

November 20, 2023

## VIA TRUEFILING

The Honorable Chief Justice Patricia Guerrero  
and Honorable Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102

**Re: *Liapes v. Facebook, Inc.***  
**Case No. S282529**  
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Guerrero and Associate Justices:

Professor Eric Goldman, Associate Dean for Research at Santa Clara University School of Law, asks this Court to grant review of *Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910 (*Liapes*). The published opinion creates uncertainty and conflict regarding the scope of immunity under title 47 United States Code section 230 (section 230) for the widespread practice by interactive computer services of using algorithmic sorting to deliver content or advertisements to specific audiences.

### **Interest of Amicus Curiae**

Professor Goldman is a law professor and Associate Dean for Research at Santa Clara University School of Law in Silicon Valley. He co-directs the High Tech Law Institute, a nationally recognized program educating and training lawyers to find innovative legal solutions to intellectual property and technology issues. He received his J.D. and M.B.A. from the University of California, Los Angeles.

Professor Goldman has been researching and writing about Internet Law, including section 230, for thirty years. He is the author of over 50 articles, book chapters, and books. He has published in various journals, including the Columbia Law Review Forum, UC Irvine Law Review, Hastings Law Journal, Berkeley Technology Law Journal, Harvard Journal of Law and Technology, Yale Journal of Law and Technology, First Amendment Law Review, and Journal of Free Speech Law.

He blogs on Internet law and section 230 topics at the Technology & Marketing Law Blog <<http://blog.ericgoldman.org>>. He commented there that the Court of Appeal's *Liapes* opinion threatens “devastating effects [for] the entire

The Honorable Chief Justice Patricia Guerrero  
and Honorable Associate Justices  
November 20, 2023  
Page 2

Internet ecosystem.” (Goldman, *Does California’s Anti-Discrimination Law Ban Ad Targeting?* (Oct. 9, 2023) Tech. & Mktg. Law Blog <<https://tinyurl.com/techlawblog>>.)

### **Reasons for Granting Review**

Review is necessary because *Liapes* creates confusion regarding the use of algorithmic sorting by interactive computer services to target ads at groups of people. Internet services commonly use such algorithms to determine the audience for an ad, such as when the potential audience for an advertisement is greater than the advertiser’s budget or the service’s ability to display the ad. Yet the Court of Appeal’s opinion casts doubt on the application of section 230 to the common use of such algorithms.

In 1996, Congress enacted the Telecommunications Act of 1996, a major statutory reform of the telecommunications industry. The Act included section 230, which provides that websites are not legally responsible for third-party content. Section 230 has emerged as one of Congress’s most important accomplishments of the 1990s. Section 230 has been described as “the law that gave us the modern Internet,” the “most important law in tech,” and “the law that makes the Internet go.” (Goldman, *The Ten Most Important Section 230 Rulings* (2017) 20 Tulane J. of Tech. & Intell. Prop. 1, 2.) In effect, section 230 provides the legal foundation for the Internet.

The Court of Appeal’s analysis in *Liapes* undermines that foundation. The Court of Appeal faults Facebook’s use of algorithms to target ads. It explains that Facebook provides advertisers with several tools to determine who among Facebook’s over two billion monthly users will receive an ad. (*Liapes, supra*, 95 Cal.App.5th at p. 916.) One tool is “Audience Selection,” allowing advertisers to specify the parameters of the target audience. (*Ibid.*) Another tool is “Lookalike Audiences,” allowing advertisers to provide Facebook with “a list of users ‘whom they believe are the type of customers they want to reach.’” (*Id.* at p. 917.) “Facebook then applies its own analysis and algorithm to identify a larger audience resembling the sample audience.” (*Ibid.*) The Court of Appeal holds that section 230 does not protect Facebook’s algorithmic activities. The court concludes that Facebook’s use of those algorithms “renders Facebook more akin to a content developer” because it “ascertains data about a user and then targets ads based on the users’ characteristics.” (*Id.* at p. 930.)

The Court of Appeal’s opinion threatens Internet services’ ability to deploy the functionality they need to target ads. Unless Facebook distributes every ad to all of its more than two billion monthly users, it necessarily must prioritize some consumers to receive ads and exclude other consumers from receiving those ads. This dynamic holds true even when advertisers express their targeting criteria to Facebook. So long as the pool of targetable consumers is greater than the advertiser’s budget, Facebook must still select the most attractive subset of consumers (out of the universe of targeted consumers) who will actually receive the ads. Because ad budgets routinely impose financial constraints on the delivery of ads to potentially interested audiences, algorithms to choose ad recipients are an intrinsic part of the advertising ecosystem. By disqualifying Facebook’s eligibility for section 230 immunity for doing its unavoidable sorting of audiences, the Court of Appeal opinion threatens the foundation of online advertising.

