No. 21-___

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Jane Doe plaintiff in this case was sex trafficked as a minor because Facebook's products connected her with a sex trafficker. The trafficker sold her for sex, allowing men to serially rape her in exchange for money. She was rescued by law enforcement and now seeks to hold Facebook accountable through this action alleging common-law and statutory claims under Texas law.

Facebook asserts that it is completely immune from this suit under Section 230(c)(1) of the Communications Decency Act ("CDA"), which provides that "[n]o 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." The Texas Supreme Court concluded that this provision granted Facebook sweeping immunity on all but one of Petitioner's claims. The court felt constrained by existing precedent to reach that holding, but also emphasized that it expected this Court to conclusively address Section 230's reach. The question presented is:

Does Section 230 of the Communications Decency Act provide immunity from suit to internet platforms in any case arising from the publication of third-party content, regardless of the platform's own misconduct?

PARTIES TO THE PROCEEDING

Petitioner in this Court, Real Party in Interest before the Texas Supreme Court and the Texas court of appeals, is a Jane Doe plaintiff in the trial court in Cause No. 2018-69816.

Respondent, Relator before the Texas Supreme Court and Texas court of appeals, and Defendant in the trial court, is Facebook, Inc.

STATEMENT OF RELATED PROCEEDINGS

This petition arises from:

In re Facebook, Inc., 625 S.W.3d 80 (Tex. 2021) (opinion issued June 25, 2021)

In re Facebook, Inc., 607 S.W.3d 839 (Tex. App.—Houston [14th Dist.] 2020) (opinion issued Apr. 28, 2020)

Jane Doe v. Facebook, Inc., et al., No. 2018-69816 (334th Dist. Ct., Harris Cty., Tex.) (order signed May 23, 2019)

There are two related proceedings involving similarly situated Jane Doe plaintiffs that were addressed in the Texas appellate court opinions, but the other two Jane Doe plaintiffs are not petitioners in this Court. The related proceedings are:

Jane Doe v. Facebook, Inc., et al., No. 2018-82214 (334th Dist. Ct., Harris Cty., Tex.) (order signed May 23, 2019)

Jane Doe v. Facebook, Inc., et al., No. 2019-16262 (151st Dist. Ct., Harris Cty., Tex.) (order signed Oct. 4, 2019)

Petitioner is not aware of any other proceedings in state or federal courts directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner was a minor who became a victim of sex trafficking through Facebook's products. Petitioner brought claims against Facebook arising out of Facebook's operation of its social media platforms, including its use of algorithms to facilitate connections between sex traffickers and their victims. The Texas Supreme Court held that all but one of Petitioner's claims were barred by Section 230 of the Communications Decency Act.

Section 230 was enacted in the early days of the internet to protect children from obscene materials online and to enable websites to assist in that effort without fear of liability. In relevant part, Section 230 provides that "[n]o 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."

In the decades since its enactment, the prevailing interpretation of Section 230 has strayed far from its origins and text. In applying Section 230, courts have refused to follow a literal reading of the statute's plain language, rarely considering whether a given claim requires a defendant to be "treated as the publisher" of third-party information. Instead, courts have looked beyond the statute's words to divine its "policy" and "purpose," holding that Section 230 affords internet platforms sweeping immunity from suit in any case that "arises from" the publication of third-party information. This atextual interpretation has led to outright dismissal of nearly all claims against internet companies, shielding them from participating in discovery and making it practically impossible for plaintiffs to hold them accountable for their actions—with devastating results. Internet companies have

been immunized from allegations of such serious wrongdoing as promoting terrorist content and facilitating sex trafficking. Based on this wayward interpretation of Section 230, internet companies have been granted expansive immunity from the consequences of their own misconduct and failures to act.

A growing chorus of dissenting voices has recently called into question whether the near limitless immunity internet platforms currently enjoy is consistent with Section 230's plain meaning. In particular, a number of jurists have expressed skepticism about whether internet platforms should be afforded such sweeping immunity under Section 230 when, as here, they take affirmative steps that contribute to the plaintiff's injuries.

