. Ct. 8.486(a)(7) (petition for stay must "explain the urgency"). It is urgent that the Court grant such a stay because, as explained in the accompanying memorandum, the benefits of Twitter's Section 230 immunity from suit would be irrevocably lost if this case were to move forward below. *See supra* pp. 54-57. If Twitter's request for a temporary stay were not granted, Twitter would soon be required to file an answer (currently due on August 10, 2018) and otherwise devote extensive time and resources to pretrial proceedings, including discovery. These are precisely the types of burdens that immunity defenses are intended to guard against. *See Big Valley Band of Pomo Indians v. Superior Ct.*, 133 Cal. App. 4th 1185, 1189 (2005) ("An immunity defense is effectively lost if an immune party is forced to stand trial *or face the other burdens of litigation*." (emphasis added)). And it is well settled that Section 230 protects entities such as Twitter not only from liability, but

from the burdens of litigation. In similar circumstances involving immunity defenses, Courts of Appeal have granted stays pending writ review. *See, e.g., County of L.A. v. Superior Ct.*, 181 Cal. App. 4th 218, 225 (2009); *Big Valley Band*, 133 Cal. App. 4th at 1189. Twitter respectfully submits that a stay is likewise appropriate in this case.

PRAYER

Petitioners pray that that this Court:

1. Issue an order (1) staying the Superior Court's order overruling in part Twitter's demurrer and (2) staying further litigation pending a ruling on Twitter's petition for writ of mandate and/or prohibition or other appropriate relief.

2. Issue a writ of mandate and/or prohibition directing the Superior Court to:

    a) Vacate the portion of its order overruling Twitter's demurrer to Plaintiffs' Third Cause of Action; and

    b) Issue a new order sustaining in full Twitter's demurrer to Plaintiff's Amended Complaint without leave to amend.

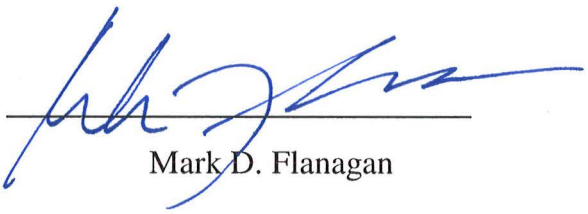
3. Grant such other relief as may be just and proper.

VERIFICATION

I, Mark D. Flanagan, declare as follows:

I am one of the attorneys for Petitioner. I have read the foregoing Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief and know its contents. The facts alleged in the petition are within my own knowledge, and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Petitioner, verify this petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in New York, New York on August 3, 2018.



Mark D. Flanagan

MEMORANDUM OF POINTS AND AUTHORITIES

I. Standard Of Review

A writ of mandate should be granted where, based on undisputed facts, "it is clear that the trial court abused its discretion," or that "'discretion can be exercised in only one way'" that the trial court failed to follow. *Robbins v. Superior Ct.*, 38 Cal. 3d 199, 205 (1985); *see also Fair Emp't & Hous. Comm'n v. Superior Ct.*, 115 Cal. App. 4th 629, 411-412 (2004) (granting writ of mandate where trial court improperly overruled a demurrer). A ruling that rests on legal error is "outside the scope of [the court's] discretion" and subject to de novo review on a writ of mandate. *Los Angeles Gay & Lesbian Ctr. v. Superior Ct.*, 194 Cal. App. 4th 288, 300 (2011) (citing *Toshiba Am. Elec. Components, Inc. v. Superior Ct.*, 124 Cal. App. 4th 762, 768 (2004)); *see also Fair Emp't & Hous. Comm'n*, 115 Cal. App. 4th at 412 ("pure question of law" is reviewed de novo).

A writ of mandate "*must* be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of the law." Cal. Civ. Proc. Code § 1086 (emphasis added). Typically, a petitioner must demonstrate: (1) that it has no right to an immediate appeal; and (2) that it would suffer "irreparable injury" (i.e., harm or prejudice that cannot be corrected on appeal) if the writ were not granted. *Los Angeles Gay &*

Lesbian Ctr., 194 Cal. App. 4th at 299-300.[2] Other circumstances can independently warrant immediate interlocutory review, including (1) "widespread interest" in the issues raised by the petition, *Brandt v. Superior Ct.*, 37 Cal. 3d 813, 816 (1985); (2) conflicting views in the lower courts on those issues, *id.*; (3) a significant issue of first impression in the petition, *Casterson v. Superior Ct.*, 101 Cal. App. 4th 177, 182 (2002); and (4) the prospect that resolving the issue or issues in the petition might finally dispose of the underlying case, *id.* California courts have granted writs of mandate in some cases based solely on these additional factors without considering the "irreparable harm" standard. *E.g.*, *id.* at 182 (writ review warranted where petition raised an issue of first impression and resolution would result in a final disposition as to petitioner); *Noe v. Superior Ct.*, 237 Cal. App. 4th 316, 325 (2015) (writ review appropriate where petition presented significant issue of first impression); *Pugliese v. Superior Ct.* 146 Cal. App. 4th 1444, 1448 (2007) (same).

[2] It is indisputable that Twitter has the requisite "beneficial[] interest[]" in the lawsuit since the ruling below directly affects its ability to control the content disseminated on its platform. Cal. Civ. Proc. Code § 1086.

II. The Superior Court Committed Grave Errors Of Law In Ruling That Plaintiffs Stated An Actionable UCL Claim

A. The UCL Claim Is Barred By The First Amendment And Section 230

In sustaining Twitter's demurrer as to the California Constitution and Unruh Act claims, the Superior Court correctly recognized that 47 U.S.C. § 230(c)(1) protects Twitter from "precisely" those claims that seek to attack its control over the content it disseminates on its platform. App'x 1335. The same analysis should have disposed of Plaintiffs' UCL claim. The gravamen of that claim is that Twitter cannot reserve its right as a publisher to set and enforce rules governing what or whose content it will or will not distribute through its platform. But that is a core First Amendment right; and Section 230 was enacted precisely to encourage platforms to actively self-regulate third-party content and immunizes Twitter for that conduct. The Superior Court committed clear error in overruling Twitter's demurrer.

