No. 21-459

IN THE

Supreme Court of the United States

JANE DOE,

Petitioner,

v.

FACEBOOK, INC.
(N/K/A META PLATFORMS, INC.),

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Texas Supreme Court construed section 230—consistent with the "overwhelming weight of precedent" interpreting the statutory text—to grant an interactive computer service provider immunity from claims seeking to hold it liable for harms caused by third-party content published on its platform. Pet. App. 17a. The court conditionally granted mandamus with respect to petitioner's state common-law claims because each of those claims was "premised on Facebook's alleged failures to warn or to adequately protect [petitioner] from harm caused by other users." Pet. App. 30a. The question presented is:

Whether the Texas Supreme Court correctly concluded that petitioner's state common-law claims were premised on harms caused by third-party content published on Facebook's platform, and were therefore barred by section 230.

RULE 29.6 DISCLOSURE STATEMENT

Facebook, Inc., now known as Meta Platforms, Inc., is a publicly traded company and has no parent corporation. No publicly held company owns 10 percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 15.2, respondent identifies the following directly related proceedings that were not identified in the petition under Rule 14.1(b)(iii):

In re Facebook, Inc., No. 14-19-00854-CV (Tex. App.—Houston [14th Dist.]) (pending appeal of order denying Facebook's special appearance to contest personal jurisdiction).

Jane Doe v. *Facebook, Inc.*, No. 2018-69816 (334th Dist. Ct., Harris Cty., Tex.):

- order denying Facebook's motion for reconsideration of the order denying its Rule 91a motion to dismiss entered September 16, 2019; order denying Facebook's motion for permission to appeal same entered October 7, 2019;
- order denying Facebook's special appearance to challenge personal jurisdiction entered October 7, 2019;
- order dismissing petitioner's common-law claims consistent with Texas Supreme Court's opinion entered September 24, 2021; and
- order recusing and transferring the case to 55th District Court, entered October 27, 2021.

Jane Doe v. *Facebook, Inc.*, No. 2018-69816 (55th Dist. Ct., Harris Cty., Tex.) (transferee court after recusal).

Jane Doe v. *Facebook, Inc.*, No. 2018-82214 (334th Dist. Ct., Harris Cty., Tex.) (voluntarily dismissed July 7, 2021).

J.D. #19 v. *Facebook, Inc. d/b/a Instagram*, No. 2019-16262 (151st Dist. Ct., Harris Cty., Tex.) (voluntarily dismissed July 7, 2021).

There are no additional proceedings in any court that are directly related to this case.

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BRIEF IN OPPOSITION

Respondent Facebook, Inc., now known as Meta Platforms, Inc., respectfully submits that the petition for a writ of certiorari should be denied.

JURISDICTION

This Court likely lacks jurisdiction under 28 U.S.C. § 1257(a) because the Texas Supreme Court did not issue a "[f]inal judgment[] or decree[]" with respect to whether section 230 bars petitioner's state common-law claims. To the contrary, the Texas Supreme Court "*conditionally* granted" a writ of mandamus "in part." Pet. App. 42a (emphasis added). Although that court "directed" the trial court to dismiss petitioner's common-law claims, it did not issue a writ of mandamus requiring the trial court to do so. Rather, the Texas Supreme Court expressed "confiden[ce]" that the trial court would comply and explained that "the writ will issue *only* if [it] do[es] not." Pet. App. 42a–43a (emphasis added).

Petitioner cites no case in which this Court has reviewed a state supreme court decision conditionally granting a writ of mandamus.[1] Indeed, petitioner's

[1] By contrast, this Court has reviewed state supreme court decisions granting or denying supervisory writs. See, e.g., *Ford Motor Co.* v. *Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1023–24 (2021) (reviewing grant of supervisory writ). That is because a state supreme court's "judgment *finally* disposing of the writ of prohibition is a final judgment reviewable" under 28 U.S.C. § 1257. *Madruga* v. *Superior Ct.*, 346 U.S. 556, 557 n.1 (1954) (emphasis added). In *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964), this Court did grant review after the Texas Supreme Court conditionally granted a writ of mandamus directing the court of appeals to issue an injunction, but the Court did so while simultaneously

own authority explains that this Court considers a state-court decision "final," for purposes of section 1257(a), when "the federal issue, finally decided by the highest court in the State, will survive and require decision *regardless* of the outcome of future state-court proceedings." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975) (emphasis added).

Yet the Texas Supreme Court's opinion here expressly contemplates future state-court proceedings—namely, whether the trial court will comply with the Texas Supreme Court's direction without the necessity of actually granting mandamus relief. As the Texas Supreme Court made clear, it would grant the writ—and thereby issue a final judgment under section 1257(a)—only if the state trial court declined to dismiss petitioner's common-law claims. The fact that the trial court ultimately did dismiss petitioner's common-law claims consistent with the Texas Supreme Court's opinion, see Order, *Jane Doe* v. *Facebook, Inc.*, No. 2018-69816 (334th Dist. Ct., Harris Cty., Tex. Sept. 24, 2021), does not transform a conditional grant of mandamus relief into a final judgment—without which this Court has no jurisdiction. The petition should be denied in light of this novel jurisdictional issue alone.