Although the Texas Supreme Court recognized that a more narrow textual reading of Section 230 was plausible, the court deemed itself constrained by the "settled expectations associated with the prevailing judicial understanding of section 230." Pet.App.23a. The court emphasized that it expected this Court to ultimately resolve the important and recurring questions about the scope of Section 230. Pet.App.20a.

The proper interpretation of Section 230 is long overdue for this Court's plenary review. Section 230 has now been addressed by every U.S. court of appeals, in addition to many other lower courts. The prevailing understanding of Section 230 has broadly immunized defendants from civil liability based on little more than the bare fact that the company does business through the internet. The internet plays an inextricable role in the daily lives of people worldwide, far greater than when Section 230 was enacted in 1996. Section 230 itself has an outsized influence on

modern commerce, in which internet-based companies are some of the largest and most powerful in the world and have far-reaching impacts on their users, yet have little or no accountability. Questions about Section 230's scope are exceptionally and indisputably important, especially given that the prevailing "policy and purpose" interpretation has shut down wide swaths of civil litigation challenging serious wrongdoing by social media companies and other internet platforms. Plenary review is warranted.

OPINIONS BELOW

The Texas Supreme Court's opinion is reported at 625 S.W.3d 80, and reproduced at Pet.App.1a-43a. The court of appeals' opinion is reported at 607 S.W.3d 839, and reproduced at Pet.App.44a-49a. The trial court's opinion is reproduced at Pet.App.50a-54a.

JURISDICTION

The Texas Supreme Court issued its decision on June 25, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a). Although one of Petitioner's claims was allowed to proceed, the Texas Supreme Court held that Section 230 categorically barred all remaining claims. This Court accordingly has jurisdiction to review the Texas Supreme Court's resolution of this important federal question. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480 (1975) (this Court has jurisdiction under Section 1257 where "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").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the application of Section 230 of the Communications Decency Act, 47 U.S.C. § 230. The full text of Section 230 is reproduced at Pet.App.55a-60a.

STATEMENT OF THE CASE

A. Facebook Facilitates Online Human Trafficking By Creating Connections Between Traffickers And Their Victims

Human trafficking is an epidemic with devastating impacts on both individual survivors and communities at large. MR1.[1] Human trafficking is now the fastest growing criminal enterprise in the world. Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 Harv. J.L. & Pub. Pol'y 553, 555 (2018). The growth of human trafficking is largely attributable to the use of the internet to facilitate the sale of human beings for sexual abuse. *Id.* The internet has exponentially increased the opportunities for sex trafficking, especially trafficking of children. MR17-18, 21. Social media platforms in particular have been increasingly used to contact, recruit, and sell children for sex. MR12-13, 17-18, 21. Social media provides unrestricted access to minors for predators to target. MR17, 21.

One of these social media platforms, Facebook, views "its company mission to connect people in order to create profit." MR18. Facebook therefore measures its profits in terms of "connections." MR1. Facebook generates its revenue from advertising to its users. MR9, 20, 24-25. Its ability to profit depends on increasing its number of users and the number of their connections to other users, thereby maximizing user

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[1] "MR" citations refer to the mandamus record before the Texas Supreme Court.

engagement with Facebook's products. MR18, 24-25. The more Facebook knows about its users, the more targeted advertising it can sell to advertisers and the more revenue it can generate. MR19-20.

Facebook's aim to "create profit" by connecting people, collecting user data, and selling ads has no discernable limit. Indeed, the users Facebook connects unquestionably include sex traffickers and their victims. Facebook knows that human traffickers use its products "to identify, cultivate, and then exploit human trafficking victims." MR21. Nonetheless, Facebook remains an active participant in facilitating these connections. MR8-10, 20-21. Critically, Facebook's own algorithms often connect traffickers to their victims. MR8-10, 20-21. Facebook's proprietary algorithms generate recommendations for users to connect with other users, groups, or other content, and those algorithms may recommend connections between minors and adult predators. MR8-10, 20-21. As the Texas Supreme Court recognized, Petitioner has alleged that "Facebook 'uses the detailed information it collects and buys on its users to direct users to persons they likely want to meet,' and, '[i]n doing so, … facilitates human trafficking by identifying potential targets, like [Petitioner], and connecting traffickers with those individuals." Pet.App.34a. Facebook knows that it is facilitating sex trafficking on its platforms, but does so anyway in order to maximize its profits. MR1, 3, 12, 18, 20-21.