Twitter's decisions on what or whose content to distribute are quintessential editorial judgments protected by the First Amendment. A private-sector communications platform cannot be compelled to disseminate a message it finds objectionable solely because its decision to exclude the message would deprive another of a private platform from which to speak. *Hurley*, 515 U.S. at 569-570. The First Amendment safeguards the "choice of material … [that]—whether fair or unfair—

constitute[s] the exercise of editorial control and judgment." *Id.* at 575. Thus, a newspaper cannot be forced to publish op-eds with which it disagrees or simply wishes to exclude, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257-258 (1974), and private citizens organizing a parade on city streets cannot be compelled "to include among the marchers a group imparting a message that organizers do not wish to convey," *Hurley*, 515 U.S. at 559.

The Superior Court perceived a distinction between claims that directly challenged Twitter's removal of user content and those that concerned only "contract principle[s]" regulating Twitter's covenants with its users. App'x 1353. But Twitter's reservation of its rights to modify its rules governing user content and to suspend users who violate those rules is no less central to Twitter's fundamental right to engage in expressive speech than its acts of removing user content.

Twitter's adoption and enforcement of a rule barring users affiliated with organizations that "identify … as an extremist group" and "use or promote violence against civilians to further their causes," App'x 694, constitutes protected expression by Twitter in at least two respects. First, adopting and enforcing that rule conveys Twitter's view that extremist violence is unacceptable. Second, it declares Twitter's unwillingness to serve as a medium for content that could chill the speech of other users of its platform or lead to dangerous consequences offline. Like the parade

organizers in *Hurley*, Twitter's "clear[] deci[sion] to exclude a message it did not like from the communication it chose to make" suffices to "invoke its right[s] as a private speaker" under the First Amendment. *Id.*

Section 230 likewise guarantees platforms like Twitter the freedom to self-regulate third-party content on their platforms. Indeed, as the California Supreme Court has recognized, that is one of Section 230's primary objectives: "to promote active screening by service providers of online content provided by others." *Barrett v. Rosenthal*, 40 Cal. 4th 33, 53 (2006). Congress "contemplat[ed] [that] self-regulation" would best achieve that objective, "rather than regulation compelled at the sword point of tort liability." *Id.* Section 230 thus "broadly shield[s] *all* providers from liability for 'publishing' information received from third parties," *id.*, in order to "remove disincentives for the development and utilization of blocking and filtering technologies" that can be used to block "objectionable or inappropriate online material," 47 U.S.C. § 230(b)(4).

More specifically, Section 230(c)(1) immunizes interactive computer service providers like Twitter from liability for their "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" created by third parties. *Barrett*, 40 Cal. 4th at 43. As the U.S. Court of Appeals for the Ninth Circuit has explained, "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce

immune under section 230." *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170-1171 (9th Cir. 2008) (en banc). Numerous courts have thus held that blocking or removing a plaintiff's posts or, as is alleged here, suspending a plaintiff's account, qualifies as "publisher conduct immunized by the CDA." *Sikhs for Justice (SFJ) v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094-1095 (N.D. Cal. 2015), *aff'd*, 697 F. App'x 526 (9th Cir. 2017); *Riggs v. MySpace, Inc.*, 444 F. App'x 986, 987 (9th Cir. 2011) (Section 230(c)(1) immunizes "decisions to delete [plaintiff's] user profiles"); *Lancaster v. Alphabet Inc.*, 2016 WL 3648608, at *2-3 (N.D. Cal. July 8, 2016) (claims arising from platform's removal of plaintiff's videos barred by Section 230(c)(1)).

In short, the provisions of Twitter's rules and terms of service that the Superior Court found actionable simply make manifest Twitter's established fundamental rights under the First Amendment and Section 230 to exercise editorial judgment. And as courts across the country have held, a provision of a contract that states expressly that a party has a right it would have even in the absence of the provision cannot possibly be unconscionable. *E.g.*, *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 234 (3d Cir. 2012) ("Quilloin fails to explain how a process allowing any employee the full amount of time permitted under law is unconscionable[.]"); *In re Checking Account Overdraft Litig.*, 485 F. App'x 403, 407 (11th Cir. 2012) ("Because the [provision allowing banks to set

off debts owed by the depositor against funds in the account] is explicitly permitted by North Carolina law, the set-off provision is not unconscionable."); *Abeyrama v. J.P. Morgan Chase Bank*, 2012 WL 2393063, at *4 (C.D. Cal. June 22, 2012) ("The arbitration agreements' incorporation of rights that exist under state law cannot be deemed unconscionable.").[3] And it cannot be fraudulent for Twitter to tell its users that it intends to exercise the discretion reserved to it under Section 230 and the First Amendment by ensuring that its rules remain consistent with Twitter's views about what content is acceptable. Twitter's rights of editorial control and self-regulation would mean little if the act of informing users of those rights could be actionably misleading.