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granting certiorari to review the court of appeals' subsequent decision to hold petitioner in contempt after the court of appeals issued the injunction and petitioner violated it. *Id.* at 409–12.

STATEMENT

This Court has recently and repeatedly denied petitions raising the same question presented here.[2] Perhaps that is because, for decades, the "overwhelming weight of precedent" on section 230 has been remarkably uniform. Pet. App. 17a. The petition does not even try to identify any conflict, because there is none. Instead, the petition sifts through a handful of concurring and dissenting opinions that only confirm the nationwide uniformity on the issue. And petitioner's headline argument—that section 230 does not immunize interactive computer service providers when they use algorithms to deliver content—was not pled, pressed, or passed upon below. And even if the Court were inclined to wade into section 230 in the absence of a conflict, this case—which arises in the unusual posture of a state-court mandamus proceeding—would be an exceptionally poor vehicle. The petition should be denied.

1. The allegations in this case are horrific. Petitioner Jane Doe alleges that in 2012, when she was 15 years old, "she was 'friended' by another Facebook user with whom she shared several mutual friends."

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[2] See, e.g., *Diez* v. *Google, Inc.*, No. 20-8010, 2021 WL 4507991 (U.S. Oct. 4, 2021); *Malwarebytes, Inc.* v. *Enigma Software Grp. USA*, 141 S. Ct. 13 (2020); *Force* v. *Facebook, Inc.*, 140 S. Ct. 2761 (2020); *Dyroff* v. *Ultimate Software Grp., Inc.*, 140 S. Ct. 2761 (2020); *Daniel* v. *Armslist, LLC*, 140 S. Ct. 562 (2019); *Herrick* v. *Grindr LLC*, 140 S. Ct. 221 (2019); *Beckman* v. *Match.com, LLC*, 139 S. Ct. 1394 (2019); *Hassell* v. *Yelp, Inc.*, 139 S. Ct. 940 (2019); *O'Kroley* v. *Fastcase, Inc.*, 137 S. Ct. 639 (2017); *Jane Doe No. 1* v. *Backpage.com, LLC*, 137 S. Ct. 622 (2017); *Klayman* v. *Zuckerberg*, 574 U.S. 1012 (2014); *Doe* v. *MySpace, Inc.*, 555 U.S. 1031 (2008); *Green* v. *Am. Online, Inc.*, 540 U.S. 877 (2003); *Zeran* v. *Am. Online, Inc.*, 524 U.S. 937 (1998).

Pet. App. 4a; MR27–28.[3] Although petitioner's pleadings allege that Facebook uses "proprietary algorithms" to "generate[] targeted recommendations for each user," MR8, they do not allege that Facebook recommended that the adult user "friend" petitioner or that petitioner accept the adult user's "friend" request. Nor do they allege that Facebook's algorithms played any role in establishing the connection between the two. See MR27–30.

Petitioner alleges that the adult user exchanged messages with her on Facebook's messaging service. Pet. App. 5a; MR28. He made false promises of financial security and a better life through modeling and then invited her to meet him offline. Pet. App. 5a; MR28. "Shortly after meeting him," petitioner "was photographed and her pictures posted to the website Backpage * * * advertising her for prostitution." Pet. App. 5a; MR29. Thereafter, petitioner was "raped, beaten, and forced into further sex trafficking." MR29.

2. Petitioner sued Facebook, asserting five state-law causes of action—four common-law negligence and strict liability claims, and one statutory claim under Texas Civil Practice and Remedies Code § 98.002. Pet. App. 1a–2a, 6a–8a; MR32–36.

Petitioner's pleadings acknowledge that Facebook takes a variety of measures to block content related to explicit material, sexual exploitation, and human trafficking; blocks users who post sexually explicit content;

[3] As in the petition, "MR" refers to the mandamus record before the Texas Supreme Court, available at https://bit.ly/2YuDM1z. The facts that follow are petitioner's allegations, which Texas courts take "as true" and construe "liberally against dismissal." Pet. App. 3a; see Tex. R. Civ. P. 91a.

reports instances of abuse to the National Center for Missing and Exploited Children; responds to subpoenas from law enforcement; prohibits abusive content, including content that exploits minors; and takes a number of other precautions to protect minors. MR4–5, 9, 12, 14–15.

The pleadings 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] 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.

Facebook sought to dismiss petitioner's suit both for lack of personal jurisdiction and for failure to state a claim. Facebook contested personal jurisdiction by filing a special appearance, see Tex. R. Civ. P. 120a, and then, subject to the special appearance, moved to dismiss petitioner's complaint on the ground that all of her claims were barred by section 230. See Tex. R. Civ. P. 91a.1; see also Tex. R. Civ. P. 91a.8 (Rule 91a motion to dismiss "does not * * * waive a special appearance").

