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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GENEVIEVE MAHONEY, a/k/a @genmahoney19, an individual,

Plaintiff,

v.

META PLATFORMS, INC., f/k/a Facebook, Inc.,

Defendant.

Case No. 22-cv-02873-JD

**PLAINTIFF'S RESPONSE AND BRIEF IN OPPOSITION TO DEFENDANT'S (1) MOTION TO DISMISS AMENDED COMPLAINT AND (2) ANTI-SLAPP MOTION TO STRIKE AMENDED COMPLAINT**

Date: August 21, 2023

Time: 10:30 a.m.

Courtroom: 11

Judge: Hon. James Donato

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2. Whether under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, Congress authorized States to prescribe rules of practice and procedure — such as California's Anti-SLAPP statute — in diversity actions in federal courts.

## INTRODUCTION

Plaintiff Genevieve Mahoney, a/k/a @genmahoney19 — her Instagram handle and username — responds in opposition to the (1) motion to dismiss and (2) Anti-SLAPP motion to strike her Amended Complaint ("Am. Compl.," ECF No. 114), filed by the Defendant Meta Platforms, Inc., f/k/a Facebook, Inc. ("Meta" or "Facebook").[1] ECF No. 115.

On January 6, 2021, Genevieve — a college freshman at the time — was a lawful and peaceful political protestor near the United States Capitol. That afternoon, protestors other than Genevieve unlawfully breached the Capitol. Before the breach, Genevieve photographed the Capitol off in the distance, captioned it "Our Capitol," and published her photo on the Internet through her public Instagram account. Genevieve's "Our Capitol" photo content included a message to be communicated — "We the People," as embodied in the Constitution's Preamble — and an audience and dedicated public forum to receive that message — the Internet and her college Instagram group and community.

After Genevieve published her "Our Capitol" photo content, Meta/Facebook executives published an Emergency News Statement to the public on the Internet, declaring that protestors' photos were inciting and encouraging the Capitol breach events, and that the photos themselves "represent promotion of criminal activity." Genevieve's college Instagram group and community understood that the Emergency News Statement referred to Genevieve because she was one of only two students at her college posting and sharing "pictures" that day at the Capitol on her public Instagram account.

Genevieve then sued Meta for Defamation *Per Se* for publishing its Emergency News Statement — its own speech, not the speech of third parties — that was false and defamed Genevieve by reasonable implication, and which was understood by members of her college

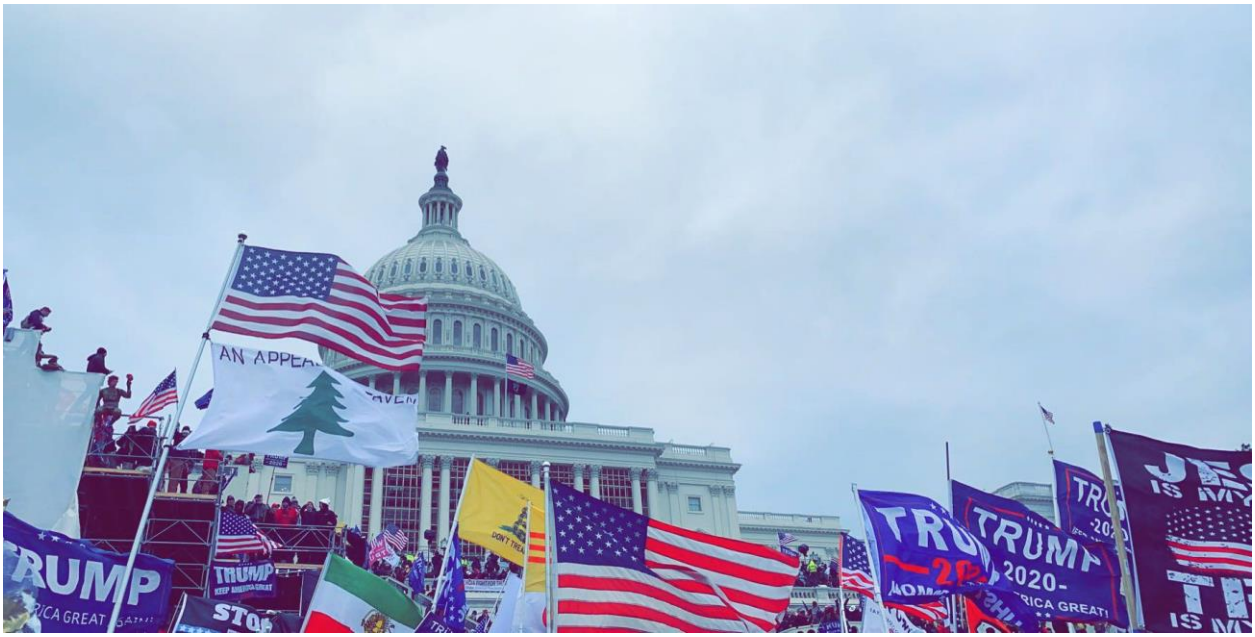
[1] Facebook, Inc. acquired Instagram, Inc. on April 9, 2012. On October 28, 2021, Facebook introduced "Meta" as its new company name and brand, and Facebook and Instagram remain under the Meta corporate brand. *See* https://about.meta.com/company-info/ (last visited Jan. 14, 2023). *See* Am. Compl., ECF No. 114 at p. 1, n. 1.

