No. 20-0434

In the Supreme Court of Texas

IN RE FACEBOOK, INC. and FACEBOOK, INC. d/b/a INSTAGRAM,
Relator.

Original Proceeding from Cause Nos. 2018-69816 & 2018-82214,
334th District Court, Harris County, Texas, and
Cause No. 2019-16262, 151st District Court, Harris County, Texas

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STATEMENT OF THE CASE

Nature of the Case: Three Jane Doe plaintiffs allege that online predators contacted them on Facebook or Instagram and lured them into sex trafficking through communications sent via messaging functions on those platforms. MR1–44; MR444–516; MR847–93. Plaintiffs assert identical state-law claims for negligence, gross negligence, negligent undertaking, products liability, and violations of section 98.002 of the Texas Civil Practice and Remedies Code. MR32–36; MR499–503; MR882–87.

Facebook moved to dismiss plaintiffs' claims under Rule 91a based on section 230 of the Communications Decency Act, 47 U.S.C. § 230 (Pet. App. E), which (1) grants interactive computer service providers—like Facebook—immunity from suits seeking to hold them liable for third-party content, and (2) expressly preempts state-law actions that seek to impose such liability. Facebook cited hundreds of cases holding that section 230 bars claims like those brought by plaintiffs.

Trial Court: Hon. Steven Kirkland, 334th District Court, Harris County (Cause Nos. 2018-69816 & 2018-82214).

Hon. Mike Engelhart, 151st District Court, Harris County (Cause No. 2019-16262).

Course of Proceedings: Judge Kirkland denied Facebook's motions to dismiss. Pet. App. A–B. So did Judge Engelhart, except for the products-liability claim, which he dismissed because Facebook and Instagram are not products. Pet. App. C; MR1365.

Facebook sought mandamus relief in the court of appeals on October 25, 2019, and November 1, 2019. The Fourteenth Court denied relief in a four-paragraph, per curiam memorandum opinion joined by Justices Spain and Poissant; Justice Christopher dissented and would have granted the writ. *In re Facebook, Inc.*, 2020 WL 2037193 (Tex. App.—Houston [14th Dist.] Apr. 28, 2020) (Pet. App. D).

On July 3, 2020, this Court stayed all proceedings in the trial courts pending resolution of Facebook's mandamus petition.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Texas Government Code § 22.002(a). This petition previously was presented to the Fourteenth Court of Appeals at Houston, which denied relief. *See* Tex. R. App. P. 52.3(e). These cases present a question of law that is vital to the jurisprudence of the state:

- Whether Texas will split from hundreds of courts nationwide—including twelve federal courts of appeals and at least four state courts of last resort—by allowing plaintiffs to use artful pleading to thwart the immunity from state-law civil claims provided by the plain text of section 230 of the Communications Decency Act.

ISSUE PRESENTED

Federal law extends "broad immunity" to interactive computer service providers like Facebook "for all claims stemming from their publication of information created by third parties." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (Clement, J.) (citing 47 U.S.C. § 230(c)(1), (e)(3)). The issue presented is:

- Did the trial courts clearly abuse their discretion—and leave Facebook with no adequate remedy at law—by denying Facebook's motions to dismiss, where section 230 affords Facebook immunity from suit that will be irretrievably lost by delaying review until after trial?

INTRODUCTION

Early on, Congress recognized that the Internet would create virtually limitless opportunities for communication, education, and commerce. Interactive computer service providers were essential to unleashing the power of the Internet, so Congress protected them by granting *immunity from suit*—not just a defense to liability—against claims related to content created by third parties. *See* 47 U.S.C. § 230. Congress penned that immunity in broad terms and then, for good measure, preempted all state and local claims inconsistent with that immunity.

Almost twenty-five years have passed since Congress enacted section 230. During that time, courts have issued hundreds of decisions effectuating Congress's intent by adhering to the plain text of the statute and dismissing artfully pled state-law civil claims. For unless courts give effect to the immunity from suit provided by section 230 at the earliest stage of litigation, that immunity will be irretrievably lost.

Absent mandamus relief, that is exactly what will happen here—a result that would contradict the plain text of the statute, ignore the overwhelming weight of precedent construing that text, and subvert

Congress's purposes in enacting it. Section 230 required the trial courts below to dismiss plaintiffs' suits because each suit necessarily depends on content allegedly communicated and posted by third parties through Facebook's platforms. But the trial courts refused to do so, and the court of appeals failed to correct their error. Justice Christopher dissented, "urg[ing] [this] Court to review these cases" because "Facebook has federal statutory immunity from these suits." *In re Facebook*, Nos. 14-19-00845-cv, 14-19-00847-cv, 14-19-00886-cv, 2020 WL 2037193, at *1 (Tex. App.—Houston [14th Dist.] Apr. 28, 2020) (Christopher, J., dissenting) (Pet. App. D).

Hundreds of courts throughout Texas and across the nation—including the Fifth Circuit—have followed the plain text and dismissed on the pleadings materially indistinguishable suits based on section 230 immunity. This Court should grant the petition and restore uniformity to Texas law on this exceedingly important, nationwide issue of statutory construction and statutory immunity.

STATEMENT OF FACTS

I. Statutory background

In 1996, Congress enacted section 230 of the Communications Decency Act, which grants immunity to interactive computer service providers against state-law claims that would impose liability based on third-party content posted on or communicated through the providers' services. *See* 47 U.S.C. § 230(b)(1)–(2) ("It is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").[1]

Section 230 implements Congress's legislative policy judgments in two ways. First, it immunizes interactive computer service providers from claims seeking to hold them liable for content generated or communicated by third parties:

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[1] *See also Klayman v. Zuckerberg*, 753 F.3d 1354, 1355 (D.C. Cir. 2014) ("In enacting [section 230], Congress found that the Internet and related computer services 'represent an extraordinary advance in the availability of educational and informational resources' and 'offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'") (quoting 47 U.S.C. § 230(a)).

> 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.

47 U.S.C. § 230(c)(1).

Second, to enforce this broad immunity, section 230 bars all suits that seek to hold providers liable for third-party content:

> 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).