3. The state trial court denied Facebook's motion to dismiss. Pet. App. 50a–54a; MR390–92. Facebook then sought reconsideration and permission for leave to pursue an interlocutory appeal. MR393–408 (reconsideration), 409–22 (permission to appeal). The trial court denied both. The next day, Facebook

sought appellate review of both (1) the denial of its special appearance challenging personal jurisdiction and (2) the denial of its motion to dismiss—appealing the former and seeking mandamus review of the latter, as required by Texas law. See Tex. Civ. Prac. & Rem. Code § 51.014(a)(7) (providing for interlocutory appeals of orders granting or denying special appearances under Rule 120a).

Facebook's interlocutory appeal of the special appearance denial has been docketed and briefed. See *Facebook, Inc.* v. *Jane Doe*, No. 14-19-00854-CV (Tex. App.—Houston [14th Dist.]). It remains pending because it was abated while the Texas Supreme Court considered Facebook's mandamus petition seeking review of the denial of its motion to dismiss. Order, *Facebook, Inc.* v. *Jane Doe*, No. 14-19-00854-CV (Tex. App.—Houston [14th Dist.] July 16, 2020). The personal jurisdiction appeal was reinstated on September 23, 2021. Order, *Facebook, Inc.* v. *Jane Doe*, No. 14-19-00854-CV (Tex. App.—Houston [14th Dist.] Sept. 23, 2021).

Facebook's mandamus petition—challenging the denial of its motion to dismiss based on section 230—was denied by a divided court of appeals. Pet. App. 44a–46a. 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," and "artful pleading * * * should not prevail over the statute." Pet. App. 48a.

4. Facebook next sought mandamus relief from the Texas Supreme Court. That court denied in part and conditionally granted in part Facebook's petition.

The court ruled that petitioner's state common-law claims were barred by section 230 and should be dismissed but that her state-law statutory claim under chapter 98 could proceed. Pet. App. 2a.

First, the court adopted "the universal approach of every court to examine the matter over the twenty-five years of section 230's existence" and concluded that this approach was "a defensible reading of [section 230's] plain language." Pet. App. 19a–21a. Accordingly, the court ruled that "[i]mposing a tort duty on a social media platform to warn of or protect against malicious third-party postings would in some sense 'treat' the platform 'as a publisher' of the postings by assigning to the platform editorial or oversight duties commonly associated with publishers." Pet. App. 21a.

The court emphasized that even if it were to accept petitioner's invitation to adopt the position discussed in Justice Thomas's statement respecting the denial of certiorari in *Malwarebytes, Inc.* v. *Enigma Software Group USA*, 141 S. Ct. 13, 15–16 (2020)—"that section 230 affords protection from 'publisher' but not 'distributor' liability"—that still "might not save [petitioner's] claims from dismissal." Pet. App. 23a n.8. "Proof of Facebook's actual or constructive knowledge of any *particular* communication's wrongful character," the court explained, "is not an element of [petitioner's] claims (nor do[es] [she] allege such specific knowledge on Facebook's part)." *Ibid.*

Second, the court determined that petitioner's state common-law claims—negligence, gross negligence, negligent undertaking, and products liability—are all "based on Facebook's alleged failure to warn of,

or take adequate measures to prevent, sex trafficking on its internet platforms." Pet. App. 1a, 24a–27a ("The essence" of petitioner's common-law claims is that Facebook breached its "duty to warn them or otherwise protect them against recruitment into sex trafficking by other users.").

Recognizing that "a plaintiff in a state tort lawsuit cannot circumvent section 230 through 'artful pleading,'" the court then analyzed whether petitioner's claims were "'merely another way of claiming that [Facebook] was liable' for harms occasioned by 'third-party-generated content' on its website" and thus barred by section 230. Pet. App. 17a (quoting *Doe* v. *MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008)).

Petitioner's common-law claims were all barred by section 230, the court explained, because "[a]ll the actions" petitioner alleged that Facebook "should have taken to protect" her—"warnings, restrictions on eligibility for accounts, removal of postings, etc."—were "those of a 'publisher' for purposes of section 230." Pet. App. 25a. At bottom, the court continued, the theory of liability underlying all of petitioner's common-law claims "ultimately arises from the company's transmission of the harmful [third-party] content." Pet. App. 26a. Those state common-law claims, as the court construed them, were "merely another way of claiming that [Facebook] was liable for publishing" that third-party content and, accordingly, were barred by section 230's prohibition on treating an internet platform as the publisher or speaker of third-party content. Pet. App. 28a (quoting *MySpace*, 528 F.3d at 420); see also Pet. App. 30a.

