CAUSE NO. 2019-16262

JANE DOE AS NEXT FRIEND OF J.D. #19, A MINOR SEX TRAFFICKING SURVIVOR	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	**HARRIS COUNTY, TEXAS**
vs.	§	
FACEBOOK, INC. d/b/a INSTAGRAM; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and G6 HOSPITALITY INC., d/b/a MOTEL 6 2900 W SAM HOUSTON PARKWAY	§	
Defendants.	§	**151st JUDICIAL DISTRICT**

MOTION BY DEFENDANT FACEBOOK, INC. TO DISMISS THE PETITION UNDER TEXAS RULE OF CIVIL PROCEDURE RULE 91A

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Subject to and without waiving its previously filed Special Appearance to Contest Personal Jurisdiction, Objection to Improper Venue, Motion to Dismiss for Improper Forum, and Answer ("Special Appearance"), Defendant Facebook, Inc. files this Motion to Dismiss Jane Doe's claims against it under Texas Rule of Civil Procedure 91a.[1]

INTRODUCTION

Plaintiff Jane Doe ("Plaintiff"), as next friend of her minor daughter Jane Doe #19 ("Jane Doe"), alleges that Jane Doe was a victim of rape and child trafficking at the hands of assailants who trafficked and raped her at a Motel 6 operated by Defendant G6 Hospitality, Inc. Plaintiff also has sued Facebook, alleging that Jane Doe's initial assailant—identified in the Petition as Akeem Whitfield—"friended" Jane Doe on Instagram and then communicated with her on Facebook's Instagram platform, which allows Instagram users to post photos and exchange messages within their group of accepted friends on their phones or other internet-connected devices.[2] Plaintiff's Original Petition ("Petition" or "Pet.") claims that, after initial communications designed to gain Jane Doe's trust, Whitfield persuaded Jane Doe to sneak out of her home and meet him in person. Plaintiff alleges that, immediately after Jane Doe met Whitfield, she was taken to the Motel 6, posted for sale on the website Backpage.com, and then, as a result of those Backpage postings, raped by unnamed "johns."

The Petition does not allege any involvement by Facebook in the acts of violence that Jane Doe allegedly suffered at the hands of these unnamed traffickers and rapists. Rather, the claims against Facebook turn solely on the communications Jane Doe had with Whitfield after she apparently agreed to include him in her "friend" network on Instagram, meaning that the claim necessarily seeks to hold Facebook liable because Instagram served as a platform for those communications. Essentially,

[1] Facebook has not been provided with Jane Doe's real identity or any information suggesting that she has access to funds. Accordingly, Facebook is willing to waive its right, should the Court grant this motion, to any award of its legal fees under Texas Rule of Civil Procedure 91a.7.

[2] The Petition incorrectly alleges that Facebook does business as Instagram. Instagram is part of the Facebook family of apps and is a wholly owned subsidiary of Facebook.

Plaintiff's claim is that Facebook failed to monitor, block, remove, or warn about the content transmitted by Whitfield or to alert Jane Doe that communicating with Whitfield might cause her harm. But as shown below, and as the Petition admits, Facebook already is taking significant measures to address issues of child exploitation and to prevent its site from being used for harm. In the end, the theory of Plaintiff's claims against Facebook is ***not*** that Facebook does nothing to address the serious issue of human and child trafficking, but rather that it should have employed *different* or *better* policies to do so.

Human trafficking is an abhorrent practice, especially when it involves children. Facebook has the deepest sympathy for all victims of human trafficking. But as with other communication services such as email or texting apps, there is no legal basis for holding a platform liable when, despite the platform's efforts, the service is used by a third party to communicate harmful content—specifically, in this case, communications by Akeem Whitfield that were geared toward befriending Jane Doe and gaining her trust. Among multiple other reasons (including the lack of both causation and a legal duty), such claims are legally barred by Section 230 of the federal Communications Decency Act ("CDA"), 47 U.S.C. § 230. Section 230 creates broad immunity for online platforms such as Facebook, Instagram, and their associated messaging services, from liability for third-party content or communications on the platform. As the Beaumont Court of Appeals, the U.S. Court of Appeals for the Fifth Circuit, and other courts around the country repeatedly have held, Section 230 bars claims, such as those here, based on the allegation that online communications via a defendant's platform or messaging service led to some form of off-line harm. *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 759 (Tex. App.—Beaumont 2014, pet. denied) (reversing trial court's denial of defendant's motion to dismiss under Rule 91a and holding that Section 230 barred plaintiffs' claims); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (affirming trial court's grant of dismissal on the pleadings).