Plaintiffs' UCL claim thus should have been dismissed at the threshold for the same reasons that their claims under the California Constitution and the Unruh Act failed. Like those claims, the UCL claim attacks Twitter's Violent Extremist Group Rule for "allowing Twitter, a

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[3] *See also Evans v. Chase Manhattan Bank USA, N.A.*, 2006 WL 213740, at *3 (N.D. Cal. Jan. 27, 2006) ("[T]he Court finds that the [contractual] terms are not unconscionable because they are specifically authorized by statute."); *Goldstein v. S&A Rest. Corp.*, 622 F. Supp. 139, 143-144 (D.D.C. 1985) (the fact that "agreements [that] did not diminish any rights that plaintiff possessed prior to the execution of those agreements" showed that the agreements were not unconscionable); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 (5th Cir. 1992) ("[A]greements to arbitrate disputes in accordance with SEC-approved procedures are not unconscionable as a matter of law.").

public forum under the … California Constitution that is required to respect the free speech rights of the public, to censor and ban users based solely on their political beliefs and affiliations." App'x 433 ¶ 105. Plaintiffs themselves allege that their UCL claim "seeks to enforce the speech and petition rights of the general public." App'x 415 ¶ 56. And the relief Plaintiffs request seeks not to compel Twitter to alter the "any or no reason" provision or issue a public correction of its purportedly fraudulent statements, but to enjoin Twitter to reinstate Plaintiffs' accounts, stop enforcing its "facially over-broad policy on Violent Extremist Groups," and "cease and desist … suspend[ing] or bann[ing] user accounts based on the user's viewpoint or perceived political affiliations." App'x 435-436. "[W]hat matters is not the name of the cause of action," but the substance of the claim and "whether the duty" the plaintiff seeks to enforce "derives from the defendant's status or conduct as a 'publisher or speaker.'" *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (applying Section 230). Here, Plaintiffs' UCL claim in substance embodies a rejection of Twitter's rights under Section 230 and the First Amendment and impinges on its protected expression and editorial judgment no differently than their other claims. The UCL claim should therefore have been dismissed with prejudice.

B. The Amended Complaint Fails To State An Actionable UCL Claim For Several Additional Reasons The Superior Court Either Did Not Consider Or Erroneously Rejected

Even setting aside the Superior Court's analysis of Section 230 and the First Amendment, the court independently committed serious errors of law in overruling Twitter's demurrer to Plaintiffs' UCL claim. Each of the UCL theories that the Superior Court deemed to be viable is fundamentally flawed as a matter of California law. That the Superior Court was forced to distort state doctrine in order to allow Plaintiffs' claims to survive makes it all the more important that this Court grant the present petition in order to prevent the underlying action from proceeding at the expense of Twitter's Section 230 immunity and First Amendment rights.

1. The Superior Court Erred In Sustaining Plaintiffs' UCL "Fraud" Theory

The Superior Court committed clear legal error in concluding that Plaintiffs alleged a viable claim that Twitter engaged in fraudulent acts or practices in violation of the UCL. To prevail on that theory, Plaintiffs must show that "members of the public are likely to be deceived" by specifically identified allegedly fraudulent statements. *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) (quotation marks omitted). As the First District has held, this inquiry focuses on "ordinary consumer[s] acting reasonably under the circumstances." *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 512 (2003).

At the hearing on Twitter's demurrer, Twitter argued that the statements by Twitter or its representatives that Plaintiffs claim were fraudulent were in fact too general, vague, or non-factual to support a claim under the UCL's fraud prong. The court directly asked Plaintiffs to identify any specific alleged statements that did not suffer from that shortcoming. App'x 1362-1364. In response, Plaintiffs focused exclusively on one: the statement in the June 2011 Twitter Rules stating that Twitter "will not censor user content[] except in the limited circumstances described below." *See* App'x 524; *see also* App'x 1363-1366; App'x 408 ¶ 40; *supra* p. 41.

The Superior Court embraced Plaintiffs' argument that this statement is actionable under the UCL fraud prong, but that was plainly wrong as a matter of law. In particular, when read in context—as the law requires but which the court erroneously found it could not do—no reasonable consumer could be misled by that statement.[4]

Significantly, Plaintiffs attached to their Amended Complaint the full text of the three-page Rules document containing the "will not censor" statement. App'x 523-527. By doing so, Plaintiffs necessarily

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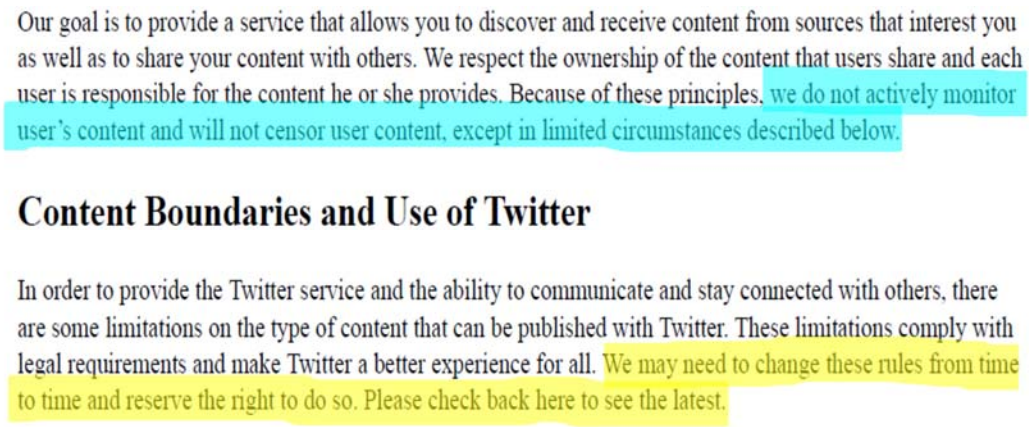
[4] Plaintiffs also failed to plead that they actually relied on this purportedly fraudulent statement (likely because they did not). *See In re Tobacco II Cases*, 46 Cal. 4th at 325. Plaintiffs do not allege that Twitter's allegedly fraudulent statements induced them to join or stay on the platform when they otherwise "in all reasonable probability" would not have. *Id.* at 326. To the contrary, Plaintiffs allege that they made frequent and advantageous use of the platform. App'x. 406-407 ¶ 33.

incorporated that document by reference. This meant, "[f]or purposes of a demurrer," that the court must "accept as true … [the] facts appearing in" the exhibit. *E.g., Mead v. Sanwa Bank*, 61 Cal. App. 4th 561, 567-568 (1998); *see also Savings Bank of San Diego Cty. v. Burns*, 104 Cal. 473, 477 (1894) ("An exhibit, as attached to the complaint, forms a part of it, and must be so treated, [even if] no express words declaring it to be so are used."). In particular, to the extent "facts appearing in the attached exhibit contradict those expressly pleaded, those in the exhibit are given precedence." *Mead*, 61 Cal. App. 4th at 568.