Third, although the court's analysis of section 230's plain language and its adoption of the "overwhelming weight of precedent" construing that language should have led the court to dismiss petitioner's state-law statutory claim, too, the court reached a different conclusion. Pet. App. 17a. Liability for that claim, in the court's view, arises "from the website's own affirmative acts to facilitate injurious communications." Pet. App. 33a–34a. Accordingly, the court held, petitioner's "statutory cause of action"—construed "liberally against dismissal"—was not barred by section 230 at this stage because it was "predicated on allegations of Facebook's affirmative acts encouraging trafficking on its platforms." Pet. App. 3a, 35a. The court expressed "no opinion" on the ultimate "viability" of petitioner's statutory claim. Pet. App. 35a n.17, 41a–42a.

The court thus denied the writ with respect to petitioner's statutory claim, while conditionally granting the writ with respect to petitioner's common-law claims. Pet. App. 3a–4a. Although the court "directed" the trial court to dismiss petitioner's common-law claims, it did not issue the writ to require the trial court to do so. Pet. App. 42a. Instead, it expressed "confiden[ce]" that the district court would comply, and explained that "the writ w[ould] issue *only* if [it] do[es] not." Pet. App. 43a (emphasis added).[4]

[4] On September 24, 2021, the district court dismissed petitioner's negligence, gross-negligence, negligent-undertaking, and products-liability claims consistent with the Texas Supreme Court's decision. Order, *Jane Doe* v. *Facebook, Inc.*, No. 2018-69816 (334th Dist. Ct., Harris Cty., Tex. Sept. 24, 2021).

REASONS TO DENY THE PETITION

In the 25 years since Congress enacted section 230, federal courts of appeals and state supreme courts have uniformly held that section 230 bars claims seeking to impose liability on interactive computer service providers for third-party content—however artfully those claims are pled. The Texas Supreme Court adopted that uniform holding in determining that section 230 bars petitioner's state common-law claims.

This Court has recently and repeatedly rejected petitions asking it to upend that longstanding consensus interpretation. It should do so again here. For one thing, this Court likely lacks jurisdiction to review a state court's *conditional* grant of mandamus relief. For another, there is concededly no conflict, petitioner's criticisms of how section 230 has been interpreted make no difference in this case, and myriad additional vehicle problems—including a pending personal jurisdiction appeal that could moot this case—counsel against review.

Petitioner does not and cannot contend that there is any conflict warranting review. To the contrary, the petition draws on a handful of concurring and dissenting opinions criticizing discrete aspects of how other courts have interpreted section 230. But the decision below does not implicate any of the four criticisms petitioner raises.

First, the Texas Supreme Court explained that, even if it were to construe section 230 as distinguishing between "publisher" and "distributor" liability, it likely would make no difference: Facebook's knowledge of the wrongful content is not an element

of petitioner's common-law claims, nor did she allege that Facebook had such specific knowledge, as would be required to impose "traditional distributor liability" on Facebook. Pet. App. 23a n.8.

Second, the Texas Supreme Court's interpretation of section 230(c)(1) does not render section 230(c)(2) superfluous. Even if petitioner's argument—that "courts have erroneously interpreted [section 230(c)(1)] to shield companies for removing content other than for the specific reasons permitted by [section 230(c)(2)]," Pet. 20–21—were correct, this case is not about removing third-party content, as the court below explained. And the court noted that section 230(c)(1) shields internet platforms from liability for hosting third-party content while section 230(c)(2) protects against liability for removing third-party content.

Third, whether section 230(c)(1) generally is better described as conferring "immunity" or "limit[ing] who may be called the publisher of information that appears online," Pet. 27, is at most a semantic debate. Even if that difference in nomenclature mattered, the Texas Supreme Court held that section 230(e)(3) specifically conferred immunity here, because it provides that no state-law claim inconsistent with section 230 "may be brought."

Fourth, whatever the merits of petitioner's argument that section 230 does not extend to algorithms, that issue is not properly presented here. Petitioner did not allege in her complaint that Facebook's algorithms had anything to do with her claims, she did not press that issue in any of the courts below, and the Texas Supreme Court did not address it.

Even if this Court were inclined to consider the scope of section 230, this case is a particularly poor vehicle for doing so. The Court likely lacks jurisdiction given the Texas Supreme Court's conditional grant of mandamus relief; this case may well become moot before the Court issues a decision (given Facebook's fully briefed personal jurisdiction appeal); and Congress is actively considering legislation to amend section 230.

The petition, which asks this Court to review the Texas Supreme Court's correct application of the uniform interpretation of section 230, should be denied.

I. NO CONFLICT WARRANTS THIS COURT'S REVIEW.

Petitioner concedes that no conflict exists between any court of appeals or state supreme court regarding the question presented. To the contrary, "an extraordinarily broad understanding of [s]ection 230 has prevailed in the lower courts." Pet. 29. That is reason enough to deny the petition.