Facebook has created "a breeding ground for sex traffickers to stalk and entrap survivors," providing sex traffickers with unrestricted access to minor users. MR4, 6, 12, 17, 20-21, 34-35. The maintenance of this breeding ground is profitable to Facebook, in-

creasing user engagement with its products and allowing Facebook to extract higher advertiser fees. MR1, 24-25, 34-35. Facebook's products are frequently the first point of contact between sex traffickers and their victims, and those products help traffickers "stalk, exploit, recruit, groom, and extort children into the sex trade." MR13, 17. For example, traffickers often "friend" their intended victim's acquaintances, such as the victim's classmates. MR17-18. Facebook cloaks these traffickers with credibility, informing the intended victims that the trafficker has "shared" friends with the victim and encouraging the victim to accept the connection. MR17-18. The traffickers then use the connections Facebook has helped create to recruit and entrap their victims. MR17-18, 20-21, 27-29. While Facebook is well aware of the prevalence of human trafficking on its platform, Facebook—motivated by profit—has failed to warn its vulnerable users about these known and foreseeable dangers or take action to protect them from connecting with traffickers. MR19-25, 28-30, 32-36. Similarly, although Facebook is aware of harmful human trafficking material on its platforms that violates its terms of service, Facebook fails to remove that material. MR1, 3, 3-16, 21, 29-30, 34-35. Facebook refuses to take action so that it can continue to financially benefit from the presence of human traffickers and trafficking materials on its platforms. MR1, 3, 13-16, 18, 24-25, 34-35.

B. Petitioner Was Sex Trafficked As A Minor Because Of Facebook's Products

Petitioner was 15 years old when she was forced into sex trafficking through Facebook. MR2, 27-30. Her trafficker was an adult Facebook user who oper-

ated under a false name and friended her through Facebook. MR27-30. The trafficker's account was littered with photos and other content that were clear signs of human trafficking. MR29.

After Petitioner had an argument with her mother, the trafficker told her she could make enough money as a model to rent an apartment of her own and convinced her to let him pick her up. MR28-29. Within hours, Petitioner was raped, beaten, photographed, and forced into sex trafficking. MR29.

C. Proceedings Before The Trial Court

Petitioner brought suit against Facebook for violations of Texas's anti-trafficking statute. Tex. Civ. Prac. & Rem. Code Ann. § 98.002(a). She also raised common law claims for negligence, negligent undertaking, gross negligence, and products liability arising out of Facebook's role in Petitioner's trafficking. MR32-36.

Facebook moved to dismiss Petitioner's claims under Texas Rule of Civil Procedure 91a on the basis that they were barred by Section 230(c)(1) of the Communications Decency Act, which provides that "[n]o 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); *see* MR177-94. The trial court denied Facebook's motion to dismiss. Pet.App.50a-54a.

D. Proceedings Before The Court Of Appeals And Texas Supreme Court

Facebook filed a petition for a writ of mandamus in the court of appeals challenging the denial of the

motion to dismiss. The court denied relief. Pet.App.44a-49a.

Facebook then sought relief from the Texas Supreme Court. *See* Pet.App.1a-43a. The court conditionally granted Facebook's petition with respect to Petitioner's common law claims and directed the dismissal of those claims. Pet.App.24a-30a. The court denied the petition with respect to Petitioner's statutory sex trafficking claims. *See* Pet.App.30a-42a.

The court's ruling turned on its interpretation of Section 230's meaning and scope. The court stated that there were two possible readings of Section 230—one conferring far-reaching immunity and one conferring more limited protection. Pet.App.15a-23a. The court noted that the overwhelming weight of precedent had adopted "a capacious conception" of Section 230's protections for internet companies. Pet.App.17a (quoting *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016)). Under this view, "'all claims' against internet companies 'stemming from their publication of information created by third parties' effectively treat the defendants as publishers and are barred." Pet.App.17a (quoting *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008)).

