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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13

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

16 Plaintiff,

17 v.

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

20 Defendant.
21
22
23

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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Cases

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Carbone v. Cable News Network, Inc., 910 F. 3d 1345 (11th Cir. 2018)..... 20

Church of Scientology of California v. Flynn, 744 F. 2d 694 (9th Cir. 1984) 13

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STATEMENT OF THE ISSUES

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2 1. Whether Plaintiff has plausibly pled a claim against Defendant for Defamation
3 *Per Se* to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

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

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INTRODUCTION

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

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

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

21 Genevieve then sued Meta for Defamation *Per Se* for publishing its Emergency News
22 Statement — its own speech, not the speech of third parties — that was false and defamed
23 Genevieve by reasonable implication, and which was understood by members of her college
24

25
26 ¹ Facebook, Inc. acquired Instagram, Inc. on April 9, 2012. On October 28, 2021, Facebook
27 introduced “Meta” as its new company name and brand, and Facebook and Instagram
28 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.

1 Instagram group and community to actually refer to Genevieve.

2 **STATEMENT OF RELEVANT FACTS**

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

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



23 **“Our Capitol”**

24 ECF No. 114, p. 10-11 at ¶63. To Genevieve, her post and message on the Internet through
25 Instagram of the phrase “Our Capitol,” along with her published photograph of the Capitol
26 in the distance beyond the temporary spectator scaffolding, reflected her beliefs and were
27

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

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

15 Following Genevieve’s post of her “Our Capitol” photo, at approximately 7:00 p.m.
16 Eastern on January 6, 2021, authorized Meta/Facebook representatives Guy Rosen, Vice
17 President of Integrity, and Monika Bickert, Vice President of Global Policy Management,
18 published from Facebook’s Newsroom a written Emergency News Statement on behalf of
19 Facebook. ECF No. 114, p. 14 at ¶84. The Emergency News Statement was entitled, “Our
20 Response To The Violence in Washington.” It was published by Facebook’s Newsroom from
21 its “Elections Operations Center” to the public on the Internet, including social media
22 groups and communities such as the @fur.meme Instagram group.² ECF No. 114, p. 14 at
23 ¶85. The Emergency News Statement said in part that Meta/Facebook was monitoring
24 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

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

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

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

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

14 But prior to deletion and a few hours after Genevieve posted her “Our Capitol”
15 photograph on the Internet through Instagram, and after Facebook published its
16 Emergency News Statement to the general public, @fur.meme published a series of posts
17 recognizing the Emergency News Statement actually referred to Genevieve by implication.
18 ECF No. 114, p. 17 at ¶98. @fur.meme recognized and understood Facebook’s Emergency
19 News Statement referred to Genevieve by implication, because Bickert and Rosen
20 specifically explained to the public in the Emergency News Statement that the protestors’
21 photos “represent promotion of criminal activity which violates our policies.” ECF No. 114,
22 p. 17 at ¶99. @fur.meme knew Genevieve was one of only two Furman student protestors
23 at the “violent” Capitol Breach events “sharing pictures on their public Instagram
24 accounts.” ECF No. 114, p. 17 at ¶100. @fur.meme had recognized Genevieve’s “Our
25 Capitol” photo that she posted on the Internet through Instagram prior to Meta/Facebook
26 publishing the Emergency News Statement in “Response To The Violence.” ECF No. 114, p.
27 17 at ¶101.

1 And when Bickert and Rosen later claimed in the Emergency News Statement that
2 protestors' photos at the Capitol events "represent promotion of criminal activity,"
3 @fur.meme and others in this Instagram group seized upon Facebook's statement since it
4 *linked* the posting of photos at the U.S. Capitol with the "promotion of criminal activity."
5 ECF No. 114, p. 17 at ¶102. Based on Bickert and Rosen's Emergency News Statement,
6 Genevieve's @fur.meme Instagram group made this direct connection because Genevieve
7 had been one of only two Furman student protestors at the Capitol that day on January 6,
8 2021, posting and sharing photos to her public Instagram account — a very small group.
9 ECF No. 114, p. 17 at ¶103. Thus, @fur.meme made a series of eleven posts on the Internet
10 through Instagram evidencing it was understood and "made clear" within the Furman
11 community and @fur.meme group that the Emergency News Statement actually referred to
12 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

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

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

10 **B. Defamation *Per Se***

11 “Defamation per se occurs when a statement, is defamatory on its face, that is untrue.”
12 *Yow v. National Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1183 (E.D. Cal. Mar. 9, 2008). “A
13 [writing] which is defamatory of the plaintiff without the necessity of explanatory matter,
14 such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face.”
15 Cal. Civ. Code § 45a; see also *Song Fi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 888 (N.D.
16 Cal. Jun. 10, 2015). “An allegation that a plaintiff is guilty of a crime is libelous on its
17 face.” *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, 117 Cal. App.
18 4th 1138, 1145 n.7 (Cal. Ct. App. 2004); *Barnes-Hind, Inc. v. Sup .Ct.*, 181 Cal. App. 3d
19 377, 385 (Cal. Ct. App. 1986) (“Perhaps the clearest example of libel per se is an accusation
20 of crime.”). Statements which falsely impute the commission of a crime are libelous on their
21 face. See *Snider v. Nat’l Audubon Soc’y, Inc.*, 1992 U.S. Dist. Lexis 10017, at *15 (E.D. Cal.
22 Apr. 14, 1992) (denying motion to dismiss where “the clear implication from the article is
23 that plaintiff is being investigated by the I.R.S.”). Publishing false and untrue written
24 material “which exposes any person to hatred, contempt, ridicule, or obloquy, or which
25 causes him to be shunned or avoided, or which has a tendency to injure him in his
26 occupation” is libelous per se. See *Washburn v. Wright*, 261 Cal. App. 2d 789, 797 (Cal. Ct.
27 App. 1968).