As the Texas Supreme Court explained, "[a]bundant judicial precedent"—"nearly all of it pointing in the same general direction"—holds that interactive computer service providers "may not be held 'legally responsible for information * * * by third parties' if such providers 'merely enable[d] that content to be posted online.'" Pet. App. 17a (final alteration in original) (quoting *Nemet Chevrolet, Ltd.* v. *Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009)). "The cases are equally uniform in holding that a plaintiff in a state tort lawsuit cannot circumvent section 230 through 'artful pleading' if his 'allegations are merely another way of claiming that [a defendant]

was liable' for harms occasioned by 'third-party-generated content' on its website." *Ibid.* (quoting *MySpace*, 528 F.3d at 420). Petitioner's "narrow view of section 230, while textually plausible," according to the court below, was "not so convincing as to compel [the court] to upset the many settled expectations associated with the prevailing judicial understanding of section 230." Pet. App. 23a.

Petitioner nonetheless urges this Court "to cast aside altogether the universal approach of every court to examine the matter over the twenty-five years of section 230's existence." Pet. App. 19a. Relying on Justice Thomas's statement respecting the denial of certiorari in *Malwarebytes*, as well as a handful of concurring and dissenting opinions from the courts of appeals, petitioner invites this Court to disregard the entirety of that precedent and reconsider section 230's proper scope. Pet. 19–24.

None of the issues petitioner raises, however, warrants this Court's review.

1. Petitioner first cites Justice Thomas's contention that "courts have 'discarded the longstanding distinction between "publisher" liability and "distributor" liability.'" Pet. 19 (quoting *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., respecting the denial of certiorari)). But petitioner does not contend that the Texas Supreme Court erred in declining to adopt that distinction. And for good reason: It would have made no difference in this case.

As the Texas Supreme Court explained, "[e]ven if we were to adopt the position that section 230 affords protection from 'publisher' but not 'distributor' liability, it is not clear that [petitioner's] common-law

claims would survive." Pet. App. 23a n.8. Not only is "[p]roof of Facebook's actual or constructive knowledge of any *particular* communication's wrongful character * * * not an element of [petitioner's] claims," but petitioner did not "allege such specific knowledge on Facebook's part." *Ibid.* "As a result, interpreting section 230 to allow traditional distributor liability to be imposed on Facebook might not save these claims from dismissal." *Ibid.*

What is more, in language the petition does not mention, Justice Thomas's statement says that section 230(c)(1)'s plain language "ensures that a company (like an e-mail provider) can host and transmit third-party content without subjecting itself to the liability that sometimes attaches to the publisher or speaker of unlawful content." *Malwarebytes*, 141 S. Ct. at 14 (Thomas, J., respecting the denial of certiorari). Petitioner's claims are thus barred under Justice Thomas's framework, too, because Facebook cannot be "subject to liability" based on third-party content transmitted on its messaging services.

2. Petitioner also contends that "[g]ranting sweeping immunity to any publisher * * * renders [s]ection 230(c)(2)'s narrower limitation on liability meaningless." Pet. 28; see also Pet. 29–30 (citing Justice Thomas's similar criticism). In her view, section 230(c)(1) should not be interpreted "to shield companies for removing content other than for the specific reasons permitted by" section 230(c)(2). Pet. 20–21. But petitioner's assertion that the Texas Supreme Court "adopt[ed] an interpretation of [s]ection 230(c)(1) that does not even attempt to preserve the specific limitations in [s]ection 230(c)(2)" is incorrect. Pet. 28.

Section 230(c)(2) "is not at issue here." Pet. App. 19a n.6. Even if petitioner's proposed dichotomy between the two provisions were correct, nothing in this case turns on Facebook's *removal* of objectionable content from its platform. Instead, petitioner's allegations relate exclusively to Facebook's alleged *failure* to remove or otherwise warn about objectionable content. See Pet. App. 24a–30a; MR27–30, 32–36.

Regardless, the Texas Supreme Court expressly articulated a distinction between section 230(c)(1), which it noted "has been interpreted to insulate websites from liability for *declining* to censor dangerous, objectionable, or otherwise injurious content generated by third-party users," and section 230(c)(2), "which protects internet companies from liability for censoring content the company deems 'objectionable'"—thus giving separate meaning and application to both provisions. Pet. App. 19a n.6; see Pet. App. 16a ("Section 230's dual protections"—in (c)(1) and (c)(2)—"are commonly understood to operate in tandem, ensuring that a website is not discouraged by tort law from policing its users' posts, while at the same time protecting it from liability if it does not."). In the same vein, the court suggested that "complaints" about "recent actions by social media companies like Facebook to block political speech the company deems dangerous or misleading" were "better directed at section 230(c)(2)(A)." Pet. App. 18a–19a & n.6.

3. Petitioner apparently objects to characterizing section 230 as an "immunity," rather than describing it as a "limit[ation]" on "who may be called the publisher of information that appears online." Pet. 27 (quoting *City of Chi.* v. *StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010)). According to petitioner, "[t]he

view that [s]ection 230 'immunizes' a defendant from suit is atextual." *Ibid.* In her view, the Seventh Circuit "rightfully observed" that section 230(c)(1) "does not mention 'immunity' or any synonym." *Ibid.* (quoting *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc.* v. *Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008)).