Here, the statement in the June 2011 Rules on which Plaintiffs exclusively focused and which the Superior Court deemed actionable was followed immediately by a warning that Twitter "may need to change these rules from time to time and reserve[s] the right to do so." App'x 524. The Rules document also instructed the user to "check back here [i.e., the webpage that hosts the Rules] to see the latest." *Id.* Here is an image of the relevant portion of the rules—as appended to the Amended Complaint—with the provision on which Plaintiffs and the court relied highlighted in blue and the provisions that the Superior Court refused to consider highlighted in yellow:



Our goal is to provide a service that allows you to discover and receive content from sources that interest you as well as to share your content with others. We respect the ownership of the content that users share and each user is responsible for the content he or she provides. Because of these principles, we do not actively monitor user's content and will not censor user content, except in limited circumstances described below.

Content Boundaries and Use of Twitter

In order to provide the Twitter service and the ability to communicate and stay connected with others, there are some limitations on the type of content that can be published with Twitter. These limitations comply with legal requirements and make Twitter a better experience for all. We may need to change these rules from time to time and reserve the right to do so. Please check back here to see the latest.

App'x 524. Immediately after the yellow-highlighted sentence followed the specific rules that were then in force and that spelled out "limited circumstances" in which Twitter might censor user content.

The language highlighted above in yellow made it obvious to any ordinary reader that the "limited circumstances" under which Twitter would refuse to disseminate content could change or expand in the future. And in light of this clear qualifier, the "will not censor" language on which Plaintiffs and the Superior Court focused cannot possibly be misleading. There can be no deception when "qualifying language appears immediately next to the representations it qualifies and no reasonable reader [can] ignore it." *Freeman v. Time, Inc.*, 68 F.3d 285, 289-290 (9th Cir. 1995); *see also Simpson v. Kroger Corp.*, 219 Cal. App. 4th 1352, 1371-1372 (2013) (where "the top and side panels of the tubs" containing butter substitute included labels informing the consumer "that the products contain both butter and canola or olive oil … [n]o reasonable person could purchase these products believing they had purchased a product containing only

butter"); *Van Ness v. Blue Cross of Cal.*, 87 Cal. App. 4th 364, 375-376 (2001) (brochure related to Blue Cross's medical plan not misleading where the "brochure carefully explain[ed]" the statement plaintiff alleged was fraudulent).

The Legislature could not have intended the UCL to bar a private-sector communications platform from being able to modify its user rules to reflect changing circumstances and protect users from new or changing sources of harm, particularly where (as here) the platform expressly reserved the right to do so. *See California Sch. Employees Ass'n v. Governing Bd.*, 8 Cal. 4th 333, 340 (1994) (a court should not interpret a statute to "lead to absurd results"); *see also Smith v. Superior Ct.*, 39 Cal. 4th 77, 83 (2006) (when a statute is ambiguous, "we choose the construction that comports most closely with the Legislature's apparent intent, … avoiding a construction that would lead to absurd consequences"); *Purifoy v. Howell*, 183 Cal. App. 4th 166, 175 (2010) (same).

The construction of the UCL fraud prong adopted by the Superior Court, if left standing, would harm the public interest. If communications platforms like Twitter faced the threat of actionable claims and the burdens of litigation every time they sought to make even minor adjustments to their user agreements and community standards, they would likely be deterred from responsibly self-regulating content distributed through their

platforms—to the detriment of users and society. *See Hassell v. Bird*, 5 Cal. 5th 522, ___, 234 Cal. Rptr. 3d 867, 885 (2018) (plurality op.) ("An injunction … can impose substantial burdens on an Internet intermediary … and could interfere with and undermine the viability of an online platform.").

Finally, a further reason to reject the Superior Court's construction of the UCL's fraud prong as applicable here is that it would trench on Twitter's exercise of its authority—protected by the First Amendment and Section 230—to decide what content to publish or omit on its platform. *See supra* pp. 32-37; *Field v. Bowen*, 199 Cal. App. 4th 346, 355 (2011) ("If a statute is susceptible of two constructions, one of which renders it constitutional and the other … raises serious and doubtful constitutional questions[], the court will adopt the construction which will render it free from doubt as to its constitutionality."); *Jevne v. Superior Court*, 35 Cal. 4th 935, 949 (2005) ("State law that conflicts with a federal statute is 'without effect.'").

Twitter presented all of these arguments to the Superior Court. *See* App'x 1360-1366. The Superior Court disregarded them, apparently because it believed it could not consider the full text of the 2011 Twitter Rules in making its ruling. On demurrer, the Superior Court explained, it could only "look at the first amended complaint and anything that is judicially noticeable." App'x 1360-1361; App'x 1366 ("We're only on a

demurrer. I have to accept the well-pled allegations [of the Amended Complaint.]"). According to the Superior Court, consideration of other "evidence" or "material[s]" would have to wait for a later stage of litigation—apparently without regard to whether those materials are incorporated in or attached to the Amended Complaint. App'x 1360-1361. But as explained above, this is wrong as a matter of law. *See supra* pp. 39-40. The Superior Court could and should have considered the full text of the June 2011 Twitter Rules, which show that the one and only specific statement Plaintiffs cited as fraudulent at the June 14 hearing could not possibly be found misleading. Accordingly, the Superior Court's conclusion that Plaintiffs stated a viable claim of fraudulent conduct under the UCL was clearly erroneous.