Instagram group and community to actually refer to Genevieve.

**STATEMENT OF RELEVANT FACTS**

Genevieve incorporates all allegations in her Amended Complaint into this Statement of Relevant Facts as if fully restated. Am. Compl., ECF No. 114, p. 1-39.

On January 6, 2021, at approximately 2:00 p.m. Eastern, while peacefully walking in Washington, D.C. with family members from the Rally at the Ellipse to the Capitol, as the Permit authorized, Genevieve lawfully exercised her First Amendment right to political free speech by publishing on the Internet through her Instagram account a single image photograph she took of the United States Capitol in the distance, captioned "Our Capitol." ECF No. 114, p. 10 at ¶62. Genevieve's actual "Our Capitol" photograph that she published on the Internet through Instagram, which reached and was accessed by the general public and her @fur.meme Instagram group and community, is as follows:




**"Our Capitol"**

ECF No. 114, p. 10-11 at ¶63. To Genevieve, her post and message on the Internet through Instagram of the phrase "Our Capitol," along with her published photograph of the Capitol in the distance beyond the temporary spectator scaffolding, reflected her beliefs and were

symbolic and representative of the statement, "We the People," embodied in the Preamble to the United States Constitution. ECF No. 114, p. 11 at ¶64. Genevieve's lawful post on the Internet through Instagram of the photograph of the Capitol was protected speech under the First Amendment and not representative of Genevieve engaging in criminal activity. Nor did her "Our Capitol" photo "represent promotion of criminal activity" in violation of a criminal statute. ECF No. 114, p. 11 at ¶68.

That afternoon at the U.S. Capitol, Genevieve did not go onto the premises of the Capitol; she did not enter the Capitol building; and she remained positioned well behind the temporary spectator scaffolding as depicted by her vantage point in her "Our Capitol" photograph she published on the Internet through Instagram. ECF No. 114, p. 11-12 at ¶69. Genevieve has never been charged with violating a state or federal criminal statute for engaging in criminal activity or inciting, encouraging, or promoting criminal activity arising out of her "Our Capitol" photograph she posted on the Internet through Instagram. ECF No. 114, p. 12 at ¶70.

Following Genevieve's post of her "Our Capitol" photo, at approximately 7:00 p.m. Eastern on January 6, 2021, authorized Meta/Facebook representatives Guy Rosen, Vice President of Integrity, and Monika Bickert, Vice President of Global Policy Management, published from Facebook's Newsroom a written Emergency News Statement on behalf of Facebook. ECF No. 114, p. 14 at ¶84. The Emergency News Statement was entitled, "Our Response To The Violence in Washington." It was published by Facebook's Newsroom from its "Elections Operations Center" to the public on the Internet, including social media groups and communities such as the @fur.meme Instagram group.[2] ECF No. 114, p. 14 at ¶85. The Emergency News Statement said in part that Meta/Facebook was monitoring activity on its platform "in real time" and searching for and removing the following content:

- Incitement or encouragement of the events at the Capitol, including videos and photos from the protestors. At this

[2] *See* https://about.fb.com/news/2021/01/responding-to-the-violence-in-washington-dc/ (last visited Jan. 15, 2023). ECF No. 114, p. 14 at n.16.