The court contrasted that view with the interpretation advanced by Justice Thomas of this Court. In a recent statement respecting the denial of certiorari, Justice Thomas explained that Section 230's scope was actually much narrower. Pet.App.17a-21a (citing *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (statement of Thomas, J., respecting denial of certiorari)). He emphasized that the plain text of Section 230 prohibits only the imposition of *publisher* liability and therefore should not

be construed to also protect defendants from liability for the knowing distribution of illegal content. *See* Pet.App.17a-21a.

The Texas Supreme Court acknowledged the textual interpretation offered by Justice Thomas, but ultimately declined to adopt it. The court explained that it was reluctant to depart from the "prevailing judicial understanding" that Section 230 confers far-reaching immunity to internet companies. Pet.App.4a, 23a. But the court emphasized that it expected this Court to ultimately resolve the meaning of Section 230 and the scope of the immunity it confers. Pet.App.20a ("Which reading is superior, given the statutory context and the other canons of construction, is a question the U.S. Supreme Court may soon take up.").

Applied to Facebook's arguments, the court concluded that Petitioner's common law claims were barred under the prevailing reading of Section 230 conferring broad immunity. Pet.App.24a-30a. The court concluded that those claims were subject to dismissal merely because they "*arise[ ] from* the company's transmission of the harmful content." Pet.App.26a (emphasis added). In its analysis of Petitioner's common law claims, the court focused largely on allegations that Facebook had failed to warn or protect her against the dangers of sex trafficking on Facebook's products. Pet.App.24a-30a. But the court did not meaningfully grapple with Petitioner's allegations about Facebook's other omissions, or allegations about the design and operation of Facebook's platforms that steer minors toward preying adults. The court concluded that Facebook was merely a passive participant, and that Petitioner's claims would indirectly fault Facebook for passively transmitting third-party communications.

Pet.App.24a-27a, 34a-35a. In particular, the court concluded that existing case law about Section 230's scope did not permit "[i]mposing a tort duty on a social media platform to warn of or protect against malicious third-party postings" because doing so "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 reached a different result with respect to Petitioner's claim under Texas's anti-trafficking statute. The court concluded that Petitioner alleged that Facebook was a sufficiently active participant for purposes of her statutory claim and thus it was not barred by Section 230. *See* Pet.App.31a-36a. The court stated that the statutory claim was "predicated on allegations of Facebook's affirmative acts encouraging trafficking on its platforms." Pet.App.35a. Attempting to distinguish the statutory claim from the common law claims, the court stated that Petitioner's claims for negligence and other common law violations were based on Facebook providing "*neutral* tools" to carry out unlawful communications and passively acquiescing in the misconduct of its users. Pet.App.34a-36a. Texas's anti-trafficking statute, on the other hand, required the defendant to "participate" in a venture that traffics another person, and therefore required "more than mere passive acquiescence in trafficking conduct by others." *See* Pet.App.31a-36a.

The court concluded that such allegations "do not treat Facebook as a publisher who bears responsibility for the words or actions of third-party content providers. Instead, they treat Facebook like any other party who bears responsibility for its *own* wrongful

acts." Pet.App.35a-36a. The court emphasized that "[n]othing in section 230's operative text goes so far as to 'create a lawless no-man's land on the Internet' in which online platforms like Facebook are free to actively encourage human trafficking." Pet.App.36a (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008)).

REASONS FOR GRANTING CERTIORARI

I. This Court Should Grant Certiorari To Address The Proper Scope Of Section 230 Of The Communications Decency Act.

The prevailing interpretation of Section 230 is wrong, as jurists and other observers have increasingly recognized. The atextual view that Section 230 confers sweeping immunity from nearly all civil claims against internet platforms and social media companies flouts the statute's plain language.

A. Courts Have Erroneously Interpreted Section 230 To Provide Internet Platforms With Near-Categorical Immunity From Suit.

1. Section 230 of the CDA was adopted as an amendment to the Telecommunications Act of 1996. Pub. L. 104-104, § 509, 110 Stat. 56, 137-39. The internet was mostly an afterthought in the Telecommunications Act. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 857-58 (1997). As this Court has explained, the Act's "primary purpose was to reduce regulation and encourage 'the rapid deployment of new telecommunications technologies'" and to "promote competition in the local telephone service market, the multichannel video market, and the market for over-

the-air broadcasting." *Id.* The "major components of the statute have nothing to do with the Internet." *Id.* at 857-58.