2. The Superior Court Erred In Sustaining An Unconscionability Theory

The Superior Court alternatively ruled that Plaintiffs stated a claim under the "unlawful" prong of the UCL on a legal theory that Plaintiffs themselves did not allege: that the provision in Twitter's terms of service "to the effect that Twitter can, at any time, for any reason, or no reason, pull any account" is unconscionable under either California Civil Code § 1670.5 or the common law. App'x 1347; *see also* App'x 1350-1351 (the UCL claim "says that it is unconscionable for Twitter to reserve [its] right to revoke anybody's ability to be on the platform for any reason at all");

App'x 619 (relevant Terms of Service provision). For several reasons in addition to Twitter's federal-law defenses, the court erred as a matter of law in sustaining this theory.

a) The "any or no reason" provision is not unconscionable as a matter of law

First, a contract term cannot be unconscionable where the party that includes the term in the contract is offering a service for free or if a customer who did not agree with the provision could simply choose to use a different service. Unconscionability has both "substantive" and "procedural" elements, with the former focusing on "overly harsh or one-sided results," and the latter focusing on "oppression or surprise due to unequal bargaining power." *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000) (quotation marks omitted). Both elements "must be present" for a court to find unconscionability. *Id.* But neither element meaningfully exists here.

Twitter's user agreement is not substantively unconscionable because it is "not so one-sided as to shock the conscience." *Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev., LLC*, 55 Cal. 4th 223, 246 (2012) ("A contract term is not substantively unconscionable when it merely gives one side a greater benefit[.]"). A provision in a user agreement that gives a communications platform "sole discretion" to remove content and "discontinue any aspect of [its] Service at any time"

does not satisfy this high bar when the underlying service is free. *See Darnaa, LLC* v. *Google, Inc.*, 2015 WL 7753406, at *2-3, *5 (N.D. Cal. Dec. 2, 2015). Given the value that the Twitter service provides to its users—which the Amended Complaint itself attests to be very great, *e.g.*, App'x 406-407 ¶ 33—and given that Twitter users generally pay no money at all to receive that value, it is appropriate and fair for Twitter both to impose conditions on how the service may be used and to reserve to itself an unfettered right to not provide, or to stop providing, the service to any or all users. In short, the "any or no reason" provision on which the Superior Court focused strikes an appropriate balance between the company and the user.

As courts have recognized in cases concerning other Internet companies that provide communications services at no charge to their users, Twitter's ability to provide a communications service for free depends in part on its ability to include in its standardized user agreement "provisions and protections" such as the one at issue here. *Song fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 63-64 (D.D.C. 2014). Such contract terms eliminate or control costs of doing business that Twitter would otherwise face—for example, by ensuring that it does not have to litigate every decision it makes about who can use its platform. Terms such as this thereby "'make it possible for [Twitter] to provide [a platform] for free to hundreds of millions of users around the world.'" *Id.* at 64. For this

reason, courts "routinely enforce" contract terms that allow providers of free communications services to "modify the Terms [of Service], discontinue service, or remove content unilaterally." *See id*. In light of the substantial benefits Twitter's users receive for no charge, it is "reasonable for [Twitter] to retain broad discretion over these services." *E.g.*, *Darnaa*, 2015 WL 7753406, at *2-3.

Here, Plaintiffs received the benefit of their bargain. They were permitted to use Twitter for years without ever having to pay any fee. App'x 406 ¶¶ 29-32. They used the Twitter platform to build their own businesses, employing Twitter to drive "traffic to [their] websites" and "alert" their supporters to "their recent publications, forthcoming conferences, public appearances, articles, videos, podcasts, and their commentary on the news of the day." App'x 406-407 ¶ 33. Having "taken advantage of [Twitter's] free services," Plaintiffs cannot complain that contractual terms that reduce Twitter's costs, and thus enabled Twitter to provide those services for free, are unenforceable. *Song fi*, 72 F. Supp. 3d at 64.

Nor is Twitter's user agreement procedurally unconscionable. The "adhesive nature of a contract" standing alone "does not mean that [the] contract will not be enforced." *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 915 (2015). Indeed, using an adhesion contract is unavoidable in this context given the scope of Twitter's user base. It would be impossible

to negotiate the terms of use with each of Twitter's hundreds of millions of users.

Moreover, as the First District has explained, even when a consumer is handed a take-it-or-leave it agreement, "the existence of 'meaningful' alternatives available to such contracting party in the form of other sources of supply tends to defeat any claim of" procedural unconscionability. *Dean Witter Reynolds, Inc. v. Superior Ct.*, 211 Cal. App. 3d 758, 771 (1989). That is true even where available "alternatives [are] less desirable" or "inferior." *E.g.*, *Belton v. Comcast Cable Holdings*, LLC, 151 Cal. App. 4th 1224, 1246 (2007).

In *Darnaa*, for example, the plaintiff argued that it was procedurally unconscionable for YouTube to require users to agree to terms similar to the "any or no reason" provision at issue here. *See* 2015 WL 7753406, at *2, *5-6. The Northern District of California concluded that any "procedural unconscionability [was] slight" because there were "various [other] websites on which a recording artist can display his or her music videos." *Id.* at *2. Even though the plaintiff alleged that "YouTube 'has emerged as the dominant, outcome-determinative website for displaying music videos,'" the existence of those alternatives defeated plaintiff's unconscionability arguments. *Id.*