Because Plaintiffs' claims against Facebook are barred by Section 230, they have no basis in law, and the Court should dismiss them with prejudice under Rule 91a.

BACKGROUND

Plaintiff's Petition asserts claims against three former senior executives at Backpage.com, the operator of the hotel at which Jane Doe alleges she was victimized, and Facebook. This motion addresses only the claims against Facebook. Plaintiff alleges three claims against Facebook: negligence, negligence *per se*, and a statutory claim under a Texas anti-human trafficking statute, section 98.002 of the Civil Practice and Remedies Code. Pet. ¶¶ 276–93.

The Petition alleges that in 2018, when Jane Doe was 15 years old (Pet. ¶ 197), she was "friended" on Instagram by another Instagram user, identified as Akeem Whitfield, a male in his late 30's. *Id.* ¶ 191. The Petition appears to allege that Jane Doe accepted this friend request, and that she and Whitfield then engaged in online communications over a two-year period through Instagram's user-to-user messaging function. *Id.* ¶ 193. During these communications, Whitfield allegedly gained Jane Doe's confidence by "manipulat[ing] and 'groom[ing]' Jane Doe into believing that he cared for her" (*id.*), and by using "several of the phrases used by traffickers" (*id.* ¶ 194).

In May 2018, Whitfield "convinced Jane Doe to leave her home and sneak out with him" (Pet. ¶ 196). Immediately after Jane Doe met Whitfield, the Petition alleges, she was taken to a Motel 6 in Houston, posted on Backpage.com, and "raped by johns seeking to sexually exploit [her]." *Id.* ¶¶ 196–97. More specifically as to Backpage, the Petition alleges that, as a result of Backpage's policies designed to "sanitize[e]" ads offering minors for sex, Jane Doe was "sexually exploited through the use of the Backpage website" and caused to prostitute herself by being forced to perform sexual acts on individuals who paid for criminal sexual conduct with a minor. *Id.* ¶ 207; *see also id.* ¶¶ 213-14, 217-26.[3]

[3] The Petition reflects some confusion about the timetable of these alleged events. The Petition alleges that Whitfield convinced Jane Doe to meet him on May 3, 2018, and that she was raped "[s]oon []after" she was "posted on Backpage by her trafficker." Pet. ¶¶ 196–97. But the Petition also alleges that "the FBI seized the Backpage website" on "April 6, 2018." *Id.* ¶ 202. The Petition does not explain how Jane Doe could have been posted on Backpage nearly a month after the site was seized.

Plaintiff's claims against Facebook center entirely upon Whitfield's alleged use of Instagram to lure Jane Doe into the initial off-line meeting. The Petition alleges that Facebook failed to implement certain safety measures to prevent Jane Doe from communicating with Whitfield—such as prohibiting adults from communicating directly with minors, monitoring communications with minors to capture certain "phrases used by traffickers," warning Instagram users about the dangers of human trafficking, requiring verification of users' identities, and implementing various parental controls (Pet. ¶¶ 186, 188–89, 192, 194, 198–200, 280, 291)—and that by allegedly failing to implement these measures, Facebook knowingly facilitated and benefitted from Jane Doe's trafficking (*id.* ¶ 292). Subject to its Special Appearance, Facebook has generally denied these allegations.

Significantly, the Petition does not allege that Facebook had any advance knowledge that Whitfield presented a risk to Jane Doe or any other person, or that it played any role in creating or editing the messages that Whitfield allegedly sent Jane Doe on Instagram. Nor does Plaintiff allege that Facebook had any involvement in the off-line harm that Jane Doe suffered, including any of the actions of Backpage in editing and "sanitizing" posts to facilitate advertisements for child trafficking.