Petitioner once again ignores the actual judgment she asks this Court to review. The Texas Supreme Court did not rely on section 230(c)(1) in concluding that Facebook was immune to petitioner's state common-law claims—the court relied on section 230(e)(3), which 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." 47 U.S.C. § 230(e)(3) (emphasis added); see Pet. App. 11a. As the court explained, that language "create[s] a substantive right to be free of litigation, not just a right to be free of liability at the end of litigation." Pet. App. 11a; see also Texas Br. 6 (agreeing that section 230(e)(3) "provid[es] immunity from suit"). If section 230 merely provided a limitation on liability, then Congress need only have specified that "no liability may be imposed"—petitioner's interpretation would render the first half of section 230(e)(3) superfluous.

In all events, the distinction between describing section 230 as conferring "immunity" versus describing it as "limit[ing] who may be called the publisher of information that appears online," Pet. 27, is nothing more than an "academic" disagreement over semantics that has no impact on the outcome. See *Nemet Chevrolet*, 591 F.3d at 254 n.4; see also *Chi. Lawyers' Comm.*, 519 F.3d at 672 (under section 230 a plaintiff "*cannot sue* the messenger just because the message

reveals a third party's plan to engage in unlawful discrimination") (emphasis added). Although the Seventh Circuit (alone) has long favored the latter nomenclature, Facebook is aware of no case—and petitioner cites none—in which the Seventh Circuit's semantic preferences have made any substantive difference.

Unsurprisingly, then, petitioner does not argue that there is any conflict among the lower courts about whether section 230 confers an immunity—because there is none. And this Court recently denied two petitions for certiorari positing such a conflict. See *Force* v. *Facebook, Inc.*, 140 S. Ct. 2761 (2020); *Dyroff* v. *Ultimate Software Grp., Inc.*, 140 S. Ct. 2761 (2020). It should deny certiorari here, too—especially because this state-law case expressly implicates the "[n]o cause of action may be brought" language of section 230(e)(3).

4. Finally, petitioner contends that the Texas Supreme Court erred in holding Facebook immune for what she characterizes as Facebook's own misconduct—its purported "use of algorithms and recommendations that connect traffickers to their victims." Pet. 28; see also Pet. 30 ("Where a defendant deploys its own algorithms to promote connections that cause injury, that misconduct should not be protected by [s]ection 230(c)(1)."). But there are at least two problems with this argument.

First, petitioner does not identify any conflict among the lower courts as to whether an interactive computer service provider's use of algorithms "renders it a non-publisher" for purposes of section 230. *Force* v. *Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019). The Second Circuit held that the use of algorithms did not

defeat section 230 immunity because "arranging and distributing third-party information inherently forms 'connections' and 'matches' among speakers, content, and viewers of content, whether in interactive internet forums or in more traditional media." *Ibid.* A contrary result, the court explained, would "eviscerate" section 230(c)(1): A "defendant interactive computer service would be ineligible for [s]ection 230(c)(1) immunity by virtue of simply organizing and displaying content exclusively provided by third parties." *Ibid.*

Petitioner cites (at 23–24) concurring and dissenting opinions contending that section 230 should not be interpreted to reach the "targeting and recommending" of third-party content to users and "thereby forging connections." *Force*, 934 F.3d at 76–77 (Katzmann, C.J., dissenting); *Gonzalez* v. *Google LLC*, 2 F.4th 871, 913–18 (9th Cir. 2021) (Berzon, J., concurring); *id.* at 918–25 (Gould, J., concurring in part and dissenting in part). But she does not cite any majority opinion from any court of appeals or state supreme court adopting that view—because none has.

Second, whatever the merits of that debate, it is not implicated by this case. That is because petitioner's pleadings do not allege that Facebook "deploy[ed] its own algorithms to promote connections that cause[d her] injury." Pet. 30. To the contrary, her pleadings allege that she "was friended by another Facebook user with whom she had several common friends," and he subsequently "messaged [her] through Facebook's messaging systems." MR28.

Understandably, given the pleadings, the interplay between section 230 and algorithms was "not pressed or passed upon below." *Illinois* v. *Gates*, 462

U.S. 213, 222 (1983). Despite playing a starring role in the petition, the word "algorithm" did not appear once in petitioner's briefing in the Texas Supreme Court. So it comes as no surprise that it played no role in the Texas Supreme Court's analysis of petitioner's common-law claims, either. See Pet. 24a–30a.

Nor could it have: The Texas Supreme Court construed all of petitioner's common-law claims as based on Facebook's alleged *failure* to act, not on any alleged affirmative act by Facebook. In conditionally granting mandamus relief with respect to those claims, the court explained that they were "all premised on Facebook's alleged failures to warn or to adequately protect [petitioner] from harm *caused by other users*"—not any affirmative act by Facebook. Pet. 30a (emphasis added). That alone provides a sufficient basis to deny review.