Here, Plaintiffs concede there are other "social media sites like Twitter" that serve as fora for public discussion. *E.g.*, App'x 399-400 ¶ 17;

see also App'x 408 ¶ 39. While Twitter, like YouTube, is undoubtedly a "popular … website," *Darnaa*, 2015 WL 7753406, at *2, Plaintiffs obviously can go elsewhere to promote their views and engage with their supporters. Indeed, Plaintiffs allege they have created and maintain their own website precisely for that purpose. *See* App'x 398 ¶¶ 12-13. On their *American Renaissance* website, Plaintiffs "disseminate facts about race and race relations," the same kind of material they allegedly seek to share on Twitter. App'x 398-399 ¶¶ 12-13; App'x 406-407, ¶ 33; App'x 407 ¶ 37; *see also* App'x 978-981. Because Plaintiffs have meaningful alternative ways to disseminate their views to the public, the Twitter user agreement is not procedurally unconscionable.

b) Plaintiffs failed to allege causation

The Amended Complaint also failed to allege that Plaintiffs' accounts were suspended *because* of the challenged "any or no reason" provision. This independently defeats their UCL claim, as the UCL requires Plaintiffs to show their injury was "*caused by*[] the unfair business practice … that is the gravamen of the claim." *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 321-322 (2011); *see also Two Jinn, Inc. v. Government Payment Serv., Inc.*, 233 Cal. App. 4th 1321, 1332 (2015) ("'there must be a causal connection between the harm suffered and the unlawful business activity'"). That requirement is not met when "'a complaining party would

suffer from the same harm whether or not a defendant complied with the law.'" *Two Jinn*, 233 Cal. App. 4th at 1332.

Here, the Amended Complaint plainly and repeatedly identifies Twitter's Violent Extremist Group Rule—and not Twitter's contractual right to suspend users for "any or no reason"—as the cause of their suspension from the platform. *See, e.g.*, App'x 419 ¶ 67 (Plaintiffs and "other users [were] banned pursuant to the 'Violent Extremist Group policy'"). This allegation dominates the Amended Complaint. From the outset, Plaintiffs allege that "Twitter banned hundreds of 'right wing' accounts (including those of Plaintiffs) pursuant to th[e] [Violent Extremist Group] policy." App'x 397 ¶ 6. They further allege that when they appealed their suspensions, Twitter explained in writing "that the suspensions were permanent because the accounts were 'found to be violating … Twitter Rules against being affiliated with a violent extremist group.'" App'x 410-411 ¶ 45. And they concede that "Twitter cited its policy regarding 'Violent Extremist Groups' as its *sole* ground for permanently banning the accounts of Plaintiffs and other similarly-situated users." App'x 422 ¶ 74 (emphasis added, citation omitted). Indeed, the first form of injunctive relief that the Amended Complaint demands is "that Twitter cease and desist from enforcing its facially overbroad policy on 'Violent Extremist Groups.'" App'x 435. The Amended Complaint makes no such demand regarding the "any or no reason" provision.

While the Amended Complaint references the "any or no reason" language in passing, it does not allege that Twitter invoked or relied on that provision in this case. Instead, it speculates about hypothetical situations in which Twitter could rely on that provision to suspend other unidentified users' accounts. For example, it imagines that Twitter employees could "ban accounts" that "belong to an ex-girlfriend or ex-boyfriend" or for other "petty … reasons." *E.g.*, App'x 432-433 ¶ 103. That scenario is far removed from Plaintiffs' theory of the case. Additional paragraphs referencing the "any or no reason" provision simply conjecture that Twitter "could" or "would" be able to use the provision for what Plaintiffs' deem improper purposes. *See, e.g.*, App'x 431-432 ¶ 101, 433 ¶ 104, 435 ¶ 111.

Absent any plausibly alleged causal connection between the supposedly unconscionable provision at issue and Plaintiffs' injury, their UCL claim is not actionable.

c) UCL liability cannot be predicated on a defense of unconscionability

Finally, it was clear error for the Superior Court to sustain the UCL claim using the *defense* of unconscionability as the supposed predicate for unlawfulness. A viable claim under the UCL's "unlawful" prong requires a "violation of another law [as] a predicate." *Graham v. Bank of Am. N.A.*, 226 Cal. App. 4th 594, 610 (2014). Here, the sole "violation of another law" Plaintiffs put forth as a predicate for unlawfulness under the UCL was

that aspects of Twitter's user agreement allegedly violated the CLRA, which provides an affirmative cause of action for damages and injunctive relief to remedy unconscionable terms in certain types of consumer contracts. App'x 431 ¶¶ 99-100; *see also* Cal. Civ. Code § 1780(a). The Superior Court, however, stated that Twitter was "probably right" that the FAC did not state any viable claim under the CLRA. App'x 1344.[5] But the court declined to reach that issue and instead relied on California Civil Code § 1670.5 and the common law as supposed support for a viable claim of unconscionability. *See* App'x 1335, 1344-1345.

That was clear error, because § 1670.5 and the common law—unlike the CLRA—do not create an affirmative cause of action for unconscionability, as the unlawful prong of the UCL requires. The common-law "doctrine of unconscionability has historically provided only a defense to enforcement of a contract." *California Grocers Ass'n v. Bank of Am.*, 22 Cal. App. 4th 205, 217 (1994); *accord Howard v. Octagon, Inc.* 2013 WL 5122191, at *7 (N.D. Cal. Sept. 13, 2013); *see also Rubio v.*

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[5] As Twitter argued below, Plaintiffs failed to plead any violation of the CLRA because the CLRA applies only to "acts or practices undertaken by any person in a transaction intended to result or that results *in the sale or lease of goods or services* to any consumer." Cal. Civ. Code § 1770(a) (emphasis added). Far from alleging that they ever paid to Twitter's platform, which would be necessary to support a CLRA violation, the Amended Complaint expressly acknowledges that "[a]nyone can join and set up an account on Twitter at any time." App'x. 399 ¶ 16.