On the contrary, the Petition repeatedly acknowledges that Facebook actively engages in reporting activities and employs and enforces community standards and monitoring policies to prevent its broadly available platforms and messaging services from being used for child trafficking and other types of harmful and illegal conduct. For example, Plaintiff admits that Facebook "do[es] not allow content that sexually exploits or endangers children," and that when such content is discovered, Facebook "will report it to the National Center for Missing and Exploited Children [("NCMEC")]." Pet. ¶ 155. This is more than just a policy—the Petition concedes that Facebook does in fact "report instances" of "child abuse," "sexual assault of a child," and "child human trafficking" to NCMEC. Pet. ¶¶ 34–36.[4]

[4] NCMEC itself has acknowledged that Facebook is a key partner in this regard:

Beyond Facebook's work with NCMEC, Plaintiffs' petition affirmatively alleges that Facebook regularly employs additional measures to curb sexual exploitation of minors on its platform:

- Facebook "has taken precautions specific to child users between the age of 13-17. Pet. ¶¶ 103–04.
- Facebook requires a user to be 13 or over to join Facebook. Pet. ¶ 128.[5]
- Facebook "has monitored content" and continues to monitor content on its site regarding "sexual exploitation of minors" and "human trafficking of minors." Pet. ¶¶ 140–41; *see also id.* ¶ 47.
- Facebook prohibits any person that is involved in human trafficking from "having a presence on Facebook." Pet. ¶ 154.
- Facebook has "provided information to Texas law enforcement agencies regarding the trafficking of minors in Texas." Pet. ¶¶ 37-38.
- Facebook has blocked users on Facebook for explicit content, including that involving the sexual exploitation of minors. Pet. ¶ 45.
- Facebook prohibits all nude images of children, even those (such as family photos) that might be shared with good intentions, due to the "potential for abuse by others and to help avoid the possibility of other people reusing or misappropriating the images." Pet. ¶ 155.
- Facebook "work[s] with external experts, including the Facebook Safety Advisory Board, to discuss and improve [its] policies and enforcement around online safety issues, especially with regard to children." Pet. ¶ 155.
- Facebook prohibits sexual solicitation on its platform. Pet. ¶ 156.

As noted, the theory of the Petition is essentially that Facebook, despite all of these admitted measures to address the issue of child trafficking and the sexual exploitation of children, should have taken different or better measures to control communications on the site.

STANDARD FOR DISMISSAL UNDER RULE 91A

Under Rule 91a of the Texas Rules of Civil Procedure, "a party may move to dismiss a cause

> Since 2011, Facebook has worked closely with NCMEC to combat online child sexual exploitation. By participating in voluntary NCMEC industry initiatives, Facebook is proactive in detecting child pornography on its system and working to prevent continued victimization. Considered a technology leader, Facebook remains on the cutting edge by developing tools to protect children and sharing best practices with other online companies.

Partners, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/supportus/partners (last visited May 13, 2019).

[5] This comports with Congress's decision in the Children's Online Privacy Protections Act to require parental consent for children under 13 to share personal information on the internet, but not to require such consent for children 13 and over. See 15 U.S.C. §§ 6502(a)(1), 6501(1).

of action on the grounds that it has no basis in law or fact." Tex. R. Civ. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* Texas courts "accept as true the factual allegations in the pleadings to determine whether the cause of action has a basis in law or fact." *Guzder v. Haynes & Boone, LLP*, 01-13-00985-CV, 2015 WL 3423731, at *3 (Tex. App.—Houston [1st Dist.] May 28, 2015, no pet.). A "cause of action has no basis in law under Rule 91a" where "the petition alleges … facts that, if true, bar recovery." *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App—-Houston [1st Dist.] 2015, pet. denied). Dismissal under Rule 91a is especially appropriate "when the plaintiff's own allegations, taken as true, trigger a clear legal bar to the plaintiff's claim." *Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 608 (Tex. App.—Corpus Christi 2017, no pet.).

ARGUMENT AND AUTHORITIES

I. Section 230 of the Communications Decency Act bars Plaintiff's claims against Facebook

Even accepting the allegations in the Petition as true, Plaintiff's claim is barred as a matter of law by Section 230 of the CDA. As both the Beaumont Court of Appeals and the U.S. Court of Appeals for the Fifth Circuit have recognized, Section 230 applies—and early dismissal is appropriate—where the plaintiff seeks to impose liability on an internet platform or messaging service based on third-party content that appeared on that platform or service and allegedly led to some form of off-line harm to the plaintiff. *GoDaddy.com*, 429 S.W.3d at 759; *MySpace*, 528 F.3d at 418. The Court should follow these precedents and dismiss Plaintiff's claim against Facebook.