Congress took this step because, in its judgment, "[i]t would be impossible for service providers to screen each of their millions of postings for possible problems," and "[f]aced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

Congress also wanted to encourage service providers to take steps to control or prevent harmful content on their platforms without fear of liability if those efforts proved imperfect. *See Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (Congress sought to "remove disincentives for the development and utilization of blocking and filtering

technologies"); *Zeran*, 129 F.3d at 331 (Congress was concerned that "the specter of liability" would "deter service providers from blocking and screening offensive material").

Through section 230, "Congress provided broad immunity" to interactive computer service providers, and courts across the country have construed section 230 accordingly. *MySpace*, 528 F.3d at 418. Courts have held that section 230 applies broadly to search engines like Google and Yahoo!;[2] social networking sites like Facebook, Instagram, MySpace, and Twitter;[3] and email and private messaging services offered by those sites and others.[4]

In 2018, Congress enacted the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, 132 Stat. 1253 (2018). FOSTA expressly exempts three specific types of lawsuits from section 230 immunity:

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[2] *See*, *e.g.*, *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1268 (D.C. Cir. 2019); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101–03 (9th Cir. 2009).

[3] *See*, *e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 68 (2d Cir. 2019); *Franklin v. X Gear 101, LLC*, 2018 WL 4103492, at *8 (S.D.N.Y. Aug. 28, 2018) (Instagram); *MySpace*, 528 F.3d at 422; *Crosby v. Twitter, Inc.*, 921 F.3d 617, 627 n.7 (6th Cir. 2019).

[4] *See*, *e.g.*, *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1127–29 (N.D. Cal. 2016) (direct messaging), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018); *Mitan v. A. Neumann & Assocs., LLC*, 2010 WL 4782771, at *4–5 (D.N.J. Nov. 17, 2010) (email); *accord Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 528, 536–37 (D. Md. 2006) (private messaging).

(1) federal civil actions brought by sex-trafficking victims under 18 U.S.C § 1595 where the underlying conduct violates 18 U.S.C. § 1591;

(2) state criminal prosecutions for sex trafficking where the underlying conduct violates 18 U.S.C. § 1591 or 18 U.S.C. § 2421A; and

(3) *parens patriae* enforcement actions by state attorneys general under 18 U.S.C. § 1595.

See FOSTA § 4, 47 U.S.C. § 230(e)(5).

Congress considered—but rejected—also exempting state-law civil suits like those brought by plaintiffs here. Congress rejected such an exemption because it wanted to combat online sex trafficking through a "uniform national policy" rather than a "patchwork of 50 different laws." *Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, H.R. Serial No. 115-43, 115th Cong. 7, 9 (2017) (testimony of former Congressman and section 230 co-author Chris Cox and U.S. Naval Academy Professor Jeff Kosseff); *see* H.R. 1865 § 3(a)(2)(C), 115th Cong. (as introduced in House, Apr. 3, 2017).

II. Factual background

In Cause No. 2018-69816, Jane Doe alleges that in 2012, when she was 15, an adult stranger sent her a "friend" request on Facebook and

thereafter exchanged messages with her on Facebook's messaging service. MR27–28.[5] He made false promises of financial security and a better life through modeling, and then invited her to meet him offline. MR28. He then raped and beat her, and ultimately forced her into sex trafficking. MR29.

In Cause No. 2018-82214, Jane Doe alleges that in 2017, when she was 14, a stranger became her "Instagram friend" (Instagram is owned by Facebook) and then used Instagram's messaging service to make false promises of love and a better future to lure her into an offline meeting. MR474. Thereafter, assailants forced her into sex trafficking, posted her for sale online using partially nude photographs of her, and sexually exploited her. MR475, 498. After she was rescued from trafficking, her traffickers continued using her Instagram profile to traffic others. MR475.

In Cause No. 2019-16262, Jane Doe alleges that in 2016, when she was 14, a stranger "friended" her on Instagram and exchanged messages with her via Instagram's messaging service. MR877–78. He convinced

[5] The facts that follow are plaintiffs' allegations, which are "taken as true" for purposes of Facebook's Rule 91a motions. Tex. R. Civ. P. 91a.

her to meet him in person and then raped, abused, and trafficked her. MR878–79.

The petitions acknowledge that Facebook takes a variety of measures to block content related to explicit material, sexual exploitation, and human trafficking;[6] blocks users who post sexually explicit content;[7] reports instances of abuse to the National Center for Missing and Exploited Children;[8] responds to subpoenas from law enforcement;[9] prohibits abusive content, including content that exploits minors;[10] and takes a number of other precautions to protect minors.[11] Plaintiffs nonetheless allege that Facebook should have done more to detect, monitor, flag, and block potentially harmful third-party content and communications—by providing additional warnings, "flagging buzzwords . . . that indicate human trafficking and blocking all further communications," adding more robust parental controls, "prevent[ing]

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[6] MR4–5, 12; MR450, 457; MR853–54, 861.

[7] MR5; MR450; MR854.

[8] MR4; MR449; MR853.

[9] MR4, 12; MR450, 457; MR853, 861.

[10] MR14–15; MR459–61; MR863–64.

[11] MR9; MR455; MR858–59.

adults over the age of 18 from communicating with minors," verifying user identity, "depriv[ing] known criminals from having accounts on Facebook," and taking other similar measures. MR22–24, 32–35; MR469–71, 499–500; MR872–73, 883–85.

Plaintiffs assert five state-law causes of action against Facebook:

(1) negligently failing to warn of or prevent online sex trafficking;

(2) gross negligence for the same conduct;

(3) intentionally or knowingly benefiting from participation in a sex-trafficking venture under Texas Civil Practice & Remedies Code § 98.002;

(4) negligently undertaking to provide warnings and employing inadequate screening features; and

(5) strict products liability for providing defective warnings.

MR32–36; MR499–503; MR882–87.