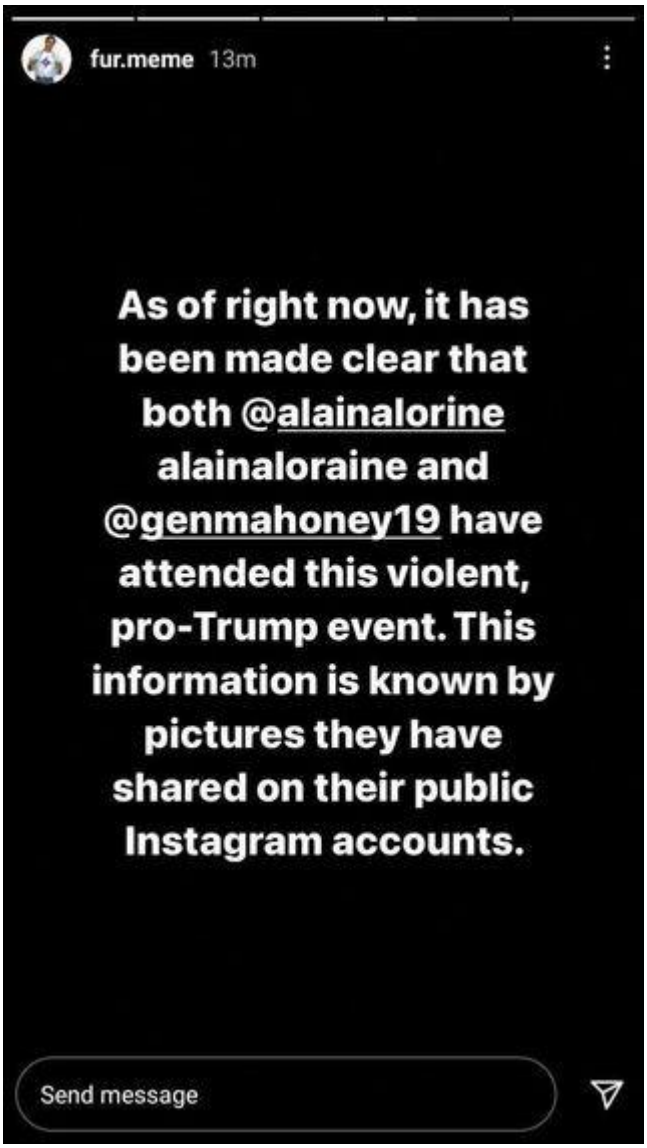
> point they represent promotion of criminal activity which violates our policies.

ECF No. 114, p. 14-15 at ¶86. The Emergency News Statement was false and untrue and defamatory on its face because it was published to the public, including Genevieve's @fur.meme Instagram group and community, and it stated the Capitol protestors' published photos "represent promotion of criminal activity." ECF No. 114, p. 16 at ¶92.

Soon after Meta/Facebook executives published the Emergency News Statement, the Furman University Conservative Society — one of Genevieve's college clubs — asked her to delete her "Our Capitol" photograph from the Internet and Instagram because it feared for her safety and well-being as well as the club's image. ECF No. 114, p. 15 at ¶89. Genevieve did not delete the image. However, Facebook eventually blocked Internet access to Genevieve's "Our Capitol" photo content, by disabling and deleting her Instagram account approximately six days later on January 12, 2021. ECF No. 114, p. 15 at ¶90.

But prior to deletion and a few hours after Genevieve posted her "Our Capitol" photograph on the Internet through Instagram, and after Facebook published its Emergency News Statement to the general public, @fur.meme published a series of posts recognizing the Emergency News Statement actually referred to Genevieve by implication. ECF No. 114, p. 17 at ¶98. @fur.meme recognized and understood Facebook's Emergency News Statement referred to Genevieve by implication, because Bickert and Rosen specifically explained to the public in the Emergency News Statement that the protestors' photos "represent promotion of criminal activity which violates our policies." ECF No. 114, p. 17 at ¶99. @fur.meme knew Genevieve was one of only two Furman student protestors at the "violent" Capitol Breach events "sharing pictures on their public Instagram accounts." ECF No. 114, p. 17 at ¶100. @fur.meme had recognized Genevieve's "Our Capitol" photo that she posted on the Internet through Instagram prior to Meta/Facebook publishing the Emergency News Statement in "Response To The Violence." ECF No. 114, p. 17 at ¶101.