A. Section 230 immunizes interactive computer service providers from claims based on third-party content

Section 230 grants immunity to online platforms such as Facebook by providing that:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

See 47 U.S.C. § 230(c)(1). Section 230 applies "without regard to the nature of the content at issue," *GoDaddy.com*, 429 S.W.3d at 759, and extends "broad immunity … to Web-based service providers for

all claims stemming from their publication of information created by third parties." *MySpace*, 528 F.3d at 418 (emphasis added); *see also Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014) ("[C]ourts have construed the immunity provisions in § 230 broadly," and "close cases ... must be resolved in favor of immunity." (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc))). In adopting this broad construction, courts have recognized that the imposition of a duty to monitor customer posts and communications would have a crippling effect on internet platforms. *Jones*, 755 F.3d at 407–08; *Roommates.com*, 521 F.3d at 1174; *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).

To enforce this federally created immunity, Section 230 expressly preempts any state law to the contrary by providing that:

> No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

47 U.S.C. § 230(e)(3). In construing the preemptive effect of a statute such as Section 230(e)(3) that "contains an express preemption clause,' [courts] do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent,'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011)). Thus, the Court need not consider any presumption for or against preemption—if a state-law cause of action is "inconsistent with" Section 230 (as all of Plaintiffs' causes of action are), it is preempted. *See Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018) ("[T]he best course is simply to follow as faithfully as we can the wording of the express preemption provision, without applying a presumption one way or the other.").

Here, the sole alleged connection between Jane Doe's alleged injuries and Facebook is that Jane Doe's alleged trafficker—Akeem Whitfield—gained her trust through communications with her on Instagram and ultimately proposed an off-line meeting, after which Jane Doe was posted on Backpage.com and, as a result of those ads, was assaulted and raped. *See* Pet. ¶¶ 191–97. In other words, Jane Doe's

claim against Facebook hinges entirely on content created and posted to Instagram by a third party, Akeem Whitfield. But as the Beaumont Court of Appeals has recognized, allowing a plaintiff "to assert *any* cause of action against [a platform] for publishing content created by a third party, or for refusing to remove content created by a third party[,] would be squarely inconsistent with [S]ection 230." *GoDaddy.com*, 429 S.W.3d at 758 (emphasis added). Where, as here, a claim depends on the assertion that the online service was used as an "intermediar[y]" for "other parties' potentially injurious messages," Section 230 bars the claim. *Zeran*, 129 F.3d at 330–31.

B. Plaintiff's claims are barred by Section 230 immunity

Plaintiff's claims meet all of the elements of Section 230 and accordingly are barred. Section 230 requires dismissal when "(1) the defendant asserting immunity is an interactive computer service provider, (2) the particular information at issue was provided by another information content provider, and (3) the claim seeks to treat the defendant as a publisher or speaker of that information." *Davis v. Motiva Enterprises, L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *2 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009)). Each element is met here.

1. Facebook is an interactive computer service provider

Facebook meets the first Section 230 element because it is a "provider … of an interactive computer service," *see* 47 U.S.C. § 230(c)(1), defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server," *id.* § 230(f)(2). Facebook's Instagram platform meets this definition because its users access its servers to share information on its platform. *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 993 (S.D. Tex. 2017); *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156 n.10 (E.D.N.Y. 2017); *see also MySpace*, 528 F.3d at 420–22 ("social networking" site was an "interactive computer service[e]" under Section 230).

This definition includes information shared by a social media platform's private email or messaging services. *See MySpace*, 528 F.3d at 420–22 ("interactive computer service" includes social

networking site on which users may contact each other "through internal email and/or instant messaging"); *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 975 (N.D. Cal. 2016) ("[T]he private nature of Direct Messaging does not remove the transmission of such messages from the scope of publishing activity under section 230(c)(1)."); *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536 (D. Md. 2006) (Section 230 bars claims based on web company's transmission of "allegedly offensive e-mails"). Plaintiff does not allege that she had any contact with Facebook or Instagram other than through this interactive computer service.