Facebook moved to dismiss each petition under Rule 91a, relying on section 230 immunity. The motions were denied by both trial courts. Pet. App. A–C.[12]

[12] Although plaintiffs amended their petitions after Facebook filed its motions to dismiss, Facebook cites plaintiffs' live petitions because none of those amendments affects Facebook's requested relief—dismissal of the claims against Facebook as barred by section 230. While Facebook's Rule 91a motions were pending in the 334th Court, plaintiffs in Cause Nos. 2018-69816 and 2018-82214 filed amended petitions adding negligence, negligent undertaking, and strict-liability failure-to-warn claims. *Compare* MR94–98, *and* MR499–503, *with* MR159–62, *and* MR567–68. These claims

Facebook sought mandamus relief and, on April 28, 2020, a Fourteenth Court panel majority issued a four-paragraph, per curiam memorandum opinion denying relief, stating only that "Facebook has not established that it is entitled to mandamus relief." 2020 WL 2037193, at *1 (Spain and Poissant, JJ.).

Justice Christopher dissented, explaining that "these suits have no basis in law, and dismissal under Texas Rule of Procedure 91a is proper," because section 230 "grants Facebook immunity from suits such as these." *Id.* (Christopher, J., dissenting). Justice Christopher "urge[d] the Texas Supreme Court to review these cases." *Id.*

SUMMARY OF ARGUMENT

I. Section 230 requires dismissal of lawsuits like plaintiffs' that seek to impose liability on interactive computer services for harmful content posted or communicated on their platforms by third parties. The Fifth Circuit, hundreds of other courts nationwide, and virtually every court in Texas all agree: Artful pleading cannot defeat section 230's plain language. *See MySpace*, 528 F.3d at 416–20.

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were addressed by the court in its order denying Facebook's motion. MR391, 794. In early 2020 (after mandamus briefing closed in the Fourteenth Court), plaintiffs dismissed their claims against other defendants—by non-suit in Cause No. 2018-82214, and by amendment in Cause Nos. 2018-69816 and 2019-16262. MR1–44; MR847–93.

II. The 2018 FOSTA amendments to section 230 prove Facebook's point: By expressly exempting from section 230's broad reach only *federal civil* suits (brought under 18 U.S.C. § 1595) and *state criminal* prosecutions, the plain language of FOSTA confirms that *state civil* suits like plaintiffs' remain barred. Plaintiffs' faux textualism—cherry-picking a section heading and a snippet of FOSTA's savings clause—doesn't compel a different result. Nor does their heavy (and misguided) reliance on legislative history. The plain text is clear, and the legislative history only confirms that plaintiffs' claims are barred: Congress considered—and *rejected*—language that would have exempted *all state civil* suits by sex-trafficking victims. *Compare* H.R. 1865 § 3(a)(2)(C), 115th Cong. (as introduced in House, Apr. 3, 2017), *with* FOSTA § 4, codified at 47 U.S.C. § 230(e)(5) (exempting only certain federal civil and state criminal suits).

III. Mandamus is needed to correct the trial courts' clear abuse of discretion in misapplying the law and failing to dismiss these cases as section 230 requires. *See In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (courts lack discretion to disregard the law). Absent mandamus, the legal error below will effectively destroy Facebook's statutory immunity from suit and leave it without an adequate appellate remedy. *See In re Geomet*

Recycling LLC, 578 S.W.3d 82, 91–92 (Tex. 2019).

The whole point of immunity from suit is to protect against the chilling effect imposed by the time, cost, and other demands of litigation. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (courts "aim to resolve the question of [section] 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles'"—"*immunity from suit* . . . is effectively lost if a case is erroneously permitted to go to trial") (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). That is why this Court grants mandamus relief when immunity precludes a plaintiff's suit. *See*, *e.g.*, *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014); *In re Schmitz*, 285 S.W.3d 451, 459 (Tex. 2009).

* * *

This Court should grant Facebook's petition and direct the trial courts to dismiss these cases under section 230—not only to preserve Facebook's statutory immunity, but also to restore uniformity to Texas law on a recurring, important question of statutory construction that impacts the ability of the Internet to continue functioning as we know it.

MANDAMUS STANDARD

"[M]andamus is proper when the trial court has abused its discretion by committing a clear error of law for which appeal is an inadequate remedy." *In re Ford Motor Co.*, 211 S.W.3d 295, 297–98 (Tex. 2006). A "trial court has no 'discretion' in determining what the law is or applying the law to the facts"—such as when it construes a statute's plain text. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004).

Appeal is an inadequate remedy where requiring the defendant to stand trial and delay review until after final judgment would effectively defeat immunity from suit. *K.D.F. v. Rex*, 878 S.W.2d 589, 592–93 (Tex. 1994) (conditionally granting writ to correct erroneous denial of sovereign immunity and "reaffirm[ing] that an appeal does not provide an adequate remedy in this context"); *In re Perry*, 60 S.W.3d 857, 862 (Tex. 2001) (conditionally granting writ to correct erroneous denial of legislative immunity); *Marshall v. Wilson*, 616 S.W.2d 932, 934 (Tex. 1981) (same where statute immunized defendant from collateral litigation). As the U.S. Supreme Court has explained, immunity from suit "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526.

ARGUMENT

I. Section 230's plain language immunizes Facebook from plaintiffs' suits—as over two decades of precedent confirms.

The plain text of section 230, the legislative policies it furthers, and the overwhelming weight of authority compel the conclusion that Facebook is immune from plaintiffs' state-law civil claims. Plaintiffs contend that they seek to hold Facebook liable not as a publisher of third-party content, but rather for not taking sufficient steps (1) to prevent harmful third-party content from being communicated on its platforms or (2) to warn plaintiffs about the risks such content may present. But this is precisely the type of artful pleading that the Fifth Circuit and myriad other courts have squarely rejected as fundamentally inconsistent with section 230's plain language.

The trial courts clearly abused their discretion by refusing to dismiss these lawsuits.

A. Section 230's plain text grants Facebook immunity from suit.

Section 230's plain text makes clear that interactive computer service providers (such as Facebook) have statutory immunity not just

from liability, but from civil suits brought under state law. As Judge Sutton explained in *O'Kroley v. Fastcase, Inc.*:

> "No cause of action may be brought," [section 230] says, "and no liability may be imposed under any State or local law," for any claim that purports to treat an "interactive computer service" "as the publisher or speaker of any information provided" by someone else.