And when Bickert and Rosen later claimed in the Emergency News Statement that protestors' photos at the Capitol events "represent promotion of criminal activity," @fur.meme and others in this Instagram group seized upon Facebook's statement since it *linked* the posting of photos at the U.S. Capitol with the "promotion of criminal activity." ECF No. 114, p. 17 at ¶102. Based on Bickert and Rosen's Emergency News Statement, Genevieve's @fur.meme Instagram group made this direct connection because Genevieve had been one of only two Furman student protestors at the Capitol that day on January 6, 2021, posting and sharing photos to her public Instagram account — a very small group. ECF No. 114, p. 17 at ¶103. Thus, @fur.meme made a series of eleven posts on the Internet through Instagram evidencing it was understood and "made clear" within the Furman community and @fur.meme group that the Emergency News Statement actually referred to Genevieve by implication. The first post in the series is below:




ECF No. 114, p. 17-18 at ¶104.

## LEGAL STANDARD

### A. Rule 12(b)(6)

Pursuant to a motion to dismiss a plaintiff's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When analyzing a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint — as well as any reasonable inferences to be drawn from them — as true and construe them in the light most favorable

to the plaintiff. *Gaprindashvili v. Netflix, Inc.*, 2022 U.S. Dist. LEXIS 23304, at *8 (C.D. Ca., Jan. 27, 2022) (citing *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005); *ARC Ecology v. U.S. Dep't of Air Force*, 411 F.3d 1092, 1096 (9th Cir. 2005); *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994)).

A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

**B. Defamation *Per Se***

"Defamation per se occurs when a statement, is defamatory on its face, that is untrue." *Yow v. National Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1183 (E.D. Cal. Mar. 9, 2008). "A [writing] which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face." Cal. Civ. Code § 45a; *see also Song Fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 888 (N.D. Cal. Jun. 10, 2015). "An allegation that a plaintiff is guilty of a crime is libelous on its face." *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles,* 117 Cal. App. 4th 1138, 1145 n.7 (Cal. Ct. App. 2004); *Barnes-Hind, Inc. v. Sup .Ct.,* 181 Cal. App. 3d 377, 385 (Cal. Ct. App. 1986) ("Perhaps the clearest example of libel per se is an accusation of crime."). Statements which falsely impute the commission of a crime are libelous on their face. *See Snider v. Nat'l Audubon Soc'y, Inc.,* 1992 U.S. Dist. Lexis 10017, at *15 (E.D. Cal. Apr. 14, 1992) (denying motion to dismiss where "the clear implication from the article is that plaintiff is being investigated by the I.R.S."). Publishing false and untrue written material "which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation" is libelous per se. *See Washburn v. Wright,* 261 Cal. App. 2d 789, 797 (Cal. Ct. App. 1968).

"The First Amendment requires a plaintiff to establish that the statement on which the defamation claim is based is 'of and concerning' the plaintiff." *D.A.R.E. America v. Rolling Stone Magazine,* 101 F. Supp. 2d 1270, 1289 (C.D. Cal. Apr. 28, 2000); *Blatty v. New York Times Co.,* 42 Cal. 3d 1033, 1042 (Cal. 1986). "Under California law, there is no requirement that the person defamed be mentioned by name. It is sufficient if the jury can infer from the evidence that the defamatory statement applies to the plaintiff, or if the publication points to the plaintiff by description or circumstances tending to identify him." *Church of Scientology of California v. Flynn,* 744 F. 2d 694, 697 (9th Cir. 1984) (cleaned up).

When a plaintiff is not specifically named in the defamatory statement, but she is reasonably implicated by the circumstances surrounding the statement, she must also show that a third party understood the alleged statement to refer to her. *SDV/ACCI, Inc. v. AT&T Corp*., 522 F.3d 955, 960 (9th Cir. 2008) (applying *Flynn*'s two-step analysis when a statement does not specifically name its target: the statement (1) must be capable of being understood to refer to the plaintiff; and (2) it must have been understood by a third party to actually refer to the plaintiff).