2. Plaintiffs' claims arise from content provided by another information content provider

The second element of Section 230 also is met because the allegedly harmful content—the private messages to Jane Doe from Whitfield—was "provided by another information content provider." *See* 47 U.S.C. § 230(c)(1). An "information content provider" is a person or entity "that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). The term "development" "refer[s] not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness." *Roommates.com,* 521 F.3d at 1167–68. Under this definition, the use of "neutral tools"—such as those that filter or arrange third-party content—does not equate with "creat[ing]" or "develop[ing]" information posted by third parties. *Id.* at 1171–72; *see also Jones*, 755 F.3d at 416 (defendant website's publishing "tools, neutral (both in orientation and design) as to what third parties submit, d[id] not constitute a material contribution to any defamatory speech that [wa]s uploaded"); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (immunity applies where 'the selection of the content was left exclusively to the user").[6]

Accepting the Petition's allegations as true, the allegedly harmful content at issue here consisted

[6] The fact that Facebook is a "for-profit" social media platform does not change the applicability of Section 230 because there is no "for-profit exception to § 230's broad grant of immunity." *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011); *accord Roommates.com*, 521 F.3d at 1161, 1174–75 (website's receipt of revenue from "advertisers and subscribers" did not affect immunity).

of messages that Whitfield composed and sent to Jane Doe via Instagram's online user-to-user messaging platform. Plaintiff does not (and could not) allege that Facebook created or developed any of Whitfield's messages to Plaintiff or altered or contributed to those messages in any way, let alone in a way that made the displayed content allegedly unlawful. What made Whitfield's messages unlawful was the criminal intent that they reflected, and Facebook added nothing whatsoever to the messages Whitfield allegedly sent. Accordingly, Whitfield, not Facebook or Instagram, was the information content provider in this sense. *See Jones*, 755 F.3d at 410, 413 (platform becomes an "information content provider" of third-party content only when it materially contributes to the alleged illegality of that content—not when it simply takes action that permits its display or transmission).

In this regard, the allegations about Facebook and Instagram starkly contrast with the allegations against former Backpage executives Michael Lacey, James Larkin, and John Brunst, who are alleged to have curated and "systematically edit[ed]" advertisements for child prostitutes posted on the Backpage.com site "to sanitize the content of innumerable advertisements for illegal transactions." *See* Pet. ¶¶ 217, 216. *See generally Roommates.com,* 521 F.3d at 1167–68 (defendant website "developed" illegal content and thus was not immune under Section 230 where the defendant "materially contribut[ed] to [the content's] alleged unlawfulness"). And in contrast to the allegations that the Backpage.com site was designed to facilitate criminal activity, Plaintiff does not dispute that Instagram is broadly available for public posting and user-to-user communications by Instagram users, or that the overwhelming majority of content on Instagram is lawful and uncontroversial.

3. Plaintiffs' claims seek to treat Facebook as a "publisher or speaker" of the challenged content

The third and final element of Section 230 is also met because the Petition seeks to hold Facebook liable as a "publisher or speaker" of third-party content. *See* 47 U.S.C. § 230(c)(1). All of the claims against Facebook depend on communications by Whitfield—not on messages or content created by Facebook or Instagram, or any off-line Facebook conduct. There is not, nor could there be, any allegation that

Facebook had any knowledge of, or involvement in, the physical violence and criminal conduct that allegedly began with the subsequent off-line meeting between Jane Doe and Whitfield. The only alleged connection among Facebook, Whitfield, and Jane Doe's injuries is that Whitfield initially contacted Jane Doe on the Instagram platform and communicated with her through Instagram's messaging service. (Pet. ¶¶ 191–97) The Petition seeks to hold Facebook liable for its alleged failure to monitor, warn Jane Doe about, block, or remove the content that Whitfield allegedly created and transmitted via Instagram. Thus, Plaintiffs' underlying theory of liability necessarily hinges on Instagram's alleged role as the publisher of the messages Whitfield allegedly sent to Jane Doe using Instagram's messaging service.

Facebook cannot be held liable under that theory, no matter how the claim is styled, because Section 230 precludes any claim for which causation necessarily depends on Facebook's alleged publication of Whitfield's content. *See, e.g., Igbonwa v. Facebook, Inc.*, 3:18-cv-2027, 2018 WL 4907632, at *6 (N.D. Cal. Oct. 9, 2018) (Section 230 "covers not only claims that are based on conduct that is directly related to the publication or removal of content but also claims where causation depends on the content itself"); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1165 (N.D. Cal. 2017) (where "Plaintiffs 'rely on content to establish causation,'" Section 230 bars their claims (quoting *Cohen*, 252 F. Supp. 3d at 157)).