Several courts have held that section 230 protects the use of algorithmic sorting to display material to audiences selected by the services. The Court of Appeal opinion conflicts with this precedent.

*Dyroff v. Ultimate Software Group, Inc.* (9th Cir. 2019) 934 F.3d 1093, 1096 applied section 230 to hold that Internet services aren’t liable for using algorithms to recommend or amplify illegal content. A social networking website used algorithms to recommend and notify users about information posted on the website. (*Id.* at p. 1098.) One of those users was addicted to drugs, found a drug dealer on the messaging board, connected with the dealer offline, purchased bad heroin, and died as a result. (*Id.* at p. 1095.) Although the website used algorithms to make recommendations, those were “tools meant to facilitate the communication and content of others.” (*Id.* at p. 1098.) They were “not content in and of themselves.” (*Ibid.*)

*Force v. Facebook, Inc.* (2d Cir. 2019) 934 F.3d 53, 70 (*Force*) held that section 230 barred claims that Facebook provided material support to terrorists, notwithstanding Facebook’s use of algorithmic sorting. Plaintiffs alleged that Facebook was liable for “ ‘giving Hamas a forum with which to communicate and for actively bringing Hamas’ message to interested parties.’ ” (*Id.* at p. 65.) In an opinion by Judge Droney, the majority held that Facebook’s alleged conduct fell “within the heartland” of what it means to be a publisher of information under section 230. (*Ibid.*)

The Honorable Chief Justice Patricia Guerrero  
and Honorable Associate Justices  
November 20, 2023  
Page 4

Several other courts have addressed these issues. (See, e.g., *Marshall's Locksmith Service Inc. v. Google, LLC* (D.C. Cir. 2019) 925 F.3d 1263, 1271 [“Because the defendants employ a ‘neutral means’ and an ‘automated editorial act’ to convert third-party location and area-code information into map pinpoints, those pinpoints come within the protection of § 230”]; *In re Apple Inc. App Store Simulated Casino-Style Games Litigation* (N.D. Cal. 2022) 625 F.Supp.3d 971, 993–994 [plaintiffs’ allegations that social media and technology companies promoted illegal casino game applications and induced users to play illegal games by using “algorithms to ‘amplify and direct users’” to the social casino applications, could not overcome section 230 immunity]; *Anderson v. TikTok, Inc.* (E.D.Pa. 2022) 637 F.Supp.3d 276, 280 [“the use of ‘tools such as algorithms that are designed to match [ ] information with a consumer’s interests’ is well within the range of publisher functions covered by Section 230”].) The Court of Appeal’s opinion is inconsistent with all of the above cases.

*Prager University v. Google LLC* (2022) 85 Cal.App.5th 1022 (*Prager*) emphasizes the conflict in the law created by the Court of Appeal. The *Prager* court held that section 230 protected YouTube’s use of an “automated filtering algorithm” to restrict access to videos based on criteria such as drug use, sexual activity, and inappropriate language. (*Id.* at pp. 1028–1029.) The court held that “algorithmic restriction of user content” fell “squarely within the letter and spirit of section 230’s promotion of content moderation.” (*Id.* at p. 1034.)

*Liapes* distinguished *Prager* by introducing a brand-new concept to section 230 jurisprudence—the idea that “shaping” an audience disqualifies a service from section 230. *Liapes* asserted that, unlike Facebook here, YouTube had not “created a system that *actively shaped* the audience based on protected characteristics.” (*Liapes, supra*, 95 Cal.App.5th at p. 929, emphasis added.) But the statutory text of section 230 does not contain an exception for “active audience shaping,” and *Liapes* does not define the term “active audience shaping” or how it differs from the standard algorithmic audience sorting that the cases discussed above (and many others) have found as core activity protected by section 230.

## Conclusion

The Court of Appeal’s opinion deviates from the extensive section 230 jurisprudence that has developed over the past quarter-century and, in doing so, removes an essential legal protection for activity that is an intrinsic and essential component of all online advertising. Therefore the Court of Appeal’s opinion could

The Honorable Chief Justice Patricia Guerrero  
and Honorable Associate Justices  
November 20, 2023  
Page 5

have broad, unintended, and unpredictable consequences for advertisers, Internet services, and the entire Internet ecosystem.

For all of these reasons, the Court should grant review.

Respectfully submitted,

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The Honorable Chief Justice Patricia Guerrero  
and Honorable Associate Justices  
November 20, 2023  
Page 6

**PROOF OF SERVICE**

**Liapes v. Facebook, Inc.**  
**Case No. S282529**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On November 20, 2023, I served true copies of the following document(s) described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 20, 2023, at Burbank, California.

\_\_\_\_\_  
Gabby Gomez



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**SERVICE LIST**  
**Liapes v. Facebook, Inc.**  
**Case No. S282529**

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The Honorable Chief Justice Patricia Guerrero  
and Honorable Associate Justices  
November 20, 2023  
Page 8

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