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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 Kevin BOLLAERT,

11 Petitioner,

12 v.

13 William GORE,

14 Respondent.

Case No.: 17-cv-2022-WQH-AGS

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

15
16 Petitioner Kevin Bollaert, a state prisoner, challenges his state court conviction on
17 the ground that his actions were protected by the Communications Decency Act, 47 U.S.C.
18 § 230 (CDA). (ECF No. 1). A California jury found Petitioner guilty of extortion and the
19 unlawful use of personal identifying information, based on Petitioner’s operation of the
20 websites “UGotPosted.com” and “ChangeMyReputation.com.” (ECF No. 1-2 at 2).
21 Respondent has filed Answer and lodged the state court record. (ECF Nos. 4–5). Petitioner
22 has filed a Traverse. (ECF No. 6).

23 **I. BACKGROUND**

24 The following summary comes from the appellate court opinion affirming
25 Petitioner’s conviction on direct review. *See Sumner v. Mata*, 449 U.S. 539, 547 (1981)
26 (stating that state court findings of fact are presumed correct in federal habeas
27 proceedings); *see also* 28 U.S.C. § 2254(e)(1) (“The applicant shall have the burden of
28 rebutting the presumption of correctness by clear and convincing evidence.”); *Parke v.*

1 *Raley*, 506 U.S. 20, 35 (1992) (holding that findings of historical fact, including inferences
2 properly drawn from those facts, are entitled to statutory presumption of correctness).

3 Petitioner operated a website called “UGotPosted.com,” through which users posted
4 private, intimate, and typically nude photographs of individuals, “as well as their names,
5 hometowns, and social media addresses,” without permission. (ECF No. 1-2 at 4). “Most
6 of the pictures were taken by or for former significant others or friends.” *Id.* When the
7 individuals wanted their photographs taken down, the individuals were directed to another
8 website Petitioner operated, called “ChangeMyReputation.com.” *Id.* On the
9 ChangeMyReputation website, individuals could pay to have their photographs and
10 information removed from the UGotPosted website. *Id.*

11 Petitioner was convicted of twenty-four counts of identity theft under California
12 Penal Code section 530.5(a) and seven counts of extortion under California Penal Code
13 section 520. (ECF No. 1 at 2). Petitioner is serving eight years in custody, to be followed
14 by ten years of supervised release. *Id.* The California Court of Appeal affirmed
15 Petitioner’s conviction, concluded the evidence was sufficient to support the jury’s finding
16 that Petitioner was an information content provider ineligible for CDA immunity (ECF
17 Nos. 1-2, 1-3). The California Supreme Court denied Petitioner’s petition for review
18 without comment (ECF No. 5-22). Petitioner did not file any state habeas corpus petitions.
19 On October 2, 2017, Petitioner filed the present petition. (ECF No. 1).

20 **II. STANDARD OF REVIEW**

21 A state prisoner is not entitled to federal habeas relief on a claim the state court has
22 adjudicated on the merits, unless that ruling

- 23 (1) resulted in a decision that was contrary to, or involved an unreasonable
24 application of, clearly established Federal law, as determined by the
25 Supreme Court of the United States; or (2) resulted in a decision that was
26 based on an unreasonable determination of the facts in light of the evidence
27 presented in the State court proceeding.
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1 28 U.S.C. § 2254(d); *Lockyer v. Andrade*, 538 U.S. 63, 70–71 (2003). These provisions
2 “create an independent, high standard to be met before a federal court may issue a writ of
3 habeas corpus to set aside state-court rulings.” *Uttecht v. Brown*, 551 U.S. 1, 10 (2007).
4 In deciding a state prisoner’s habeas petition, a federal court is not called upon to decide
5 whether it agrees with the state court’s determination; rather, the court applies an
6 extraordinarily deferential review, inquiring only whether the state court’s decision was
7 “objectively unreasonable.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003); *Medina v.*
8 *Hornung*, 386 F.3d 872, 877 (9th Cir. 2004).

9 If there is no reasoned decision from the state’s highest court, the court “looks
10 through” to the underlying appellate court decision and presumes it provides the basis for
11 the higher court’s denial of a claim or claims. *Ylst v. Nunnemaker*, 501 U.S. 797, 803–06
12 (1991). In this case, the Court presumes that the reasoned opinion of the California Court
13 of Appeal provides the basis for the California Supreme Court’s denial of Petitioner’s
14 claim. (ECF Nos. 1-2, 1-3).

15 **III. DISCUSSION**

16 Petitioner states that his actions are immune from state criminal prosecution under
17 the CDA. (ECF No. 1 at 14). Petitioner contends that the state court’s holding otherwise
18 “is directly contrary to establish Federal Law,” and “involve an unreasonable interpretation
19 of facts and their application to Federal law.” *Id.* at 17–18.