## ARGUMENT

### A. Genevieve plausibly pled a claim for Defamation *Per Se.*

Genevieve plausibly pled a Defamation *Per Se* claim in her Amended Complaint. Her Amended Complaint gives Meta fair notice of her legally cognizable claim and the grounds on which it rests thoroughly explained in exhaustive factual detail. *See Twombly*, 550 U.S. at 555; *see also* Am. Compl., ECF No. 114. However, inexplicably, Meta challenges the Amended Complaint for "three independent reasons," claiming (1) Meta's Emergency News Statement did not refer to Plaintiff, (2) Meta's Emergency News Statement was not published to a third party who reasonably understood its allegedly defamatory meaning or applicability to Plaintiff, and (3) Meta's Emergency News Statement was not false or reasonably susceptible to a defamatory meaning. *See* ECF No. 115, p. 10. But Meta's Rule

12(b)(6) motion to dismiss must be denied because Genevieve plausibly pled "factual content that allows the [C]ourt to draw the reasonable inference that [Meta] is liable for [Defamation *Per Se*]." *See Iqbal*, 556 U.S. at 678.

*First*, Meta's Emergency News Statement that Capitol protestors' photos "represent promotion of criminal activity" is capable of being understood to refer to Genevieve by reasonable implication since she was a "protestor" posting her "Our Capitol" photo on her public Instagram account earlier that day. *Second*, Meta's Emergency News Statement was published to the public on the Internet including Genevieve's @fur.meme Instagram group and community, who reasonably understood it to actually refer to Genevieve. *Third*, Meta's Emergency News Statement is false because it imputes that Genevieve committed a crime by posting her "Our Capitol" photo, and Genevieve has never been charged with a crime arising out of sharing her "Our Capitol" photo on her public Instagram account.

**1. Meta's Emergency News Statement that Capitol protestors' photos "represent promotion of criminal activity" is capable of being understood to refer to Genevieve by reasonable implication because she had posted her "Our Capitol" photo on her public Instagram account that day.**

Although Genevieve was not specifically named in the Emergency News Statement, a jury can infer from it that it points to Genevieve by description and circumstances.

Meta incorrectly argues that Genevieve's "theory is that the Emergency News Statement defamed *every person* who attended the January 6 protest and did not engage in violence or other criminal behavior." ECF No. 115, p. 11. But that is not her theory as set forth in the Amended Complaint. Moreover, Meta completely ignores that its Emergency News Statement identified persons at the January 6 protest and events at the Capitol earlier that day who engaged in specific behavior: protestors who posted photos on Meta's social media platforms, which includes Genevieve.

First, Genevieve was a "protestor" at "the events at the Capitol" in Washington D.C. on January 6, 2021. Second, Genevieve was posting "photos" earlier that day on her public Instagram account when she posted her "Our Capitol" photo approximately five hours

before Meta published its Emergency News Statement. Thus, Genevieve has satisfied the first step in the *Flynn* analysis that the Emergency News Statement is capable of being understood to refer to her. *See AT&T Corp.*, 522 F. 3d at 960.

**2. Meta's Emergency News Statement was published to the public including Genevieve's college Instagram group and community, who understood it to actually refer to Genevieve.**

Meta's Emergency News Statement was published to the public on the Internet, including Genevieve's @fur.meme Instagram group and community, who reasonably understood it to actually refer to Genevieve as evidenced by a series of Instagram posts.

Meta incorrectly claims that "crucially," Genevieve did not identify "*a single person*" who actually saw the Emergency News Statement, understood its defamatory meaning towards Genevieve, and who "legitimately" read the meaning as applying to Genevieve. ECF No. 15, p. 13. That is simply not true. Moreover, a "legitimate" standard is not the proper legal standard at the Rule 12 stage. Additionally, Genevieve is further entitled to all reasonable inferences, including inferences from @fur.meme's series of Instagram posts.

First, @fur.meme had recognized Genevieve's "Our Capitol" photo that she posted on the Internet through Instagram before Meta/Facebook published the Emergency News Statement in "Response To The Violence." Second, @fur.meme knew Genevieve was one of only two Furman student protestors at the Capitol during the "violent" Capitol Breach events "sharing pictures on their public Instagram accounts." Third, when Bickert and Rosen later claimed in the Emergency News Statement that protestors' photos at the Capitol events "represent promotion of criminal activity," @fur.meme and others in this Instagram group seized upon the statement since it *linked* the posting of photos at the U.S. Capitol with the "promotion of criminal activity." Thus, Genevieve has satisfied the second step in the *Flynn* analysis that the Emergency News Statement was understood by a third party — @fur.meme — to actually refer to her. *See AT&T Corp.*, 522 F. 3d at 960.