831 F.3d 352, 354–55 (6th Cir. 2016) (quoting 47 U.S.C. § 230(c), (e)(3)).

Plaintiffs' state-law claims against Facebook are barred by this provision. There is no dispute that Facebook is a "provider" of "an interactive computer service." 47 U.S.C. § 230(f)(2); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) ("Facebook qualifies as an interactive computer service because it is a service that provides information to 'multiple users' by giving them 'computer access . . . to a computer server.'") (alteration in original) (quoting 47 U.S.C. § 230(f)(2)).

And plaintiffs seek to hold Facebook liable for "information provided by another information content provider"—*i.e.*, the messages written and sent by the online predators. 47 U.S.C. § 230(c)(1), (f)(3) ("information content provider" means "any person" "responsible" "for the creation" of "information provided through" an "interactive computer service").

That unambiguous statutory text explains why every U.S. Court of Appeals to have construed section 230 has granted or affirmed dismissal of claims seeking to hold providers liable for third-party content.[13] Plaintiffs ignore—and ask this Court to disregard—not only those decisions but also more than twenty decisions by state and federal courts throughout Texas, including three decisions by Texas appellate courts and one by the Fifth Circuit.[14] Each of these decisions refused to allow a

[13] *See Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 415 (1st Cir. 2007); *Herrick v. Grindr LLC*, 765 F. App'x 586, 591 (2d Cir. 2019); *Green v. Am. Online (AOL)*, 318 F.3d 465, 468 (3d Cir. 2003); *Nemet Chevrolet*, 591 F.3d at 252–53 (4th Cir.); *MySpace*, 528 F.3d at 415 (5th Cir.); *O'Kroley*, 831 F.3d at 354 (6th Cir.); *Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008); *Johnson v. Arden*, 614 F.3d 785, 787, 792 (8th Cir. 2010); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1265–66 (9th Cir. 2016); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 983 (10th Cir. 2000); *Dowbenko v. Google, Inc.*, 582 F. App'x 801, 803 (11th Cir. 2014); *Klayman*, 753 F.3d at 1355 (D.C. Cir.).

[14] *MySpace*, 528 F.3d at 420; *see Davis v. Motiva Enters., L.L.C.*, 2015 WL 1535694, at *4–5 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (affirming Rule 91a dismissal based on section 230); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 760–61 (Tex. App.—Beaumont 2014, pet. denied); *Milo v. Martin*, 311 S.W.3d 210, 215–18 (Tex. App.—Beaumont 2010, no pet.); *see also McMillan v. Amazon.com, Inc.*, 433 F. Supp. 3d 1034, 1044–45 (S.D. Tex. 2020); *Takhvar v. Page*, 2018 WL 4677808, at *2 (E.D. Tex. Feb. 25, 2018), *adopted by* 2018 WL 4677799 (E.D. Tex. Mar. 6, 2018); *Inge v. Walker*, 2017 WL 4838981, at *4 (N.D. Tex. Oct. 26, 2017); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 995 (S.D. Tex. 2017); *Int'l Cotton Mktg., Inc. v. Commodity Credit Corp.*, 2009 WL 10705346, at *5 (N.D. Tex. June 15, 2009); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 664–65 (E.D. Tex. 2009); *GW Equity LLC v. Xcentric Ventures LLC*, 2009 WL 62173, at *13 (N.D. Tex. Jan. 9, 2009); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849–50 (W.D. Tex. 2007); *Doe v. Bates*, 2006 WL 3813758, at *4–5 (E.D. Tex. Dec. 27, 2006); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646, 652 (E.D. Tex. 2006).

suit based on third-party content to proceed in the face of section 230's broad statutory immunity.[15]

These decisions faithfully apply the statutory text to dismiss state-law suits that seek to hold interactive computer service providers liable for harmful third-party content—even where the third-party content leads to tragic consequences. *See*, *e.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18–24 (1st Cir. 2016) (sex trafficking of minors); *MySpace*, 528 F.3d at 416 (sexual assault of a minor); *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 149–50 (Ct. App. 2009) (sexual assault of minors); *Herrick v. Grindr LLC*, 765 F. App'x 586, 591 (2d Cir. 2019) (harassment and stalking); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 753, 762 (Tex. App.—Beaumont 2014, pet. denied) (revenge pornography).

Mandamus is needed to correct the trial courts' failure to dismiss the claims here, too.

B. Artful pleading cannot defeat the plain language of section 230.

A suit seeking to hold Facebook liable for publishing and transmitting messages generated by third parties is precisely the type of

[15] The only Texas decision allowing such a suit to proceed was subsequently reversed on interlocutory review. *See GoDaddy.com*, 429 S.W.3d 752.

publishing activity section 230 was enacted to prohibit—and artful pleading cannot overcome the statute's plain language. 2020 WL 2037193, at *1 (Christopher, J., dissenting) ("artful pleading . . . should not prevail over the statute").

What matters is not magic words (or whether a plaintiff expressly alleges that she seeks to hold the provider liable for publishing third-party content), but whether, at its core, a claim "seek[s] to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content." *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) (quoting *Zeran*, 129 F.3d at 330).

The Fifth Circuit's *MySpace* decision is closely on point. In that case, the plaintiffs (a mother and her minor daughter) alleged that the minor daughter was sexually assaulted after an online predator contacted the daughter on MySpace and lured her into meeting him offline. 528 F.3d at 416. Just like plaintiffs here, the *MySpace* plaintiffs alleged that MySpace (the provider) "failed to implement basic safety measures to prevent sexual predators from communicating with minors on its Web site." *Id.*

In an opinion authored by Judge Clement and joined by Judges Elrod and Garwood, the Fifth Circuit affirmed the dismissal of the case on the pleadings, ruling 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. "Parties complaining that they were harmed by a Web site's publication of user-generated content have recourse," the court explained—"they may sue the third-party user who generated the content, *but not the interactive computer service that enabled them to publish the content online*." *Id*. at 419 (emphasis added).

