No. 21-459

In The
Supreme Court of the United States

JANE DOE,

Petitioner,

v.

FACEBOOK, INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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Facebook knows that its platform harms its users, but it has chosen to facilitate those injuries because doing so maximizes profits. Facebook has no incentive to do otherwise because Facebook has relied on Section 230 as an impenetrable shield to protect it from both liability and any discovery into the inner workings of its business. The prevailing interpretation of Section 230—in Justice Thomas's words—deprives plaintiffs of "a chance to raise their claims in the first place." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 18 (2020) (statement of Thomas, J., respecting the denial of certiorari).

Section 230 should not be interpreted as an all-encompassing immunity that forecloses all suits that in any way involve third-party content. The plain text of Section 230 does not immunize Facebook from the consequences of its own misconduct, including creating connections that injure its users and failing to provide basic warnings and safeguards against known dangers on its platform. This Court should grant review and realign the judicial interpretation of Section 230 with its plain text.

I. This Court Has Jurisdiction Over This Petition.

Facebook contends that this Court lacks jurisdiction over this petition because the Texas Supreme Court only *conditionally* granted a writ of mandamus. BIO 1-2. Yet Facebook admits that this Court exercises review over state supreme court decisions on supervisory writs. BIO 1 n.1. Further, Facebook admits that this Court would have jurisdiction over this petition if the Texas Supreme Court had granted—rather

than conditionally granted—the writ. BIO 2. And while Facebook claims that its argument raises a "novel jurisdictional issue," BIO 2, this Court regularly exercises jurisdiction over orders conditionally granting habeas relief. *E.g.*, *Lafler v. Cooper*, 566 U.S. 156, 162 (2012).

Facebook's position presents the proverbial distinction without a difference. The practice of the Texas Supreme Court is *always* to "conditionally" grant mandamus relief so that trial courts are afforded the judicial courtesy to voluntarily comply. *See* Hon. Dori Contreras & Cecile Foy Gsanger, *Mandamus*, State Bar of Texas, Civil Appellate Practice 101, at 21 (Sept. 9, 2020). And trial courts comply with such directives. True to form, the trial court here followed the Texas Supreme Court's order and dismissed Petitioner's common law claims. BIO 2. As a result, the conditional grant was effected and the same result obtained as if the court had unconditionally granted the writ in the first instance.

Facebook's position that this Court lacks jurisdiction to review "conditional" grants of mandamus relief, if accepted, would lead to absurd results. Appellate courts could evade review of mandamus orders just by labeling them "conditional," and trial courts would be the ultimate arbiters of this Court's jurisdiction depending upon their willingness to accept or defy the conditional grant.

Moreover, Facebook acknowledges 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.'" BIO 2 (quoting *Cox*

Broad. Corp. v. Cohn, 420 U.S. 469, 480 (1975)). That test is unquestionably satisfied here. The Texas Supreme Court ordered Petitioner's common-law claims dismissed under Section 230. The state court cannot revisit the Section 230 issue. Because this interpretive issue of federal law will not be affected by any forthcoming state court proceedings, this case falls squarely within this Court's jurisdiction.

II. This Case Warrants Review Because It Presents An Important Question Of Federal Law That Needs To Be Conclusively Resolved.

The interpretation of Section 230 presents a critical issue of federal law with ever-increasing importance. Section 230 has improperly shielded internet platforms like Facebook from responsibility for their wrongdoing and has concealed the true nature of their activities from any discovery. Indeed, the extent of Facebook's misconduct in multiple areas has only recently been more fully revealed and only because of documents disclosed by a Facebook whistleblower.[1] These documents corroborate what Petitioner has alleged here, but has not been allowed to establish through discovery: Facebook knows that its platform facilitates human trafficking and knows that

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[1] Jeff Horwitz, *The Facebook Whistleblower, Frances Haugen, Says She Wants to Fix the Company, Not Harm It*, Wall Street Journal (Oct. 3, 2021, 7:36 PM), https://www.wsj.com/articles/facebook-whistleblower-frances-haugen-says-she-wants-to-fix-the-company-not-harm-it-11633304122.

its algorithms harm its users, but it allows these problems to persist because doing so maximizes profits.[2] This Court's guidance regarding the correct interpretation of Section 230 is imperative.