**3. Meta's Emergency News Statement is false because it imputes that Genevieve committed a crime by posting her "Our Capitol" photo.**

Meta's Emergency News Statement is false and untrue and imputes that Genevieve committed a crime by posting her "Our Capitol" photo on her public Instagram account. Indeed, the Emergency News Statement is "provably false" despite Meta's failure to engage with her Amended Complaint in its argument. *See* ECF No. 115, p. 13.

First, Genevieve is not being prosecuted for a crime by the United States Attorney for the District of Columbia for posting and publishing her "Our Capitol" photo content and communicative message on January 6, 2021. Second, the House Select Committee on January 6 Final Report does not state in the report that Genevieve's "Our Capitol" photo content and communicative message "represent promotion of criminal activity." Third, as the California Court of Appeals has stated, "Perhaps the clearest example of libel per se is an accusation of crime." *Barnes-Hind, Inc.,* 181 Cal. App. 3d at 385.

**B. Section 230 is inapplicable because Meta is being sued for its own speech, not third-party speech, and Meta acted in bad faith.**

Section 230 is inapplicable here because (1) Genevieve has sued Meta for its own speech, not the speech of third parties; and (2) Meta acted in bad faith.

**1. Meta was an information content provider when it created and published its Emergency News Statement.**

Meta was an information content provider when it created and published its Emergency News Statement that forms the basis for Genevieve's Defamation *Per Se* claim. *See* 47 U.S.C. § 230(f)(3). Meta is being sued for its own speech, not the speech of third parties, so Section 230 is inapplicable.

"Meta does not contend that Section 230 immunizes it from liability for its own statements." ECF No. 115, p. 115. In other words, Meta concedes that the Emergency News Statement — which forms the basis for Genevieve's claim — forecloses any reliance upon Section 230 as a defense. That is correct and should end any argument and debate on Section 230's applicability to this case.

But remarkably, Meta then incorrectly asserts that "Plaintiff's claim is that she was harmed by information published by the @fur.meme account, not directly by the Emergency News Statement." ECF No. 115, p. 115. Nothing could be further from the truth regarding the facts alleged. Genevieve does not allege that the @fur.meme statements were themselves defamatory; she alleges that *Meta's* Emergency News Statement was defamatory, and that the @fur.meme statements show that Meta's statement was reasonably understood by others to refer to Genevieve. Once again, Meta fails to engage with the actual factual allegations Genevieve alleged in her Amended Complaint, which are considered true at this stage of the litigation and must be construed in the light most favorable to Genevieve. *See Gaprindashvili*, 2022 U.S. Dist. LEXIS at *8.

**2. Meta published its Emergency News Statement in bad faith.**

To the extent Meta relies upon 47 U.S.C. § 230(c)(2) as a defense, it may not do so because that provision of Section 230 requires voluntary action to be taken in "good faith." And Meta did not act in good faith when it published the Emergency News Statement.

Instead, Bickert and Rosen acted with actual malice because (1) they knew the Emergency News Statement stating that all protestors' photos "represent promotion of criminal activity" was false when they published it; and (2) they harbored serious doubts as to its truth. They knew it was false or harbored serious doubts it was true because they and Meta/Facebook employees had not even reviewed and evaluated *all* the photos to determine if they "represent promotion of criminal activity" at the time they published the Emergency News Statement since they acknowledged they were still searching their platforms "in real time" — which includes Instagram where Genevieve posted her "Our Capitol" photo. ECF No. 114, 38:5-9.

**C. California's Anti-SLAPP statute is inapplicable because, pursuant to the Rules Enabling Act, Congress did not authorize States to prescribe rules of practice and procedure in diversity actions in federal courts.**

California's Anti-SLAPP statute — a State rule of practice and procedure — is inapplicable here because Congress did not authorize California's legislature — or any other State legislatures — to implement such rules in diversity actions in federal courts.