The Fifth Circuit rejected the *MySpace* plaintiffs' attempt to avoid that result through artful pleading. Responding to plaintiffs' "assertion that they only seek to hold MySpace liable for its failure to implement measures that would have prevented Julie Doe from communicating with [the online predator]," the Fifth Circuit explained that plaintiffs' "allegations [were] merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content." *Id.* at 420.[16]

[16] In reaching that conclusion, the Fifth Circuit relied on one of the cases plaintiffs' here rely on: *Green v. America Online (AOL)*. *See* Resp. to Pet. 18–19; *MySpace*, 528 F.3d at 420 ("*Green* demonstrates the fallacy of [plaintiffs'] argument."). *Green* held

So too here. There is no allegation that Facebook's involvement extends beyond transmitting and publishing third-party communications between users—activity squarely protected by section 230. Resp. to Pet. 4–5. Instead, as in *Myspace*, plaintiffs allege that Facebook should have prevented the third-party online predators' communications from reaching plaintiffs, warned the plaintiffs of the dangers of those communications, or both. *See* Resp. to Pet. 1 ("Facebook failed to implement proper safeguards and warnings"); Resp. to Pet. 6 ("[Facebook] could have implemented safeguards to prevent adults from connecting with minors they did not know, . . . prevented unauthorized adults from contacting minors, . . . or prevented known sex traffickers from having Facebook accounts."); Resp. to Pet. 8 ("[plaintiffs] seek to hold Facebook liable for its conduct in failing to properly warn minor users of the dangers of sex trafficking").

But as the Fifth Circuit and several other courts have held, seeking to hold a provider liable for *failing to prevent* third-party communications

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that a plaintiff's claim for negligent failure "to address certain harmful content on [AOL's] network" was barred by section 230 because, at base, that claim "attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role." *Green*, 318 F.3d at 471.

is no different than holding it liable *for transmitting and publishing* those communications. *See MySpace*, 528 F.3d at 420; *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 723–24 (Wis. 2019) ("This rule prevents plaintiffs from using 'artful pleading' to state their claims only in terms of the interactive computer service provider's own actions, when the underlying basis for liability is unlawful third-party content published by the defendant.").[17]

Plaintiffs' failure-to-warn claims are yet another way of accomplishing that same result. Whether a plaintiff claims a provider should have refused to publish communications or should have effectively erased those communications by warning other users to disregard them, the plaintiff is treating the provider as a publisher—exactly what section 230 prohibits. Only a publisher, after all, could eliminate, edit, or warn about content on its platform.

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[17] In *Daniel*, the Wisconsin Supreme Court held that section 230 barred a plaintiff's claim that Armslist—a classified site for selling firearms—negligently "fail[ed] to implement sufficient safety measures to prevent the unlawful use of its website." 926 N.W.2d at 725–26 (discussing allegations that Armslist failed to "provide proper legal guidance to users" or to "adequately screen unlawful content").

The court ruled that the plaintiff's claim was "precisely the type of claim that is prohibited by [section] 230(c)(1), no matter how artfully pled" because the "duty Armslist is alleged to have violated"—"fail[ing] to adequately monitor [third-party] content"—"derives from its role as a publisher of firearm advertisements." *Id*. at 726. "That Armslist may have known that its site could facilitate illegal gun sales does not change the result." *Id*.

Indeed, the Second Circuit reached precisely that conclusion in affirming the dismissal of the plaintiff's failure-to-warn claims in *Herrick*. Like plaintiffs here, Herrick alleged that the service provider was liable for "failing to generate its own warning that its software could be used to impersonate and harass others." 765 F. App'x at 591. The court affirmed the dismissal of Herrick's failure-to-warn claim as "barred by [section] 230" because that claim was "inextricably linked to [the service provider's] alleged failure to edit, monitor, or remove the offensive [third-party] content." *Id*. There is no meaningful difference between alleging that a provider failed to warn users about the dangers of third-party content and alleging that a provider failed "to combat or remove offensive third-party content"—both "are barred by [section] 230." *Id*. at 590.

In sum, section 230 bars claims alleging that an interactive computer service provider is liable for failing to do *something* about third-party content—regardless of what that *something* is (*e.g.*, block it, prevent it, edit it, remove it, or warn against its dangers). The purported duty to do *something*, which underlies such claims, "derives from [the provider's] role as a publisher" and is precisely why such claims are "prohibited by [section] 230(c)(1), no matter how artfully pled." *Daniel*,

926 N.W.2d at 726; *see Hassell v. Bird*, 420 P.3d 776, 792 (Cal. 2018) (similarly rejecting "[p]laintiffs' attempted end-run around section 230").

C. The "presumption against preemption" plays no role given section 230's express preemption provision.

As the D.C. Circuit has explained, section 230 "also contains a preemption provision that expressly extends . . . immunity to 'State or local law' claims 'inconsistent with this section.'" *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267 n.2 (D.C. Cir. 2019) (quoting 47 U.S.C. § 230(e)(3)); *see also Daniel*, 926 N.W.2d at 717 (section 230 "preempts any state tort claims . . . that [are] inconsistent with" "immunizing interactive computer service providers from liability for publishing third-party content").[18]

Plaintiffs attempt to circumvent section 230's express preemption provision by invoking the "presumption against preemption." Resp. to Pet. 9–10, 17–18. But where, as here, "the statute's language is plain," the analysis "begins 'with the language of the statute itself,' and that 'is

[18] *See also Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1015 (N.Y. 2011) ("Section 230 . . . preempts any state law—including imposition of tort liability—inconsistent with its protections."); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1013, 1018 (Fla. 2001) (holding "section 230 does preempt Florida law" because "section 230 expressly bars 'any actions' and we are compelled to give the language of this preemptive law its plain meaning").

also where the inquiry should end.'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016).[19] As the U.S. Supreme Court made clear in *Puerto Rico*, if "the statute contains an express pre-emption clause, [courts] do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause"—because the plain language "necessarily contains the best evidence of Congress' pre-emptive intent." *Id*. (internal quotation marks omitted).

Section 230's express preemption clause conveys its scope with perhaps the most understandable word in the English language: "*no* cause of action may be brought and *no* liability may be imposed." 47 U.S.C. § 230(e)(3) (emphases added); *see also BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 12 (Tex. 2016) (applying express preemption because statute's "language . . . unmistakably expresses the Legislature's desire to preempt any ordinance 'inconsistent' with the Act or with a TCEQ rule or order"). The presumption against preemption has no role to play here.