Capital One Bank, 613 F.3d 1195, 1205 (9th Cir. 2010) (" Under California law, … unconscionability is an affirmative defense, not a cause of action." (citation omitted)). Because § 1670.5 "does not in itself create an affirmative cause of action but merely codifies the [common-law] defense of unconscionability," it "normally cannot be used offensively to obtain mandatory injunctive relief" absent "express" statutory authorization. *California Grocers*, 22 Cal. App. 4th at 217; *see also, e.g.*, *Jones v. Wells Fargo Bank*, 112 Cal. App. 4th 1527, 1539 (2003) ("[T]here is no cause of action for unconscionability under section 1670.5; that doctrine is only a defense."). The CLRA exemplifies such express authorization, specifically providing that "[i]nserting an unconscionable provision in [a] contract" is "unlawful" and making clear that a CLRA plaintiff can seek injunctive relief. Cal. Civ. Code §§ 1770(a)(19), 1780(a)(1). In contrast, the UCL does not include "express authorization of an affirmative cause of action for unconscionability" that would justify making an exception to the general rule. *California Grocers*, 22 Cal. App. 4th at 218.[6]

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[6] *California Grocers* and *Jones* both assumed without deciding that there might be a viable UCL claim under the statute's nebulous "unfair" prong—as opposed to the unlawful prong—but ultimately declined to grant relief. *California Grocers*, 22 Cal. App. 4th at 218; *Jones*, 112 Cal. App. 4th at 1539-1540. Here, Plaintiffs do not allege that Twitter's user agreement constitutes an "unfair" business practice under the UCL. *See* App'x. 1223-1224.

No California state court has held that a *defense* of unconscionability can provide the predicate for unlawfulness under the UCL. The Northern District's decision in *Howard* lays out the proper analysis. There, the plaintiff attempted to invoke the UCL as an affirmative cause of action to enjoin his former employer from invoking a mandatory arbitration provision in his employment contract. 2013 WL 5122191, at *7. The court rejected this argument, explaining that "[u]nconscionability is a defense to the enforcement of a contract, not an independent cause of action." *Id.* Because the plaintiff did not rely on a discrete "statutory basis for asserting an affirmative cause of action for unconscionability," his UCL claim failed as a matter of law. *Id.*

The same is true here. Absent a viable CLRA claim—which Plaintiffs have not stated and cannot state—Plaintiffs cannot allege unconscionability as the predicate for unlawfulness under the UCL.

III. Twitter Would Suffer Irreparable Harm If The Writ Were Not Granted And Has No Other Adequate Remedy

If the requested writ were not granted, Twitter would suffer the irreparable harm of forever losing in this case the immunity from suit conferred by Section 230. The fundamental purpose of an immunity from suit is to protect a party from being "forced to stand trial or face the other burdens of litigation." *Big Valley Band of Pomo Indians v. Superior Ct.*, 133 Cal. App. 4th 1185, 1189 (2005). Such immunity is "rendered

meaningless" if the party that is supposed to be immune is instead forced to "proceed to trial" or "face the other burdens of litigation." *Id.* Accordingly, when a demurrer based on immunity is overruled, "the defendant asserting an immunity defense has a right to file a petition for extraordinary relief in the Court of Appeal litigating the propriety of the trial judge's order." *Samuel v. Stevedoring Servs. of Am.*, 24 Cal. App. 4th 414, 423 (1994).

It is well settled that Section 230 creates immunity not only from liability, but also from the burdens of litigation. The statute states that *"[n]o cause of action may be brought and* no liability may be imposed" under any state or local law that would be inconsistent with Section 230's broad protections for information content providers. 47 U.S.C. § 230(e)(3) (emphasis added). As the California Supreme Court has recently reaffirmed, Section 230 "creates a federal immunity *to any cause of action* that would make service providers liable for information originating with a third-party user of the service." *Barrett*, 40 Cal. 4th at 43 (emphasis added) (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 329-330 (4th Cir. 1997)); *see also Hassell*, 5 Cal. 5th at ___, 234 Cal. Rptr. 3d at 885 (plurality op.) ("[S]ection 230 is not just a defense to liability; it instead confers immunity from suit." (internal quotation marks omitted)); *Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119, 1125 (9th Cir. 2003) (Section 230 entitles service providers to "immunity from suit"); *Nemet v.*

Consumeraffairs.com, 591 F.3d 250, 254-255 (4th Cir. 2009) ("Section 230 immunity, like other forms of immunity, is generally accorded effect at the first logical point in the litigation process."). Section 230 thus protects online service providers "not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Roommates.com, LLC*, 521 F.3d at 1175.

Writ review is particularly necessary in cases involving erroneous denials of immunity from suit because no other remedy is available to correct the Superior Court's erroneous ruling in time to avoid such irreparable harm. Twitter cannot perfect an ordinary appeal from the decision without a final judgment on Plaintiff's claims. *See* Cal. Civ. Proc. Code § 904.1; *Casterson*, 101 Cal. App. 4th at 182 ("An order overruling a demurrer is not directly appealable, but may be reviewed on appeal from the final judgment."). And by the time a final judgment has been entered, it would be too late. Once Twitter's immunity from suit has been lost, it is lost forever. *See City of Stockton v. Superior Ct.*, 42 Cal. 4th 730, 747 n.14 (2007) (finding writ review "clearly appropriate" where "[a] significant legal issue is presented, and the benefits of the … defense would be effectively lost if defendants were forced to go to trial").

Moreover, if the Superior Court's denial of immunity were left undisturbed, it could provide a tempting model for copycat litigation—further undermining the statutory immunity. Indeed, two such suits citing

the ruling below as precedent have already been filed against Twitter. *See* Am. Compl. ¶ 19, *Brittain v. Twitter, Inc.*, No. 2:18-cv-01714 (D. Ariz. June 26, 2018), ECF No. 13; Compl. ¶¶ 45-47, *Kimbrell v. Twitter, Inc.*, No. 4:18-cv-04144 (N.D. Cal. July 11, 2018).