Plaintiff cannot plead around Section 230 by recasting her claims against Facebook in "failure to warn," "failure to prevent," or "failure to safeguard" terminology, or by arguing that she is challenging Facebook's own actions in these respects, not third-party content. *See* Pet ¶¶ 186, 188–89, 192, 198–200, 280, 291. Courts consistently have unmasked and rejected similar attempts to evade Section 230. "What matters" for Section 230 is not the "label[]" placed on the claim but "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1101–03. If "the duty" allegedly violated "derives from the defendant's status or conduct as a 'publisher or speaker,'" that ends the analysis, and Section 230 "precludes liability." *Id.* at 1102; *see also Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 591–92 (S.D.N.Y. 2018) ("failure to warn claims … also require treating [the platform] as the 'publisher' of" third-party content).

For example, in 2008, the Fifth Circuit addressed this issue in *MySpace*, a remarkably similar case in which the plaintiff claimed that her daughter joined MySpace (a social medial platform) at age 13 by lying about her age, and then was contacted by another user on the site, agreed to meet with him off-line, and was sexually assaulted by the other user during the off-line encounter. 528 F.3d at 416. The plaintiff alleged that MySpace had "failed to implement basic safety measures to prevent sexual predators from communicating with minors on its Web site," but the Fifth Circuit held that these allegations were "merely another way of claiming that MySpace was liable for publishing the [sexual predator's] communications" and "sp[oke] to MySpace's role as a publisher of online third-party-generated content." *Id.* at 416, 420–21. The court looked to both the plain language and the consistent judicial interpretations of the statute to conclude that Section 230 extends "broad immunity … to Web-based service providers for all claims stemming from their publication of information created by third parties." *Id.* at 418. Reasoning that liability for failing to screen potential users would be no different from liability for publishing users' content, the court held that Section 230 applied "notwithstanding [the plaintiff's] assertion that they only sought to hold Myspace liable for its failure to implement measures that would have prevented Julie Doe from communicating with [the sexual predator]." *Id.* at 420. The Court rejected plaintiff's argument that her claims "were predicated solely on MySpace's failure to implement basic safety measures to protect minors," calling it "artful pleading" and "disingenuous." *Id.* at 419.

The Beaumont Court of Appeals came to the same conclusion in 2014 in *GoDaddy.com*, a case in which a class of women alleged that they were victims of non-consensual postings of pornographic images of themselves on two "revenge porn" websites that were hosted by GoDaddy. 429 S.W.3d at 753. The plaintiffs alleged that GoDaddy "knew of the content, failed to remove it, and then profited from the activity on the websites." *Id.* GoDaddy filed a Rule 91a Motion to Dismiss, arguing that it was immune from civil liability under Section 230. The trial court denied the motion, but the Court of Appeals reversed. *Id.* Explaining that plaintiffs may not "circumvent [Section 230] by couching their claims as state law intentional torts," *id.* at 759, the Court held that "[a]llowing [the] plaintiffs to

assert *any* cause of action against GoDaddy for publishing content created by a third party, or for refusing to remove content created by a third party[,] would be squarely inconsistent with section 230," *id.* 758 (emphasis added); *see also Davis v. Motiva Enterprises, L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (Section 230 barred plaintiff's negligence claims because the "theory of liability" was "based on [the defendant] allowing [a third party] access to the Internet … to publish fake Craig's List posts and failing to prevent those posts from being published"); *Milo v. Martin*, 311 S.W.3d 210, 215 (Tex. App.—Beaumont 2010, no pet.) (following *Zeran* and other federal cases that "applied section 230 broadly");

In a similar ruling just two weeks ago, the Wisconsin Supreme Court reaffirmed that Section 230 bars any claim—even if allegedly based on an internet platform's "own actions"—where the claim turns on an allegation that the platform "provided an online forum for third-party content and failed to adequately monitor that content." *Daniel v. Armslist, LLC*, ---N.W.2d---, 2019 WL 1906193, at *11 (Wisc. April 30, 2019). Specifically, the Court held that Section 230 barred claims by a shooting victim against the online gun merchant from which the shooter had purchased the weapon. The plaintiff claimed the merchant had deliberately designed its website to enable persons prohibited by law from possessing a firearm to avoid federal background checks and waiting periods by guiding them to the "private sale" option, which did not include those restrictions. The plaintiff argued, and the mid-level Wisconsin appellate court agreed, that Section 230 did not apply because plaintiff was challenging the website's "own conduct in facilitating user activity" through the design of its site, not the underlying content of the advertisements. *Daniel v. Armslist*, 913 N.W.2d 211, 214 (Wisc. Ct. App. 2018).