[19] At no point do plaintiffs argue that the text of section 230(e)(3) is ambiguous. Instead, putting the cart before the horse, plaintiffs contend that "the legislative history . . . raise[s] significant questions" about what "Congress intended." Resp. to Pet. 18.

Applying the presumption wouldn't change the outcome in any event. Overcoming the presumption requires only a clear intent to preempt. *See MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 489 (Tex. 2010) ("we apply the presumption that Congress did not intend to preempt contrary state law absent evidence that such a result was Congress's clear and manifest purpose"); *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018) (finding a clear "legislative intent . . . to preempt" based on the plain language of the statute, which contained an express preemption provision). Here, section 230(e)(3) unquestionably evinces such a clear intent as to both the existence of federal preemption and the scope of that preemption. *See Marshall's Locksmith*, 925 F.3d at 1267 n.2; *Zeran*, 129 F.3d at 333–34.

* * *

The statute's plain text, two decades of precedent construing it, and the legislative purposes it furthers all compel the conclusion that plaintiffs' state-law claims are barred by section 230. Neither plaintiffs' artful pleading nor the trial courts' clear abuse of discretion should be permitted to defeat the statutory text. This Court should grant Facebook's

petition, direct the trial courts to dismiss plaintiffs' claims, and bring Texas in line with every other jurisdiction to address section 230.

If, instead, plaintiffs are permitted to continue litigating their cases, then Texas will become the Nation's sole forum for claims seeking to hold interactive computer service providers liable for third-party-generated content in direct contravention of section 230's plain language.

II. FOSTA confirms that section 230 bars plaintiffs' claims.

Faced with the plain text of section 230 and two decades of precedent, plaintiffs are left to argue that FOSTA's 2018 amendments to section 230 exempted their state-law civil claims from section 230's otherwise broad grant of immunity. *See* Resp. to Pet. 14–18. But the plain text of FOSTA makes clear that plaintiffs' claims remain barred. Neither plaintiffs' faux textualist cherry-picking nor their resort to legislative history compels a contrary conclusion.

A. FOSTA's plain text confirms that plaintiffs' state-law civil suits continue to be barred by section 230.

FOSTA expressly exempts three specific types of sex-trafficking-related actions from section 230's scope:

> (1) *federal civil* actions brought by victims under 18 U.S.C. § 1595(a) (if the underlying conducts violates 18 U.S.C. § 1591);

(2) *federal civil* actions brought by state attorneys general under 18 U.S.C. § 1595(d); and

(3) *state criminal* prosecutions (if the underlying conduct violates 18 U.S.C. § 1591 or 18 U.S.C. § 2421A).

See FOSTA § 4, 47 U.S.C. § 230(e)(5). None of those exemptions applies here.

Congress carefully enumerated specific categories of exempt claims, but did *not* include state-law civil suits like those here—a clear indication that such claims are not exempted. *See Law v. Siegel*, 571 U.S. 415, 424 (2014) (Scalia, J.) (Congress's "meticulous . . . enumeration of exemptions and exceptions . . . confirms that courts are not authorized to create additional exceptions"). The FOSTA exemptions are limited by the plain text to claims that these plaintiffs did not (or could not) bring. Nothing in FOSTA altered section 230's prohibition on the state-law civil claims plaintiffs *did* choose to bring.

With the plain text of FOSTA against them, plaintiffs try to cobble together support from a section heading and a snippet of FOSTA's savings clause—but neither can change the meaning of the plain text.

Plaintiffs rely heavily on section 230(e)(5)'s *heading*—"No effect on sex trafficking law," *see* Resp. to Pet. 1, 7, 13—but ignore that section's

text, which makes clear that the "sex trafficking law" to which the heading refers is a *federal* sex-trafficking law (18 U.S.C. § 1595) and certain state *criminal* laws:

> **(5) No effect on sex trafficking law**
>
> Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—
>
> (A) any claim in a *civil action brought under section 1595 of title 18*, if the conduct underlying the claim constitutes a violation of section 1591 of that title;
>
> (B) any charge in a *criminal prosecution brought under State law* if the conduct underlying the charge would constitute a violation of section 1591 of title 18; or
>
> (C) any charge in a *criminal prosecution brought under State law* if the conduct underlying the charge would constitute a violation of section 2421A of title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

FOSTA § 4, 47 U.S.C § 230(e)(5) (Pet. App. E) (emphases added).[20]

It is a fundamental rule of statutory construction that titles and headings cannot alter the meaning of a statute's plain text. *Fla. Dep't of*

[20] Section 1595(a) provides that a victim of sex trafficking as defined by federal law "may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter)." And section 1595(d) authorizes state attorneys general to bring *parens patriae* actions against "any person who violates section 1591," which proscribes sex trafficking of children.

Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) ("a subchapter heading cannot substitute for the operative text of the statute"); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("the title of a statute . . . cannot limit the plain meaning of the text").

Rather, section "headings . . . are 'but a short-hand reference to the general subject matter' of [a] provision, 'not meant to take the place of the detailed provisions of the text.'" *Lawson v. FMR LLC*, 571 U.S. 429, 446 (2014) (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528 (1947)); *see also Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977–78 (2016) (prefatory language does "not change the plain meaning of the operative clause").[21]

Plaintiffs also point to the first half of FOSTA's "savings clause," *see* Resp. to Pet. 16–17, but the rest of that clause refutes their argument:

> Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) *filed before or after the day before the date of enactment of this Act that was not*

[21] At most, a heading can help resolve facial ambiguity in the operative text, *see Piccadilly Cafeterias*, 554 U.S. at 47, but there is no ambiguity here to resolve. FOSTA explicitly exempts specific *federal civil* actions and *state criminal* actions from the scope of section 230—it leaves *state civil* actions, like plaintiffs' suits here, barred. *See* FOSTA § 4, 47 U.S.C. § 230(e)(5). FOSTA did not alter the language of either section 230(c)(1) or section 230(e)(3)—the provisions that bar plaintiffs' state-law civil claims in the first place.