20 Respondent states that Petitioner “has failed to demonstrate he is immune from
21 prosecution” under the CDA and that “the California Court of Appeal rejected this claim
22 on the merits in a reasoned decision.” (ECF No. 4 at 2). Respondent states that “the
23 California Supreme Court rejected [Petitioner’s] petition for review of that decision,” and
24 that “[n]either decision was an unreasonable determination of fact, or contrary to, or an
25 unreasonable application of, United States Supreme Court precedent.” *Id.*

26 **A. “Clearly Established Federal Law” under § 2254(d)(1)**

27 Clearly established federal law under § 2254(d)(1) is “determined by the Supreme
28 Court of the United States.” Clearly established federal law for purposes of federal habeas

1 review “refers to the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions
2 as of the time of the relevant state-court decision.” *Williams v. Taylor*, 529 U.S. 362, 412
3 (2000). The Court of Appeals has explained that if “the Supreme Court has not addressed
4 an issue in its holding, a state court adjudication of the issue not addressed by the Supreme
5 Court cannot be contrary to, or an unreasonable application of, clearly established federal
6 law.” *Stenson v. Lambert*, 504 F.3d 873, 881 (9th Cir. 2007); *see also Demirdjian v.*
7 *Gipson*, 832 F.3d 1060, 1066 (9th Cir. 2016) (noting that federal courts cannot “grant
8 habeas relief unless the California Court of Appeal’s decision on that claim was ‘contrary
9 to, or involved an unreasonable application of’ clearly established Supreme Court
10 authority”) (quoting 28 U.S.C. § 2254(d)(1)).

11 The CDA protects “providers of interactive computer services against liability
12 arising from content created by third parties.” *Fair Housing Council of San Fernando*
13 *Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008). Under the CDA,
14 “[n]o provider or user of an interactive computer service shall be treated as the publisher
15 or speaker of any information provided by another information content provider” for
16 purposes of “Civil liability.” 47 U.S.C. § 230(c)(1). Immunity under the CDA “applies
17 only if the interactive computer service provider is not also an ‘information content
18 provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the
19 creation or development of’ the offending content.” *Roommates*, 521 F.3d at 1162 (quoting
20 47 U.S.C. § 230(f)(3)).

21 Federal circuit court “precedent does not constitute clearly established Federal law,
22 as determined by the Supreme Court. It therefore cannot form the basis for habeas relief
23 under [§ 2254(d)].” *Parker v. Matthews*, 567 U.S. 37, 48–49 (2012) (citations and internal
24 quotation marks omitted). A court may “look to circuit precedent to ascertain whether it
25 has already held that the particular point in issue is clearly established by Supreme Court
26 precedent.” *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013). A court “may not canvass circuit
27 decisions to determine whether a particular rule of law is so widely accepted among Federal
28 Circuits that it would, if presented to [the Supreme] Court, be accepted as correct.” *Id.*

1 In this case, the Supreme Court has never recognized that the CDA applies in state
2 criminal actions. The Supreme Court has never indicated circumstances that would qualify
3 a state criminal defendant for CDA immunity. Absence of applicable Supreme Court
4 precedent defeats the contention that Petitioner is entitled to CDA immunity under clearly
5 established federal law. *See Premo v. Moore*, 562 U.S. 115, 127 (2011) (“[N]ovelty
6 alone—at least insofar as it renders the relevant rule less than ‘clearly established’—
7 provides a reason to reject it under [§ 2254(d)].”).

8 Petitioner cannot satisfy § 2254(d)(1) by “look[ing] to circuit precedent”—federal
9 circuits have not applied CDA immunity in state criminal actions or indicated
10 circumstances that would qualify a state criminal defendant for CDA immunity. *See*
11 *Marshall*, 569 U.S. at 64. Petitioner cannot satisfy § 2254(d)(1) with district court opinions
12 applying CDA immunity in state criminal actions. *See Backpage.com, LLC v. McKenna*,
13 881 F. Supp. 2d 1262, 1274–75 (W.D. Wash. 2012) (“If Congress did not want the CDA
14 to apply in state criminal actions, it would have said so.”); *Voicenet Commc’ns, Inc. v.*
15 *Corbett*, No. 04-1318, 2006 WL 2506318, at *1–4 (E.D. Pa. Aug. 30, 2006) (“[T]he plain
16 language of the CDA provides internet service providers immunity from inconsistent state
17 criminal laws”).