*First*, the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, authorizes *only* the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Not a State such as California. The Act has been described as a treaty between Congress and the judiciary and represents a manifestation of the traditional doctrine of separation of powers. Congress, through the Act, delegated the essential rulemaking function to a co-equal branch of government while retaining the ability to review and reject any rule adopted by the Supreme Court. Pursuant to Section 2073 of the Rules Enabling Act, the Judicial Conference has established procedures to govern the work of the Standing Committee and its advisory rules committees.[3]

The United States Supreme Court analyzed the Rules Enabling Act and the federal rulemaking process in a 1995 opinion, *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995). In that case, the Court was faced with a rule issue implicating its "power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals." *Id.* at 48. (citing 28 U.S.C. § 2072(a)). The Court noted the procedure Congress ordered for such rule changes, however, is not expansion by court decision, but by rulemaking under § 2072. *Id.* The Supreme Court explained its "rulemaking authority is constrained by §§ 2073 and 2074, which require, among other things, that meetings of bench-bar committees established to recommend rules ordinarily

[3] *See* https://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees#:~:text=The%20Rules%20Enabling%20Act%2C%2028,evidence%20for%20the%20federal%20courts.

be open to the public, § 2073(c)(1), *and that any proposed rule be submitted to Congress before the rule takes effect, § 2074(a)." Id*. (emphasis added).

Here, California's legislature *exclusively and unilaterally* made findings and declarations when it enacted its anti-SLAPP statute without the approval of Congress or the U.S. Supreme Court. *See* Cal. Civ. Proc. § 425.16(a) (emphasis added). While that may be acceptable when such a rule is to be implemented in a California state court, a rule may not be implemented in federal courts without approval of Congress and the Supreme Court in accordance with the Rules Enabling Act. Contrary to the Rules Enabling Act's process of approving rules to be implemented in federal courts, California's anti-SLAPP statute was not approved by Congress, the U.S. Supreme Court, and the five Standing Advisory Rules Committees of the Judicial Conference prior to taking effect. Thus, it may not be asserted in federal courts including in this Court.

*Second*, California's anti-SLAPP statute is inapplicable in federal court under the Supreme Court's test in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 398 (2010) (reaffirming *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) ("When a situation is covered by one of the Federal Rules," a federal court must apply the Federal Rule, notwithstanding the existence of a conflicting state statute.). Under *Shady Grove*, if a federal rule of civil procedure "answers the question in dispute," then it governs—notwithstanding a state-law procedure to the contrary. *Id*. In this instance, the question in dispute is whether Meta may dismiss or strike Genevieve's claim by motion. Because Federal Rule of Civil Procedure 12 provides the conditions and grounds under which Meta may do so and it has not challenged the applicability or validity of Rule 12, it trumps California's anti-SLAPP statute.

*Third*, the Second Circuit applied the *Shady Grove* test in a case of first impression and held that "California's anti-SLAPP statute is inapplicable in federal court because it increases a plaintiff's burden to overcome pretrial dismissal, and thus conflicts with Federal Rules of Civil Procedure 12 and 56." *La Liberte v. Reid*, 966 F. 3d 79, 83 (2d

Cir. 2020).[4] The Second Circuit acknowledged a circuit split as to whether anti-SLAPP statutes apply in federal courts, with the Fifth, Eleventh, and D.C. Circuits holding them inapplicable, *id*. at 86 (citing *Klocke v. Watson*, 936 F. 3d 240, 242 (5th Cir. 2019) (Texas statute); *Carbone v. Cable News Network, Inc*., 910 F. 3d 1345, 1350 (11th Cir. 2018) (Georgia statute); *Abbas v. Foreign Policy Grp*., *LLC*, 783 F. 3d 1328, 1335 (D.C. Cir. 2015) (D.C. statute); and the First Circuit applying them. *Id*. (citing *Godin v. Schencks,* 629 F.3d 79, 86-7 (1st Cir. 2010) (Maine statute)).

The Second Circuit noted that the Ninth Circuit decision *United States ex rel. Newsham v. Lockheed Missiles & Space Co*., 190 F.3d 963, 972 (9th Cir. 1999) (California statute), which had applied the California anti-SLAPP law, predated *Shady Grove* and was no longer controlling law. *Id*. at 87 (citing *Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1188 (9th Cir. 2013) (Watford, J., joined by Kozinski Ch. J., Paez J., and Bea, J., dissenting from denial of rehearing en banc) ("Just as the New York statute in *Shady Grove* impermissibly barred class actions when Rule 23 would permit them, so too California's anti-SLAPP statute bars claims at the pleading stage when Rule 12 would allow them to proceed.").[5]

The Second Circuit explained that under Rule 12, "'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable.'" *Id*. (quoting *Twombly*, 550 U.S. at 570). In contrast, the California anti-SLAPP statute "require[es] the plaintiff to establish that success is not merely plausible but probable." *Id*. (cleaned up). The court found that the California anti-SLAPP statute "establishes the circumstances under which a court must dismiss a plaintiff's claim before trial, a question that is already answered (differently) by Federal Rules 12 and 56." *Id*. Thus, it concluded

[4] Additionally, the court rejected defendant's argument that she enjoyed Section 230 immunity, a defense Meta has also asserted in this case. *See La Liberte*, 966 F. 3d at 89.