> *limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act*.

FOSTA § 7, 132 Stat. at 1254 (plaintiffs' omission emphasized). As its full text makes clear, this clause merely provides that FOSTA doesn't expand section 230's preemption to any civil suit or criminal prosecution that was not barred by section 230 before FOSTA. But because state-law civil claims like plaintiffs' *were* barred by section 230 before FOSTA (and remain barred today), FOSTA's savings clause is irrelevant here. *See supra* p. 17 (citing cases).[22]

B. FOSTA's legislative history only confirms what its plain text says.

Plaintiffs rely heavily on legislative history. *See* Resp. to Pet. 9–10, 15–18. But legislative history has no relevance where, as here, the statutory text is clear. *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) ("[Courts] do not resort to extrinsic aides, such as legislative history, to interpret a statute that is clear and unambiguous."). And in any event, the legislative history confirms Facebook's interpretation. The original

[22] *See also M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1058 (E.D. Mo. 2011); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009); *cf. Woodhull Freedom Found. v. United States*, 948 F.3d 363, 367–68 (D.C. Cir. 2020) (discussing dismissal of sex-trafficking-related claims under section 230).

version of the bill that became FOSTA included language—which Congress considered and *rejected*—expressly exempting from section 230 all state-law civil suits brought by sex-trafficking victims:

> (5) NO EFFECT ON CIVIL LAW RELATING TO SEXUAL EXPLOITATION OF CHILDREN OR SEX TRAFFICKING.—Nothing in this section shall be construed to impair the enforcement or limit the application of—
>
> (A) section 1595 of title 18, United States Code; or
>
> (B) *any other* federal or *state law that provides causes of action, restitution, or other civil remedies to victims* of—
>
> (i) sexual exploitation of children;
>
> (ii) sex trafficking of children; or
>
> (iii) sex trafficking by force, threats of force, fraud, or coercion.

H.R. 1865 § 3(a)(2)(C) (as originally introduced in House, Apr. 3, 2017) (emphases added). Congress rejected that broad exemption, and deliberately chose a narrower, more focused approach that favored uniform national standards over a "patchwork" of state laws. *See* FOSTA § 4, 47 U.S.C. § 230(e)(5) (exempting certain *federal civil* suits brought by sex-trafficking victims, certain *federal civil* suits brought by state attorneys general, and certain *state criminal* prosecutions); *see also supra* p. 6 (citing H.R. Serial No. 115-43 at 7, 9).

As this Court has explained, the "deletion of a provision in a pending bill disclose[s] the legislative intent to reject the proposal." *Camacho v. Samaniego*, 831 S.W.2d 804, 814 (Tex. 1992) (quoting *Smith v. Baldwin*, 611 S.W.2d 611, 616–17 (Tex. 1980)); *see Russello v. United States*, 464 U.S. 16, 23–24 (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."); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 442–43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").

In a similar vein, plaintiffs contend that their claims fit within FOSTA's exemptions because their "state law claims are the same sort of claims Congress protected against preemption" by exempting claims under the federal sex-trafficking laws in FOSTA. Resp. to Pet. 14–15. But this argument lacks any basis in law and is contrary to section 230's plain text.

To begin, adopting plaintiffs' argument would require improperly disregarding Congress's careful enumeration of specific categories of

exempt claims in FOSTA. *See Law*, 571 U.S. at 424. In FOSTA itself, Congress showed not only that it knows how to exempt state-law claims that have the same elements as various federal statutes, but also that it does so expressly. *See* 47 U.S.C. § 230(e)(5)(B)–(C) (exempting "*criminal prosecution[s]* brought under State law"—if the underlying conduct violates either 18 U.S.C. § 1591 or 18 U.S.C. § 2421A) (emphasis added).

Indeed, plaintiffs' same-sort-of-claims argument would render that express exemption superfluous because section 230(e)(1) (enacted in 1996) itself exempts enforcement of "any" "Federal criminal statute." Applying plaintiffs' same-sort-of-claims logic, state prosecutions for conduct that also violated federal criminal law never would have been precluded by section 230 in the first place, which would in turn render FOSTA's express exemption of those prosecutions unnecessary and redundant. That cannot be right, as it would violate the rule against surplusage. *See Shinogle v. Whitlock*, 596 S.W.3d 772, 776–78 (Tex. 2020) ("To read the statute the way [plaintiffs] suggest would render the word defendant meaningless or mere surplusage. This, we will not do.") (internal quotation marks and citation omitted) (quoting *TIC Energy &*

Chem., Inc. v. Martin, 498 S.W.3d 68, 74 (Tex. 2016)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Moreover, plaintiffs' argument relies on an unprecedented interpretation of the phrase "consistent with this section" in section 230(e)(3). *See* 47 U.S.C. § 230(e)(3) (permitting enforcement of "any State law that is *consistent with this section*" while preempting "any State or local law that is *inconsistent with this section*") (emphases added). According to plaintiffs, this means that a state-law claim can proceed if it is consistent with *the types of federal claims* that are exempted from section 230's broad immunity by section 230(e). *See* Resp. to Pet. 14–15.

But as the overwhelming weight of authority makes clear, the relevant inquiry under section 230(e)(3) is whether a state-law claim conflicts with section 230(c)(1) by seeking to hold a provider liable for third-party content—not whether a state-law claim is consistent with the claims Congress exempted from section 230's scope (like the sex-trafficking-related claims exempted by FOSTA). *See O'Kroley*, 831 F.3d at 354–55 ("'No cause of action may be brought,' [section 230] says, 'and no liability may be imposed under any State or local law,' for any claim

that purports to treat an 'interactive computer service [provider]' 'as the publisher or speaker of any information provided' by someone else.") (quoting 47 U.S.C. § 230(c)(1), (e)(3)).[23]

And even though an exemption for federal criminal statutes has been in section 230 since its inception, *see* 47 U.S.C. § 230(e)(1), no court has ever read section 230(e)(3) to exempt state laws that present the "same sort of claims" as exempted federal criminal laws. Plaintiffs can point to nothing in FOSTA that would cast doubt on this long line of precedent, and indeed FOSTA did not alter the language of either section 230(c)(1) or section 230(e)(3). *See supra* note 20.