Not surprisingly, therefore, California appellate courts routinely grant the writ in cases like this one, where the trial court overruled a demurrer that raised an immunity defense. *E.g.*, *Big Valley Band*, 133 Cal. App. 4th at 361 (reviewing order overruling demurrer based on tribal immunity); *Casterson*, 101 Cal. App. 4th at 182 (same based on immunity under Cal. Educ. Code § 35330); *American Arb. Ass'n v. Superior Ct.*, 8 Cal. App. 4th 1131, 1133 (1992) (same based on arbitral immunity); *Gates v. Superior Ct.*, 32 Cal. App. 4th 481, 487 (1995) (same based on immunity under state tort claims act). This Court should do the same here.

IV. The Other Traditional Factors Favor Granting The Writ

While the threat of irreparable harm alone warrants grant of the writ, the stakes here extend beyond harm to Twitter in this particular case and implicate several additional factors that further militate in favor of immediate review.

First, this case involves an issue of widespread public interest. *See Brandt*, 37 Cal. 3d at 816. Whether the Superior Court's novel ruling stands is tremendously important not only for Twitter itself, but also for Twitter's hundreds of millions of users and the providers and users of many

other online platforms. *E.g.*, App'x 397 ¶ 5. The court's reasoning would apply to any communications platform based in California that hosts third-party content. If adopted by other courts—as multiple copycat litigants have already urged in the weeks since the court's oral ruling, *see supra* p. 57—the Superior Court's analysis would decimate those platforms' rights to exercise editorial judgment about the content disseminated on their platforms, in violation of both Section 230 and the First Amendment.[7]

That result could deter Twitter and other such platforms from adopting and enforcing policies that make the Internet safer for public use. Twitter adopted the Violent Extremist Group Rule—and places other limits on harassing and abusive conduct—to protect its users' safety and experience both on and off the platform. *E.g.*, App'x 953. As the current Twitter Rules explain, "freedom of expression and open dialogue … mean[] little as an underlying philosophy if voices are silenced because people are afraid to speak up." App'x 1007. Under the Superior Court's reasoning, however, Twitter and other Internet-communications platforms could find themselves unable to protect their users without assuming the risk of costly litigation.

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[7] Although the Superior Court's ruling cannot be cited in state court, Cal. Rule of Court 8.115(a), litigants in federal district court are not under the same restrictions, *see supra* p. 57. Moreover, the ruling's analysis can be relied upon by future state court litigants even if the ruling itself is not citeable.

Second, this case presents an issue of first impression for this Court, and one on which there is a split of authority among the lower courts. *See Brandt*, 37 Cal. 3d at 816; *Pugliese*, 146 Cal. App. 4th at 1448. On July 3, 2018, the Superior Court for the County of Fresno ruled that a lawsuit bearing similarities to the present action was barred *in its entirety* by both Section 230 and the First Amendment. *See Johnson v. Twitter, Inc.*, No. 18-CECG-00078. Like Plaintiffs here, Mr. Johnson alleged that Twitter had impermissibly suspended his user accounts on the basis of his "conservative political ideology, and thus discriminated against [his] free speech" on the Twitter platform. App'x 1487. Also like Plaintiffs, Mr. Johnson alleged that Twitter's decision to suspend his accounts violated the California Constitution, the Unruh Act, and the UCL. App'x 1481. Indeed, Mr. Johnson went so far as to argue before the court in Fresno that his case "presents "an essentially identical [UCL] claim against Twitter" as the Plaintiffs' UCL claim here. *See* Plaintiff's Second Notice of Supplemental Authority, *Johnson*, No. 18-CECG-00078 (June 15, 2018).

Thus, allowing the decision below to stand without prompt review would subject Twitter to litigation based on novel theories that have never been approved by any appellate court and have been rejected by other trial courts. In contrast, by granting the writ here, the Court of Appeal can provide guidance to aid in resolving this case and similar cases. *See*

Volkswagen of Am., 94 Cal. App. 4th at 702 (granting writ review "to provide guidance to the trial in resolving similar claims.").

Finally, granting the writ could finally dispose of this case. If this Court agrees that Twitter's demurrer to the UCL claim should have been sustained, the case will end, saving both the parties and the courts from expending further time and resources on meritless litigation. Such circumstances weigh in favor of granting review on a petition for a writ of mandate. *See Casterson*, 101 Cal. App. 4th at 182 (petition raised issue of first impression and resolution of the issue in defendant's favor would result in final disposition as to defendant); *Fair Emp't & Hous. Comm'n*, 115 Cal. App. 4th at 631-632 (writ appropriate where trial court has improperly overruled a demurrer). Given the stakes in this case, the importance of the legal issues, and the grave errors in the Superior Court's ruling, this Court should grant review.

CONCLUSION

For the foregoing reasons, Twitter respectfully requests that the Court issue a writ as described in Petitioners' Prayer. Twitter also requests that the Court order a temporary stay of all proceedings in the Superior Court pending final disposition of this petition.

Respectfully submitted,

Dated: August 6, 2018 WILMER CUTLER PICKERING HALE AND DORR LLP

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1).)

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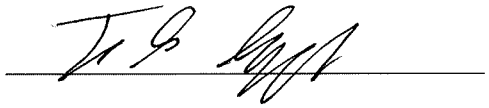

Thomas G. Sprankling

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Twitter, Inc. v. Superior Court
First Appellate District Case No. ___
Superior Court Case No. CGC-18-564460

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CALIFORNIA STATE COURT PROOF OF SERVICE

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First Appellate District Case No. __
Superior Court Case No. CGC-18-564460

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San Francisco, CA 94102

George Gascon
District Attorney, County of San Francisco
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850 Bryant St., Room 322
San Francisco, CA 94103
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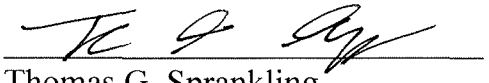
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 6, 2018 at Palo Alto, California.



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