II. THIS CASE IS AN EXCEEDINGLY POOR VEHICLE.

Even if the Court were otherwise inclined to consider the scope of section 230, this case would be an extraordinarily poor vehicle for doing so: (1) it arises in the unusual posture of discretionary mandamus review by a state supreme court; (2) it could be rendered moot by Facebook's personal jurisdiction challenge, which is pending before the intermediate appellate court; and (3) Congress is actively considering legislation to amend section 230.

First, this Court likely does not have jurisdiction to review a state-court judgment "conditionally" granting mandamus. See *supra* pp. 1–2. At the very least, the Court would have to contend with that threshold question before addressing the merits. But even if jurisdiction existed, the mandamus posture of

this case renders it a particularly poor vehicle for addressing the question presented.

Mandamus relief in Texas "is appropriate to correct 'a clear abuse of discretion' for which a relator 'has no adequate remedy by appeal.'" Pet. App. 9a. Petitioner cites no case where this Court has ever reviewed a state supreme court's judgment holding that a state trial court has abused its discretion. It should not do so here, either, where the state supreme court declined to order the state district court to do anything. See Pet. App. 42a–43a ("The petition for writ of mandamus is * * * conditionally granted in part. * * * We are confident the district court[] will comply, and the writ will issue only if [it] do[es] not.").

Second, were the Court to grant review, this case could well become moot before the Court issues its judgment. Facebook entered a special appearance in the trial court, arguing that the case must be dismissed because Facebook is not subject to personal jurisdiction in Texas for these claims. Although the trial court denied Facebook's special appearance, an appeal is pending in the court of appeals and was reinstated after the Texas Supreme Court's decision. Order, *Facebook, Inc.* v. *Jane Doe*, No. 14-19-00854-CV (Tex. App.—Houston [14th Dist.] Sept. 23, 2021). If the court of appeals were to rule in Facebook's favor, then petitioner's case would have to be dismissed regardless of whether section 230 bars her state common-law claims.

Third, petitioner is "not the only one[] asking" whether the uniform interpretation of section 230 that has prevailed in the lower courts for 25 years should

be modified in light of the changing role of the internet. See *Nat'l Coal. for Men* v. *Selective Serv. Sys.*, 141 S. Ct. 1815, 1816 (2021) (statement of Sotomayor, J., joined by Breyer and Kavanaugh, JJ., respecting the denial of certiorari) (agreeing with the denial of certiorari "while Congress actively weighs the issue").

Congress is actively considering a "flurry of bills" to amend section 230—with "roughly 12 bills introduced in the last four months of 2020 alone." Megan Anand et al., *All the Ways Congress Wants to Change Section 230*, Slate (Mar. 23, 2021), https://bit.ly/3qvkFzR. At least one of those bills, the "Protecting Americans from Dangerous Algorithms Act," would create an express exception from section 230 for claims involving "a case in which the interactive computer service used an algorithm, model, or other computational process to rank, order, promote, recommend, amplify, or similarly alter the delivery or display of information." H.R. 2154 § 2, 117th Cong. (introduced Mar. 23, 2021).

Petitioner (at 1) faults the lower courts for "look[ing] beyond the statute's words to divine its 'policy' and 'purpose,'" but the Texas Supreme Court did no such thing: It expressly "decline[d]" to "rely on legislative history." Pet. App. 13a n.4. Instead, it focused on section 230's "plain language" and adopted a "defensible reading" of that language—recognizing that rejecting the large and uniform body of precedent adopting the same reading would have a destabilizing effect on the law in Texas and across the Nation. See Pet. App. 21a.

In truth, petitioner urges this Court to narrow section 230's scope to better align with what petitioner perceives as Congress's intent—"to prevent minors

from accessing pornography and other obscene materials on the internet * * * by empowering parents to determine the content of communications their children receive through interactive computer services." Pet. 13.[5] But the language Congress actually enacted sweeps more broadly. If section 230 should be updated to reflect the "far greater" role the internet plays today "in the daily lives of people worldwide" than it did when the statute "was enacted in 1996," Pet. 2, that is a job for Congress, not this Court.

III. THE TEXAS SUPREME COURT CORRECTLY HELD THAT SECTION 230 BARS PETITIONER'S STATE COMMON-LAW CLAIMS.

With no conflict to resolve, the petition amounts to a request for error correction. But there is no error to correct—at least not with respect to the dismissal of petitioner's state common-law claims.

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[5] Petitioner's state amici likewise contend that this Court should grant review to advance their policy goals—specifically, to enable them to "protect[] their citizens from human trafficking." Texas Br. 1. Facebook shares that goal, which is why it joined the States in asking Congress to adopt the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, 132 Stat. 1253 (2018), see MR1420—a statute that the States do not mention in their brief.