1. Facebook argues that this Court should not review the proper interpretation of Section 230 because "no conflict exists between any court of appeals or state supreme court" on the issue. BIO 12. But the need for this Court's review does not depend on the existence of a conflict. This Court reviews cases where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). This Court has never addressed the proper scope of Section 230, and the proper interpretation of Section 230 is undeniably important. Although Facebook addresses the amici briefing only in passing footnotes, twenty-five states agree with Petitioner that the interpretation of Section 230 is an issue of critical nationwide importance that this Court should review.

Justice Thomas also recently emphasized the importance of this issue, highlighting that Section 230 has been used "to confer sweeping immunity on some of the largest companies in the world." *Malwarebytes,*

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[2] Justin Scheck et al., *Facebook Employees Flag Drug Cartels and Human Traffickers. The Company's Response is Weak, Documents Show*, Wall Street Journal (Sept. 16, 2021, 1:24 PM), https://www.wsj.com/articles/facebook-drug-cartels-human-traffickers-response-is-weak-documents-11631812953; Keach Hagey & Jeff Horwitz, *Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead*, Wall Street Journal (Sept. 15, 2021, 9:26 AM), https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215.

141 S. Ct. at 13. Justice Thomas urged this Court to accept certiorari to "consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms." *Id.* at 14. As Justice Thomas's statement suggests, there is a disconnect between the statute's plain text and the prevailing judicial interpretation that warrants this Court's review.

Facebook criticizes Petitioner's reliance on Justice Thomas's statement, suggesting that the problems he identified are not applicable here.[3] BIO 13-15. But these arguments miss the point. The issue is not that this case directly involves the removal of content under Section 230(c)(2) or distributor liability. Rather, the issue is that the overbroad interpretation of Section 230(c)(1) cannot be correct because it swallows Section 230(c)(2) and distributor liability.[4]

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[3] Facebook also suggests that Justice Thomas's interpretation of Section 230(c)(1) would bar Petitioner's claims because he observed that Section 230(c)(1) allows a company to "host and transmit third-party content" without being subject to publisher liability. BIO 14 (quoting *Malwarebytes*, 141 S. Ct. at 14). But there is no dispute that Section 230(c)(1) provides protection for merely hosting or transmitting third-party content. The question presented here is whether Section 230(c)(1) provides protection for a defendant's *own* misconduct.

[4] Facebook contends that "[t]he 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)." BIO 16. But Section 230(e)(3) merely gives effect to Section 230(c)(1) by preempting state law "that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

2. As the Petition explains, a number of jurists have recently questioned whether the prevailing interpretation of Section 230 is correct, particularly when that interpretation provides protection for a defendant's own misconduct. *See* Pet. 19-25.

Facebook downplays these authorities by arguing that they involve algorithms and that the role of algorithms was not "pled, pressed, or passed upon below." BIO 3, 11, 18-19. That is not correct. *See infra* at 7-8. Regardless, the logic of the dissenting jurists' viewpoints was not limited to the use of algorithms. Rather, their reasoning drew a critical distinction between a defendant's passive publishing of third-party content and a defendant's own misconduct.

In *Gonzalez v. Google*, Judge Gould explained that "Section 230 was not intended to immunize, nor does its literal language suggest that it immunizes, companies providing interactive computer services from liability for serious harms knowingly caused by their conduct." 2 F.4th 871, 920 (9th Cir. 2021) (Gould, J., concurring in part and dissenting in part). Justice Thomas likewise criticized courts for "filtering their decisions through the policy argument that 'Section 230(c)(1) should be construed broadly'" and thereby giving defendants immunity for claims resting on "the defendant's own misconduct" rather than its role as a publisher. *Malwarebytes*, 141 S. Ct. at 18.