18 **B. “Contrary To” or “Unreasonable Application Of” under § 2254(d)(1)**

19 A state court’s decision may be “contrary to” clearly established Supreme Court
20 precedent “if the state court applies a rule that contradicts the governing law set forth in
21 [the Court’s] cases,” or “if the state court confronts a set of facts that are materially
22 indistinguishable from a decision of [the] Court and nevertheless arrives at a result different
23 from [the Court’s] precedent.” *Williams*, 529 U.S. at 405–06.

24 A state court decision may involve an “unreasonable application” of clearly
25 established federal law “if the state court identifies the correct governing legal rule from
26 this Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s
27 case.” *Id.* at 407. Relief under the “unreasonable application” clause of § 2254(d) is
28 available “if, and only if, it is so obvious that a clearly established rule applies to a given

1 set of facts that there could be no ‘fairminded disagreement’ on the question.” *White v.*
2 *Woodall*, 572 U.S. 415, 427 (2014) (quoting *Harrington v. Richter*, 562 U.S. 86, 103
3 (2011)).

4 Even assuming federal circuit decisions of civil CDA immunity could clearly
5 establish federal law, Petitioner fails to show the state court decision contradicted or
6 unreasonably applied such law. The California Court of Appeal rejected Petitioner’s claim
7 to CDA immunity as an “interactive service provider” or “access software provider.” (ECF
8 No. 1-2 at 7). The California Court of Appeal concluded that “Bollaert’s design and
9 operation of UGotPosted.com—which required users who wished to use the Web site to
10 provide content that violated other persons’ privacy—does not entitle him to statutory
11 immunity under the CDA.” *Id.* at 24. The court explained “[w]e base our conclusion on
12 the reasoning of the Ninth Circuit Court of Appeals in *Roommates*.” *Id.* The court stated,

13 Here, the evidence shows that like the Web site in *Roommates*, Bollaert
14 created UGotPosted.com so that it forced users to answer a series of questions
15 with the damaging content in order to create an account and post photographs.
16 That content—full names, locations, and Facebook links, as well as the nude
17 photographs themselves—exposed the victims’ personal identifying
18 information and violated their privacy rights. As in *Roommates*, but unlike
19 *Carafano[v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003)]* or *Zeran[*
20 *v. America Online, Incorporated, 129 F.3d 327 (4th Cir. 1997)]*, Bollaert’s
21 Web site was “*designed to solicit*” content that was unlawful, demonstrating
22 that Bollaert’s actions were not neutral, but rather materially contributed to
23 the illegality of the content and the privacy invasions suffered by the victims.
24 In that way, he developed in part the content, taking him outside the scope of
25 CDA immunity.

26 Bollaert would have us follow the Sixth Circuit’s decision in *Jones[v. Dirty*
27 *World Entm’t Recordings LLC]*, 755 F.3d 398[(6th Cir. 2014)], involving a
28 “user-generated, online tabloid” where users could anonymously post
comments, photographs and video, which the operator selected and published
along with his own editorial comments. But *Jones* supports our conclusions.
There, the Sixth Circuit adopted the Ninth Circuit’s material contribution test
to determine whether a Web site operator is “ ‘responsible, in whole or in part,
for the creation or development of [allegedly tortious] information’ ” within
the meaning of the CDA. The court held that unlike the Web site in

1 *Roommates*, the Web site operator in that case “did not require users to post
2 illegal or actionable content as a condition of use,” but instead instructed users
3 to “ ‘[t]ell us what’s happening’ ” and “ ‘who, what, when, where, why.’ ” It
4 also provided “*neutral* tools”—labels by which to categorize the submission—
5 as to what third parties submit. These tools, the Sixth Circuit held, did not
6 constitute a material contribution to any defamatory speech that was uploaded.
7 Nothing in *Jones* changes our conclusion that the evidence in this case
8 supports the jury’s finding that Bollaert’s design and operation of
9 UGotPosted.com made him an information content provider, taking him
10 outside CDA immunity.

11 (ECF No. 1-2 at 30; ECF No. 1-3 at 1) (citations omitted). In *Roommates*, the plaintiff
12 claimed that the defendant violated the Fair Housing Act and analogous California law by
13 requiring answers to certain registration questions that were illegal in the context of
14 housing. 521 F.3d at 1164–65. The *Roommates* court held that the defendant was
15 “undoubtedly the ‘information content provider’ as to the questions and can claim no
16 immunity for posting them on its website, or for forcing subscribers to answer them as a
17 condition of using its services.” *Id.* at 1164.