[5] In the underlying opinion, the Ninth Circuit panel reversed the denial of the anti-SLAPP motion and held the nonmoving party was a limited public figure. The panel remanded to the district court for a determination of whether the nonmoving party could prevail on the merits of its defamation claim when it was a limited public figure. *Makaeff v. Trump Univ*., LLC, 715 F. 3d 254, 271-72 (9th Cir. 2013).

"federal courts must apply Rule 12 and 56 instead of California's special motion to strike." *Id*. at 88. The court further denied attorneys' fees because California's anti-SLAPP statute "does not purport to make attorney's fees available to parties who obtain dismissal by other means, such as under Federal Rule 12(b)(6)." *La Liberte*, 966 F.3d at 88; *Abbas*, 783 F.3d at 1337 n.5; *see also Klocke*, 936 F.3d at 247 n.6.

*Finally*, regarding the merits of Meta's anti-SLAPP motion to strike, the Rule 12 plausibility pleading standard still applies when the SLAPP proponent, like Meta here, challenges the legal sufficiency of a claim. *See Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress*, 890 F. 3d 828, 834 (9th.Cir. 2018).

In *Planned Parenthood*, the Ninth Circuit adopted a compromise framework in which federal courts review anti-SLAPP motions to strike under different standards, depending on the motion's basis. If the proponent of the anti-SLAPP motion makes a legal challenge to the sufficiency of a claim, Rule 12 governs. And if the party asserting the anti-SLAPP motion makes a factual challenge to the sufficiency of the claim, Rule 56 governs, and the party opposing the anti-SLAPP motion is entitled to conduct discovery. *Id*. at 833-34. The *Planned Parenthood* court did not address nor cite *Shady Grove*, leaving the applicability of that decision an open question in the Ninth Circuit.

Meta concedes its present anti-SLAPP motion is "based on alleged deficiencies in the plaintiff's complaint." ECF No. 115, p. 19. And that its motion "must be treated in the same manner as a motion under Rule 12(b)(6)." *Id*. Thus, Meta abandons the "probability" and burden-shifting regime under California's anti-SLAPP statute. Therefore, even under *Planned Parenthood*, the anti-SLAPP regime does not apply, and the Court should deny the motion to strike under Rule 12's analysis because as set forth above, Genevieve has stated a plausible Defamation *Per Se* claim on which relief can be granted.

It is important to note that Meta has failed to address Genevieve's factual allegations in her Amended Complaint that Bickert and Rosen acted with actual malice when they published the Emergency News Statement on January 6, 2021. *See generally New York*

*Times v. Sullivan*, 376 U.S. 254 (1964). This precludes Meta from prevailing on its anti-SLAPP motion to strike because the Emergency News Statement was not protected speech.

**D. Rule 15 of the Federal Rules of Civil Procedure governs amendment**.

In response to Meta's argument, to the extent this Court is faced with an issue of whether to allow Genevieve to amend her Amended Complaint — which is not currently before the Court — leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). This policy is "to be applied with extreme liberality." *Owens v. Kaiser Foundation Health Plan, Inc.,* 244 F.3d 708, 712 (9th Cir. 2001) (cleaned up). Thus, leave to amend is freely given to a party unless the opposing party can establish "bad faith, undue delay, prejudice to the opposing party, and/or futility." *Id* The Ninth Circuit has further recognized that "granting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with Fed. R. Civ. P. 15(a)'s policy favoring liberal amendment." *Verizon Delaware, Inc. v. Covad Commun. Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004)

Here, Meta is unable to establish that Genevieve has acted in bad faith, with undue delay, that it is prejudiced in any way, or it is futile to allow her to amend her Amended Complaint if that becomes an issue before the Court.

## CONCLUSION

For these reasons, Genevieve has plausibly pled her Defamation *Per Se* claim against Meta/Facebook. Thus, the Court should deny in their entirety Meta's (1) Rule 12 motion to dismiss; and (2) Anti-SLAPP motion to strike.

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Respectfully submitted,

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