Even setting aside the role of Facebook's algorithms, this case unquestionably involves allegations regarding Facebook's "own misconduct." Petitioner alleged that Facebook knew its platform was a breeding ground for sex traffickers, but it chose not to warn or protect vulnerable users because doing so would have decreased profits. MR1, 3-5, 19-25, 28-30, 32-36.

Petitioner also alleged that certain features of Facebook's platform improperly facilitate trafficking. For example, Facebook informs users when another user has "shared friends." MR17-18. Traffickers will "friend" persons who are acquainted with their intended victim. MR17-18. When the traffickers approach their victims, Facebook "cloaks the traffickers with credibility" by suggesting that the trafficker is already part of the victim's community of "shared friends." MR17-18. This feature directly contributed to Petitioner's trafficking in this case because the trafficker established several common "friends" with Petitioner before connecting with her. MR28-30. Thus, at a minimum, Facebook's features and functions encouraged Petitioner to form a relationship with her trafficker.

In any event, Petitioner's pleadings *did* complain of Facebook's use of algorithms to form connections between traffickers and its users. *See* MR8, 20. Nonetheless, Facebook faults the sex-trafficked minor for failing to allege that Facebook specifically recommended that this trafficker "friend" her or that she accept the trafficker's "friend" request. BIO 4. This argument is risible, as it is Facebook's heretofore successful claims of categorical Section 230 immunity that have allowed it to evade discovery into its operations, the function of its algorithms, and the role of its algorithms in connecting Petitioner and her trafficker in the first place.

Facebook's use of algorithms was also discussed explicitly at oral argument below. *See* Transcript of Oral Argument, *In re Facebook, Inc.*, No. 20-0434, 2021 WL 3862519 (Tex. Feb. 24, 2021). And the Texas Supreme Court's opinion highlighted Petitioner's allegations that Facebook "directs users to persons they

likely want to meet," and "[i]n doing so, … facilitates human trafficking by identifying potential targets, like [Plaintiffs], and connecting traffickers with those individuals." Pet.App.34a (quoting MR20). The suggestion that Facebook's use of algorithms to connect sex traffickers and their victims was not previously raised in this case does not withstand scrutiny.

III. This Is An Ideal Case To Address Section 230.

This case presents an ideal opportunity for this Court to address the interpretation of Section 230 for the first time. The meaning of Section 230 is squarely presented. The Texas Supreme Court dismissed Petitioner's common law claims exclusively based on Section 230.

The interpretation of Section 230 is now well developed. In fact, the Texas Supreme Court indicated that it was constrained by existing cases interpreting Section 230. Pet.App.4a, 23a. Although the court recognized that both sides advanced plausible interpretations of the statute, it refused to interpret Section 230 on a "clean slate" because of concerns about upsetting "expectations associated with the prevailing judicial understanding of section 230." Pet.App.4a, 23a. Instead, the court stated that it was expecting this Court to step in and resolve "[w]hich reading [of Section 230] is superior." Pet.App.20a.

Facebook offers several reasons why it believes this case presents a poor vehicle to clarify Section 230's meaning. None has merit.

First, Facebook argues that the mandamus posture of this case renders it inappropriate for review

because mandamus relief under Texas law is available only to correct an abuse of discretion. BIO 20. This argument misinterprets the standard of review. While mandamus relief is appropriate to correct an abuse of discretion, the issue presented here—the proper interpretation of Section 230—is a legal issue subject to de novo review. Misapplication of the law is, by definition, an abuse of discretion. The Texas Supreme Court's opinion embraced these very principles: "We review de novo the trial courts' legal conclusions, including their interpretations of federal statutes, since an error of law or an erroneous application of law to facts is always an abuse of discretion." Pet.App.10a (citing *In re Geomet Recycling LLC*, 578 S.W.3d 82, 91-92 (Tex. 2019)).

Second, Facebook argues that this case may become moot because of a pending appeal regarding whether Facebook is subject to personal jurisdiction. BIO 20. The far-fetched theory that Facebook is not subject to personal jurisdiction in Texas was appropriately rejected by the trial court. The remote possibility that the court of appeals could decide otherwise is not a proper basis to reject this petition. This Court has exercised jurisdiction in various "recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox*, 420 U.S. at 477. In any such situation, there is some possibility that the case will be resolved by other means during the pendency of the ongoing state court proceedings. Here, the Texas Supreme Court has conclusively resolved the federal issue presented regarding the interpretation of Section 230. That decision is as final as it will ever be, and no further proceedings

in the trial court could affect that unequivocal determination about the scope of federal law.