18 In this case, the California Court of Appeal performed an exhaustive and
19 comprehensive analysis of the applicable circuit court decisions before concluding
20 Petitioner is an information content provider under *Roommates*. The state court reasonably
21 interpreted *Roommates* and *Jones*, and reasonably concluded that Petitioner “developed, at
22 least in part, the offensive content on his Web site by requiring users to input private and
23 personal information as a condition of posting the victims’ pictures, making him an
24 information content provider within the meaning of the CDA.” (ECF No. 1-2 at 3).

25 The Court gives a high level of deference to the state court’s decision. The
26 California Court of Appeal’s decision was not contrary to or an unreasonable application
27 of federal law. *See Yarborough*, 540 U.S. at 4. Petitioner failed to show that the California
28 Court of Appeal concluded, in a manner contrary to or unreasonably applying federal law,
that Petitioner is an “information content provider” ineligible for CDA immunity.

C. “Unreasonable Determination Of The Facts” under § 2254(d)(2)

1 Federal habeas relief is available if the state court’s adjudication of a claim “resulted
2 in a decision that was based on an unreasonable determination of the facts in light of the
3 evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d)(2). “Factual
4 determinations by state courts are presumed correct absent clear and convincing evidence
5 to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and
6 based on a factual determination will not be overturned on factual grounds unless
7 objectively unreasonable in light of the evidence presented in the state-court proceeding, §
8 2254(d)(2).” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also Taylor v. Maddox*,
9 366 F.3d 992, 1000 (9th Cir. 2004) (“[I]n concluding that a state-court finding is
10 unsupported by substantial evidence in the state-court record, it is not enough that we
11 would reverse in similar circumstances if this were an appeal from a district court decision.
12 Rather, we must be convinced that an appellate panel, applying the normal standards of
13 appellate review, could not reasonably conclude that the finding is supported by the
14 record.”), *abrogated on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th
15 Cir. 2014).

16 Petitioner states that “the decision of the State courts was based upon an
17 unreasonable determination of the facts, which determination was made to wrongfully
18 exclude petitioner from immunity provided under [the CDA].” (ECF No. 1 at 19). The
19 petition does not state that the California Court of Appeal, the trial court, or the jury made
20 incorrect factual findings. Petitioner was specifically warned that the traverse “must not
21 raise new grounds for relief that were not asserted in the Petition.” (ECF No. 2 at 3). The
22 Court need not review claims of unreasonable fact determination first raised in the traverse.
23 *See Wheaton v. Glebe*, 705 F. App’x 648 (2017) (mem.) (citing *Cacoperdo v. Demosthenes*,
24 37 F.3d 504, 507 (9th Cir. 1994) (“A Traverse is not the proper pleading to raise additional
25 grounds for relief.”)); *but see Boardman v. Estelle*, 957 F.2d 1523, 1525 (9th Cir. 1992)
26 (holding that district court erred in failing to address issue raised in traverse).

27 The traverse states that Petitioner “would rely upon the factual statements set out by
28 the Court of Appeal in its opinion.” (ECF No. 6 at 2). The traverse also states that “[t]he

1 California State Courts interpretation of both the facts and the federal statute were
2 unreasonable, thereby entitling petitioner to relief.” *Id.* at 3. The traverse contains a section
3 titled “The State Court’s factual interpretation was unreasonable,” in which “Petitioner
4 disputes a number of claims made in *respondent’s answer* that attempt to establish
5 petitioner was an information content provider and therefore not a beneficiary of the
6 protections provided in the CDA.” *Id.* at 6 (emphasis added). Petitioner does not assert
7 that the California Court of Appeal, the trial court, or the jury made incorrect fact findings.
8 Petitioner’s claim fails under § 2254(d)(2).

9 **D. Certificate of Appealability**


10 Rule 11 of the Rules Governing Section 2254 Cases states that “[t]he district court
11 must issue or deny a certificate of appealability when it enters a final order adverse to the
12 applicant.” A certificate of appealability should issue as to those claims on which a
13 petitioner makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C.
14 § 2253(c)(2). The standard is satisfied if “jurists of reason could disagree with the district
15 court’s resolution of [the] constitutional claims” or “conclude the issues presented are
16 adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S.
17 322, 327 (2003). Reasonable jurists would not find Petitioner’s claim debatable. The Court
18 declines to issue a certificate of appealability.

19 **IV. CONCLUSION**

20 Petitioner fails to demonstrate that the state court’s decision was contrary to, or an
21 unreasonable application of, clearly established Supreme Court law.

22 IT IS HEREBY ORDERED that Petitioner’s habeas petition is denied. The Court
23 grants no certificate of appealability. The Clerk is directed to close this case.

24 Dated: November 5, 2018

25 
26 Hon. William Q. Hayes
27 United States District Court
28