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

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

17 ARGUMENT

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

19 Genevieve plausibly pled a Defamation *Per Se* claim in her Amended Complaint. Her
20 Amended Complaint gives Meta fair notice of her legally cognizable claim and the grounds
21 on which it rests thoroughly explained in exhaustive factual detail. *See Twombly*, 550 U.S.
22 at 555; *see also* Am. Compl., ECF No. 114. However, inexplicably, Meta challenges the
23 Amended Complaint for “three independent reasons,” claiming (1) Meta’s Emergency News
24 Statement did not refer to Plaintiff, (2) Meta’s Emergency News Statement was not
25 published to a third party who reasonably understood its allegedly defamatory meaning or
26 applicability to Plaintiff, and (3) Meta’s Emergency News Statement was not false or
27 reasonably susceptible to a defamatory meaning. *See* ECF No. 115, p. 10. But Meta’s Rule
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1 12(b)(6) motion to dismiss must be denied because Genevieve plausibly pled “factual
2 content that allows the [C]ourt to draw the reasonable inference that [Meta] is liable for
3 [Defamation *Per Se*].” *See Iqbal*, 556 U.S. at 678.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 The United States Supreme Court analyzed the Rules Enabling Act and the federal
 17 rulemaking process in a 1995 opinion, *Swint v. Chambers County Comm’n*, 514 U.S. 35
 18 (1995). In that case, the Court was faced with a rule issue implicating its “power to
 19 prescribe general rules of practice and procedure . . . for cases in the United States district
 20 courts . . . and courts of appeals.” *Id.* at 48. (citing 28 U.S.C. § 2072(a)). The Court noted
 21 the procedure Congress ordered for such rule changes, however, is not expansion by court
 22 decision, but by rulemaking under § 2072. *Id.* The Supreme Court explained its
 23 “rulemaking authority is constrained by §§ 2073 and 2074, which require, among other
 24 things, that meetings of bench-bar committees established to recommend rules ordinarily
 25

26 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.>
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1 be open to the public, § 2073(c)(1), *and that any proposed rule be submitted to Congress*
2 *before the rule takes effect, § 2074(a).*” *Id.* (emphasis added).

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

13 *Second*, California’s anti-SLAPP statute is inapplicable in federal court under the
14 Supreme Court’s test in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S.
15 393, 398 (2010) (reaffirming *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (“When a situation
16 is covered by one of the Federal Rules,” a federal court must apply the Federal Rule,
17 notwithstanding the existence of a conflicting state statute.). Under *Shady Grove*, if a
18 federal rule of civil procedure “answers the question in dispute,” then it governs—
19 notwithstanding a state-law procedure to the contrary. *Id.* In this instance, the question in
20 dispute is whether Meta may dismiss or strike Genevieve’s claim by motion. Because
21 Federal Rule of Civil Procedure 12 provides the conditions and grounds under which Meta
22 may do so and it has not challenged the applicability or validity of Rule 12, it trumps
23 California’s anti-SLAPP statute.

24 *Third*, the Second Circuit applied the *Shady Grove* test in a case of first impression and
25 held that “California’s anti-SLAPP statute is inapplicable in federal court because it
26 increases a plaintiff’s burden to overcome pretrial dismissal, and thus conflicts
27 with Federal Rules of Civil Procedure 12 and 56.” *La Liberte v. Reid*, 966 F. 3d 79, 83 (2d
28

1 Cir. 2020).⁴ The Second Circuit acknowledged a circuit split as to whether anti-SLAPP
 2 statutes apply in federal courts, with the Fifth, Eleventh, and D.C. Circuits holding them
 3 inapplicable, *id.* at 86 (citing *Klocke v. Watson*, 936 F. 3d 240, 242 (5th Cir. 2019) (Texas
 4 statute); *Carbone v. Cable News Network, Inc.*, 910 F. 3d 1345, 1350 (11th Cir.
 5 2018) (Georgia statute); *Abbas v. Foreign Policy Grp., LLC*, 783 F. 3d 1328, 1335 (D.C. Cir.
 6 2015) (D.C. statute); and the First Circuit applying them. *Id.* (citing *Godin v. Schencks*, 629
 7 F.3d 79, 86-7 (1st Cir. 2010) (Maine statute)).

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

16 The Second Circuit explained that under Rule 12, “a well-pleaded complaint may
 17 proceed even if it strikes a savvy judge that actual proof of those facts is improbable.” *Id.*
 18 (quoting *Twombly*, 550 U.S. at 570). In contrast, the California anti-SLAPP statute
 19 “require[es] the plaintiff to establish that success is not merely plausible but probable.” *Id.*
 20 (cleaned up). The court found that the California anti-SLAPP statute “establishes the
 21 circumstances under which a court must dismiss a plaintiff’s claim before trial, a question
 22 that is already answered (differently) by Federal Rules 12 and 56.” *Id.* Thus, it concluded
 23

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

26 ⁵ In the underlying opinion, the Ninth Circuit panel reversed the denial of the anti-SLAPP
 27 motion and held the nonmoving party was a limited public figure. The panel remanded to
 28 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).

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

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

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

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

25 It is important to note that Meta has failed to address Genevieve’s factual allegations in
26 her Amended Complaint that Bickert and Rosen acted with actual malice when they
27 published the Emergency News Statement on January 6, 2021. *See generally New York*
28

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

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

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

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

18 **CONCLUSION**

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

22
23 Dated: April 28, 2023

Respectfully submitted,

24
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