The Wisconsin Supreme Court reversed, holding that Section 230 "immuniz[es] interactive computer service providers from liability" based on third-party content regardless what cause of action is alleged. *See Daniel*, 2019 WL 1906193, at *4. The Court held that the lower court's "own actions" test could not be squared with the plain language of the statute, with the many judicial decisions construing the statute, or with the legislative purpose of "prevent[ing] the specter of tort liability from undermining

an interactive computer service provider's willingness to host third-party content." *Id.* As the Court explained, any claim where "[t]he duty [the defendant] is alleged to have violated derives from its role as a publisher of" third-party content "is precisely the type of claim that is prohibited by § 230(c)(1), no matter how artfully pled." *Id.* at *11.[7]

The same rationale plainly applies here. Just as in *Myspace*, *GoDaddy*, and *Armslist*, Plaintiff's claims seek to hold Facebook liable based on its alleged failures to "safeguard and warn its users … of the dangers of human traffickers using Facebook," to "mitigate the use of Facebook by human traffickers," to "prevent minors and adults from communicating without parental consent," or to "implement[] safeguards requiring verification of the identity of all users on Instagram." *See* Pet. ¶¶ 179, 186, 280, 291. Under Section 230, Facebook cannot be held liable for its alleged failure to adopt measures that allegedly would have prevented Jane Doe from communicating with Whitfield. *See MySpace*, 528 F.3d at 420; *GoDaddy.com*, 429 S.W.3d at 758; *Armslist*, 2019 WL 1906193, at *11. Because Plaintiff's claims against Facebook seek to do just that, this is a textbook case for application of Section 230—and for dismissal under Rule 91a. *See GoDaddy.com*, 429 S.W.3d at 762.

4. The 2018 Amendments to Section 230 Confirm its Applicability Here

Recent amendments to Section 230 confirm that the statute bars Plaintiff's claims. In 2018, Congress enacted the Allow States And Victims To Fight Online Sex Trafficking Act of 2017 ("FOSTA"), Pub. L. 115-164, Apr. 11, 2018, 132 Stat. 1254, in response to overwhelming information through which advocacy groups and affected parties documented and highlighted the growing problem of child trafficking. Presented with voluminous evidence regarding the proliferation of child trafficking

[7] This approach is consistent with how numerous courts around the country have applied Section 230. For example, courts have dismissed claims alleging that individuals or groups used Facebook, Twitter, and Google to communicate harmful messages that allegedly led to off-line harm such as terrorist attacks or other violent acts. *See, e.g.*, *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888–92 (N.D. Cal. 2017) (applying Section 230 to dismiss claims alleging that use of online platforms led to Dallas police shootings); *Cohen*, 252 F. Supp. 3d at 157–58 (same for terrorist attacks); *accord Force v. Facebook, Inc.*, 304 F. Supp. 3d 315, 319–25 (E.D.N.Y. 2018), *appeal docketed*, No. 18-397 (2d Cir. Feb. 9, 2018); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1360 (D.C. Cir. 2014); *Gonzalez*, 282 F. Supp. 3d at 1153–56; *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1128–29 (N.D. Cal. 2016), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018); *Fields*, 200 F. Supp. 3d at 975.

on the internet—and specifically trafficking over sites like backpage.com that were knowingly used to buy and sell children for sex—Congress amended both the underlying federal substantive law and Section 230 to address the problem.

The 2018 amendments added three express exemptions to the immunity created by the portion of Section 230 that states, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section" (47 U.S.C. § 230(e)(3)):

- *First*, FOSTA created a new federal civil cause of action against platform operators who intentionally "promote or facilitate the prostitution of another person," FOSTA, Pub. L. 115-164, Apr. 11, 2018, 132 Stat. 1254, § 3 (codified at 18 U.S.C. § 2421A), and amended Section 230 to create a specific exception to Section 230 immunity for this new federal civil cause of action, *id.* § 4 (codified at 47 U.S.C. § 230(e)(5)(A)).
- *Second*, FOSTA for the first time authorized state Attorneys General to bring an action to enforce the federal provisions *in parens patriae* behalf of state residents, *id.* at § 6 (codified at 18 U.S.C. § 2421(d)), and it amended Section 230 to create a specific exception to Section 230 immunity for claims brought by state Attorneys General, *id.* § 4 (codified at 47 U.S.C. § 230(e)(5)).
- *Finally*, FOSTA exempted certain types of state criminal prosecutions related to sex trafficking that previously would have been covered by Section 230. *See* FOSTA § 4 (codified at 47 U.S.C. § 230(e)(5)(B)–(C)).