Third, Facebook argues that this Court should not review this case because there are a "flurry of bills" before Congress proposing amendments to Section 230. BIO 20-21. According to Facebook, there are a dozen or more such bills pending, making clear that a resolution on this point is neither imminent nor assured.[5] Notably—with one exception—Facebook does not identify these bills, discuss their contents, or explain whether these bills would even affect the Section 230 issues resolved by the Texas Supreme Court.

The one bill Facebook discusses—the Protecting Americans from Dangerous Algorithms Act—"would create an express exception from section 230" in "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." BIO 21 (quoting H.R. 2154 § 2, 117th Cong. (introduced Mar. 23, 2021)). Facebook implies that the passage of this bill would moot the issues presented here, yet elsewhere argues that this case has nothing to do with algorithms. *See* BIO 11, 18-19. In any event, the proposed amendment does not purport to be retroactive and would be of no assistance to individuals like Jane Doe who have *already* been harmed by Facebook's misconduct. Facebook also fails to mention

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[5] John D. McKinnon, *Big Tech's Liability Shield Is Under Siege*, Wall Street Journal (Dec. 1, 2021, 4:03 PM), https://www.wsj.com/articles/big-techs-liability-shield-under-siege-11638374930 ("A top question hovering over all the legislative efforts [regarding Section 230] is what—if anything—the closely divided Senate can pass.").

that this proposed bill applies only to certain claims that are not at issue. H.R. 2154 (Section 230(c)(1) protection shall not apply to certain claims under 42 U.S.C. §§ 1985, 1986 and 18 U.S.C. § 2333). Further, this bill is unnecessary because, properly interpreted, Section 230 does not bar claims based on an internet platform's misconduct, such as its use of algorithms that injure its users.

IV. This Court Should Correct The Atextual Interpretation of Section 230 That Gives Internet Platforms Near-Limitless Immunity From Suit.

Facebook argues that the Texas Supreme Court's decision presents no error because Petitioner's common law claims treat Facebook as the publisher or speaker of third-party communications. BIO 23. But Facebook's arguments simply assume its ultimate conclusion while sidestepping the issue presented here.

There is no dispute that, under Section 230(c)(1), an interactive computer service cannot be "treated as the publisher or speaker" of third-party content. 47 U.S.C. § 230(c)(1). The relevant question is: What does it mean to "treat" a defendant as a "publisher or speaker"? As Facebook indicates, the Texas Supreme Court and other courts have concluded that any claim that "derives" or "arises" from the publication of third-party content treats a defendant as a publisher or speaker. BIO 24 (quoting *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 723-26 (Wis. 2019)); Pet.App.24a, 26a. But Section 230(c)(1) contains nothing indicating that any claim "deriving" or "arising" from the publication of third-party content is barred. Rather, this standard was judicially created.

The allegations in this case—that Facebook profited from facilitating connections between sex traffickers and their victims, and that Facebook failed to warn or protect its users of a known sex trafficking problem on its platform—do not fault Facebook for exercising any publisher functions. *See* BIO 25 (describing publisher functions as "deciding whether to publish, withdraw, postpone, or alter content" (quoting *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003))). The bare fact that this case *involves* the publication of third-party content is not sufficient to cloak Facebook with immunity under Section 230(c)(1). If that were the rule, there are few situations in which Facebook—a company whose entire business involves publishing third-party content online—could be held liable, no matter the breadth of its own misconduct. As Justice Thomas has recognized, there is a serious question as to whether the "current state of immunity enjoyed by Internet platforms" under the prevailing judicial gloss of Section 230(c)(1) is actually "align[ed] with" the text of the provision. *Malwarebytes*, 141 S. Ct. at 14. This Court should grant review to address this important issue of federal law.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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