Any lingering uncertainty is dispelled by Congress's explicit rejection of language that would have exempted *all* state civil suits by sex-trafficking victims—arguably "the same sort of claims" that Congress actually exempted in section 230(e)(5). *Compare* H.R. 1865 § 3(a)(2)(C)

[23] *See also Klayman*, 753 F.3d at 1356 (section 230(e)(3) "adds preemptive bite to [section 230(c)(1)'s] prohibition"); *Marshall's Locksmith*, 925 F.3d at 1267 ("To determine whether dismissal [under section 230(e)(3)] is appropriate, this circuit has adopted a three-pronged test that tracks the text of [section] 230(c)(1)."); *Bennett v. Google, LLC*, 882 F.3d 1163, 1165–66 (D.C. Cir. 2018) ("To give [section 230(c)'s] provisions teeth, section 230[(e)(3)] provides that '[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.'") (second alteration in original); *Shiamili*, 952 N.E.2d at 1011 (section 230(e)(3) "preempts any state law—including imposition of tort liability—inconsistent with [section 230(c)(1)'s] protections").

(Apr. 3, 2017), *with* FOSTA § 4, 47 U.S.C. § 230(e)(5). At base, plaintiffs ask this Court to do what Congress declined to do—expand FOSTA's exemptions beyond those delimited by its plain text.

* * *

Section 230's plain language bars plaintiffs' claims, and those claims are not exempted by FOSTA. Plaintiffs are not without a remedy. As the Fifth Circuit explained, a plaintiff allegedly "harmed by a Web site's publication of user-generated content . . . may sue the third-party user who generated the content." *MySpace*, 528 F.3d at 419; *see also* 47 U.S.C. § 230(e)(5)(A) (authorizing certain *federal civil* actions by sex-trafficking victims under 18 U.S.C. § 1595).

But section 230 immunity embodies a legislative policy judgment to relieve interactive computer service providers of the burdens of litigation altogether. *E.g.*, *Zeran*, 129 F.3d at 330. The trial courts' decisions to the contrary cannot stand—particularly in the face of section 230's plain language and the mountain of precedent interpreting it.

III. Facebook has no adequate appellate remedy.

Absent mandamus relief, Facebook's immunity from suit will be permanently lost. A successful appeal after discovery and trial will come

far too late. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004) (sovereign immunity case discussing the need for the State to be able to "extricate itself from litigation"—in a "timely manner"—"if it is truly immune"); *McSurely v. McClellan*, 697 F.2d 309, 317 n.13 (D.C. Cir. 1982) (Scalia and Wald, JJ.) (forcing a defendant "to proceed to trial . . . will generally constitute irreparable injury not because of the expense of litigation, but because of the irretrievable loss of immunity from suit").

As this Court has explained, "[m]andamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss . . . and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *Prudential*, 148 S.W.3d at 136.

The whole point of section 230's "[n]o cause of action may be brought" language is to protect interactive computer service providers like Facebook from suit. *Nemet Chevrolet*, 591 F.3d at 254–55. Forcing Facebook to litigate plaintiffs' claims is squarely contrary to Congress's purpose in providing broad immunity from suit—and at this stage can be

avoided only through mandamus relief from this Court. *See id.* ("Section 230 immunity . . . is generally accorded effect at the first logical point in the litigation process" because "*immunity from suit* . . . is effectively lost if a case is erroneously permitted to go to trial.").

As this Court and others have recognized, statutory immunity from suit embodies a legislative policy judgment to relieve defendants of the burdens of litigation altogether. *See Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 415 (Tex. 1997) (discussing "political policy concerns" undergirding legislative grant of immunity from suit); *see also Zeran*, 129 F.3d at 330 ("Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. . . . Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."). As the U.S. Supreme Court has stressed, the refusal to enforce immunity from suit is "effectively unreviewable on appeal from final judgment" because that immunity is "lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526–27.

Where, as here, trial courts refuse to enforce statutory immunity, mandamus is not just an appropriate remedy—it is the *only* remedy. *See*

Perry, 60 S.W.3d at 859–62; *Marshall*, 616 S.W.2d at 934. Just as an egg can't be un-scrambled, and a bell can't be un-rung, a case can't be un-litigated, which is why the "most frequent use [this Court has] made of mandamus relief involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved." *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008); *see also Prudential*, 148 S.W.3d at 138–41 (conditionally granting writ to enforce jury-trial waiver because the trial court's failure to do so could "[i]n no real sense . . . ever be rectified on appeal").

Granting relief in such cases "spare[s] private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *In re Hous. Specialty Ins. Co.*, 569 S.W.3d 138, 142 (Tex. 2019); *see also Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) ("mandamus relief . . . will issue when the failure to do so would vitiate and render illusory the subject matter of an appeal").

Facebook has been forced to litigate these cases for the past twenty months, contrary to the plain text of section 230 and the overwhelming weight of authority construing it. Every day Facebook is forced to

continue litigating statutorily barred suits is another day that it cannot vindicate its congressionally mandated immunity from suit.

Federal law bars these lawsuits, and waiting for relief until after the trials are conducted and final judgments are issued will deprive Facebook of the very immunity that section 230 guarantees.

PRAYER

Facebook respectfully requests that this Court grant its petition and direct the trial courts to dismiss plaintiffs' claims.

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Respectfully submitted,

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RULE 52.3(j) CERTIFICATE OF COMPLIANCE

I have reviewed this brief and concluded that every factual statement is supported by competent evidence included in the appendix to the petition for writ of mandamus or mandamus record. *See* Tex. R. App. P. 52.3(j).

/s/ *Allyson N. Ho*
Allyson N. Ho

RULE 9.4(i) CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), I certify that this brief contains 8,483 words, excluding the portions exempted by Rule 9.4(i)(1).

/s/ *Allyson N. Ho*
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CERTIFICATE OF SERVICE

I certify that, on August 3, 2020, a true and correct copy of the foregoing brief was served via electronic service on all counsel of record.

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