Crucially, ***none*** of these exemptions applies to state-law civil actions brought by private plaintiffs. Congress created three express exemptions to Section 230 for human-trafficking claims—one for a federal civil claim; one for certain state criminal prosecutions; and one for certain state-law civil actions brought in *parens patriae* by state attorneys general—but did ***not*** create a fourth exemption for state-law civil claims brought by private plaintiffs. The "meticulous … enumeration of exemptions" in FOSTA "confirms that courts are not authorized to create additional exceptions." *See Law v. Siegel*, 571 U.S. 415, 424 (2014); *accord Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (the existence of an "express exception" "precludes the [creation] of implicit" exceptions); *see also Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). Where, as here, Congress has expressly

created three exceptions to a statute, it would be "inconsistent with" the statute for a court to create a fourth exceptions by implication. *See* 47 U.S.C. § 230(e)(3).

On top of that, the legislative history of FOSTA shows that Congress's omission of any exemption for state civil actions such as this one was no accident. The original version of the Bill that became FOSTA, introduced in April 2017, would have included a broad exemption that expressly carved out from the scope of Section 230(e) "any other Federal or State law that provides a cause of action, restitution, or other civil remedies to victims of [trafficking]." *See* H.R. 1865 115th Cong. (1st Sess. 1997). But a year later, when Congress enacted FOSTA, Congress ***dropped*** the exemption for state civil claims**.** In other words, Congress expressly considered the very exemption to Section 230 that Plaintiffs would have the Court create—an exemption for civil actions under state law brought by private plaintiffs—but rejected such a provision in the final version of FOSTA.

It would be inappropriate for this Court (or any court) to amend the statute judicially to create an exception that Congress considered and rejected. *See Camacho v. Samaniego*, 831 S.W.2d 804, 814 (Tex. 1992) ("The deletion of a provision in a pending bill discloses the legislative intent to reject the proposal." (quoting *Smith v. Baldwin*, 611 S.W.2d 611, 616–17 (Tex. 1980))); *see also Russello v. United States*, 464 U.S. 16, 24–25 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Penn. R Co v. Int'l Coal Min. Co.*, 230 U.S. 184, 198 (1913) (finding the deletion from a prior version of a bill a provision containing the remedy requested by the plaintiff "conclusive against the contention of the plaintiff" that the enacted bill should be construed to provide that remedy). If Congress had wanted to create an additional exception to Section 230 for civil claims by private plaintiffs under state anti-trafficking statutes, it would have written that exception into FOSTA.

II. The Court should dismiss Plaintiff's claim against Facebook with prejudice

The nature of Section 230 immunity means defendants should not be subject to multiple rounds of litigation where it is clear that immunity would cover any new iteration of the underlying

legal theories. *Jones*, 755 F.3d at 417 ("[D]eterminations of immunity under the CDA should be resolved at an earlier stage of litigation."). This case presents the very danger that Congress sought to prevent in enacting Section 230: that platforms hosting immeasurable amounts of third-party content would face endless litigation seeking to hold them responsible for harms allegedly stemming from that content—the "death by ten thousand duck-bites" the Ninth Circuit warned about in *Roommates.com*, 521 F.3d at 1174. The Court should dismiss Plaintiff's claim against Facebook with prejudice. *See GoDaddy.com*, 429 S.W.3d at 761–62 (reversing denial of Rule 91a motion on interlocutory appeal and finding that futile amendment of petition "would be contrary to the policies set forth in the CDA").

CONCLUSION

Facebook respectfully asks the Court to dismiss all three of Plaintiffs' claims against Facebook with prejudice under Texas Rule of Civil Procedure 91a.

Dated: May 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2019, the foregoing document was served on all counsel of record by electronic mail in accordance with the Texas Rules of Civil Procedure.

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