FOSTA amended section 230 to exempt "any charge in a criminal prosecution brought under State law" if the underlying conduct violates federal sex trafficking laws. 47 U.S.C. § 230(e)(5)(B)–(C). FOSTA also permits state attorneys general to bring a *parens patriae* action under federal law to combat the scourge that is online human trafficking and likewise exempts such claims from section 230. 18 U.S.C. § 1595(d); 47 U.S.C. § 230(e)(5)(A). If the States believe that FOSTA did not do enough to advance their goals, their argument is for Congress, not this Court.

Petitioner asks this Court to decide whether section 230 "provide[s] immunity from suit to internet platforms in any case arising from the publication of third-party content, regardless of the platform's own misconduct." Pet. i. But the Texas Supreme Court—closely tethering its holding to section 230's plain text—correctly held that petitioner's state common-law claims impermissibly "treat[] Facebook as the publisher or speaker of third-party communication and are therefore barred." Pet. App. 24a (internal quotation marks omitted). Petitioner's "claims for negligence, gross negligence, negligent undertaking, and products liability," the court explained, are "all premised on Facebook's alleged failures to warn or to adequately protect [petitioner] from harm caused by other users"—not any affirmative misconduct by Facebook. Pet. App. 30a. The correctness of that holding is yet another reason the petition should be denied.

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)(1), (e)(3)). But that is precisely what petitioner's state-law claims against Facebook attempt to do.

There is no dispute that Facebook is a "provider" of "an interactive computer service." 47 U.S.C. § 230(c)(1), (f)(2). And petitioner plainly seeks to hold Facebook liable for "information provided by another information content provider"—i.e., the messages written and sent by the online predator who trafficked

her. 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").

So that leaves whether petitioner's common-law claims "treat" Facebook as the "publisher or speaker" of "information provided by" a third party. The Texas Supreme Court correctly applied the statutory text and followed the great weight of precedent in holding that they do. Regardless of what petitioner contends Facebook should have done about the third-party content here—prevent it, block it, remove it, edit it, flag it, or warn about it—the purported duty to take action that undergirds those state common-law claims "derives from [Facebook's] role as a publisher," of third-party content, which is why these claims are "prohibited by [section] 230(c)(1)," *Daniel* v. *Armslist, LLC*, 926 N.W.2d 710, 723–26 (Wis. 2019)—just as the Texas Supreme Court held.

That is why myriad courts have refused to allow "artful pleading"—like petitioner's theory that the gravamen of her common-law claims is really Facebook's "own misconduct"—to end-run section 230's plain language. See, e.g., *ibid.*; *MySpace*, 528 F.3d at 416, 420. 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, as here, the plaintiff alleges that the third-party content lead to tragic consequences.

A suit seeking to hold Facebook liable for publishing and transmitting messages generated by third

parties is precisely the type of publishing activity section 230 was enacted to prohibit—and artful pleading "should not prevail over the statute." Pet. App. 48a (Christopher, J., dissenting). As this Court repeatedly has made clear, what matters is not "the use (or non-use) of particular labels and terms": "What matters is the crux—or in legal speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *Fry* v. *Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017). "[A]ny other approach," the Court explained, "would allow plaintiffs to evade [statutory] restrictions through artful pleading." *Ibid.* (quoting *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 36 (2015)); see also *Brown* v. *Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976) ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.").

What matters under section 230 is 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). The Texas Supreme Court did not reversibly err in concluding that petitioner's common-law claims do just that. Here, as in *Sachs*, petitioner's "claims turn on the same tragic episode," "allegedly caused by [the same] wrongful conduct," "which led to the [same] injuries suffered." 577 U.S. at 35. "However [petitioner] frames her suit," the sex trafficker's harmful third-party content "remains at its foundation"—and the only link between Facebook and petitioner's injuries

is that Facebook allegedly hosted or transmitted (i.e., published) that content. *Id.* at 36.

"Parties complaining that they were harmed by [an interactive computer service's] publication of user-generated content have recourse," the Fifth Circuit has 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." *Myspace*, 528 F.3d at 419. So too here. In this way, plaintiffs are prevented "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." *Daniel*, 926 N.W.2d at 724.[6]

At best, then, petitioner asks this Court to review whether the Texas Supreme Court correctly applied "a properly stated rule of law"—i.e., whether petitioner's common-law claims would treat Facebook as the publisher of information provided by someone else—but such review is "rarely granted." S. Ct. R. 10. It should not be granted here.

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[6] The state amici acknowledge (at 8) that "without the third-party content produced by the traffickers, [p]etitioner would not have sustained the injuries she alleges." But they assert that section 230(c)(1) turns on whether "an *element*" of a state-law claim "requires treating the defendant as the speaker or publisher of third-party content." Texas Br. 5 (emphasis added). No court has adopted that elements-based approach, and for good reason: When Congress wants courts to take an elements-based approach, it knows how to do so—and it does so expressly, as it did in the Armed Career Criminal Act. See 18 U.S.C. § 924(e)(2)(B)(i) (defining "violent felony" as "any crime" that "has *as an element* the use, attempted use, or threatened use of physical force against the person of another") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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