The intent behind the CDA was specific and narrow—to prevent minors from accessing pornography and other obscene materials on the internet. *See* 141 Cong. Rec H8469-72 (Aug. 4, 1995). Section 230 sought to achieve this goal by empowering parents to determine the content of communications their children receive through interactive computer services. *See* 47 U.S.C. § 230(b)(3)-(4).

Section 230 was proposed specifically to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). *See* 141 Cong. Rec. H8469-72. In *Stratton Oakmont*, Prodigy held itself out as a family-oriented service provider that exercised editorial control over the content on its website by promulgating content guidelines and using screening software. 1995 WL 323710, at *3-5. By exercising editorial control over *some* content, the court concluded that Prodigy had become a "publisher" with respect to all content on its website, rather than a mere "distributor." *Id.* Therefore, Prodigy was subject to defamation liability when it failed to remove objectionable content on its website, even when it merely distributed content without knowledge of its defamatory nature. *Id.*; *see Malwarebytes*, 141 S. Ct. at 14 (the *Stratton Oakmont* court "determined that the company's decision to exercise editorial control over some content 'render[ed] it a publisher' even for content it merely distributed").

Congress concluded that *Stratton Oakmont* punished websites for attempting to exercise some control

over the content on their websites, effectively discouraging them from removing objectionable content to protect children. *See* 141 Cong. Rec. H8470 ("We want to encourage people like Prodigy … to do everything possible for us … to help us control … what comes in and what our children see."). Congress responded with Section 230 to protect interactive computer service providers from liability for restricting access to objectionable material, thereby encouraging websites to undertake such screening efforts. *See* 141 Cong. Rec. H8471-72 (Section 230 "removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems …."); H.R. Rep. No. 104-458, at 194 (1996) (Section 230 protects "from civil liability … an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material.").

The text of Section 230(c)—notably titled "Protection for 'Good Samaritan' blocking and screening of offensive material"—contains two separate substantive provisions. First, Section 230(c)(1) limits who may be treated as a "publisher" of content:

> 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). Section 230(c)(1) establishes that "an Internet provider does not become the publisher of a piece of third-party content—and thus subjected to strict liability—simply by hosting or distributing that content." *Malwarebytes*, 141 S. Ct. at 14.

Second, Section 230(c)(2)(A) provides an additional limitation on liability:

> No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

47 U.S.C. § 230(c)(2)(A). This provision "provides an additional degree of immunity when companies take down or restrict access to objectionable content, so long as the company acts in good faith." *Malwarebytes*, 141 S. Ct. at 15.

In sum, Section 230 "suggests that if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by §230(c)(1); and if it takes down certain third-party content in good faith, it is protected by §230(c)(2)(A)." *Id.* As discussed below, however, this plain-text reading of the statute "is a far cry from what has prevailed in court." *Id.*

2. The prevailing interpretation of Section 230 has strayed far from its origins and plain text. Courts have read "extra immunity" into the provision, "rel[ying] on policy and purpose arguments to grant sweeping protection to Internet platforms." *Id.* This atextual interpretation of Section 230 began with the Fourth Circuit's decision in *Zeran v. America Online, Inc.,* 129 F.3d 327 (4th Cir. 1997). The *Zeran* court declared that Section 230 created a "broad immunity," although the statue itself does not speak in terms of "immunity." *Id.* at 331. The court also held that the

statute served to protect websites from *both* distributor and publisher liability, despite the plain terms of the statute addressing only publisher liability. *Id.* at 330-34. The court invoked the "policy" behind the statute to expand its reach, reasoning that "to leave distributor liability in effect would defeat the two primary purposes of the statute"—immunizing service providers to avoid chilling effects on speech and encouraging self-regulation among computer service providers. *Id.* at 331, 334.

Relying on *Zeran*, other courts subsequently adopted its holding "as a categorical rule across all contexts." *Malwarebytes*, 141 S. Ct. at 15. Those decisions have granted internet platforms near-total immunity from suit in any case involving the publication of third-party information. Courts have found a wide variety of claims barred that "arise" in any way from the publication of third-party content. *See MySpace,* 528 F.3d at 418 (Section 230 has been "construed … broadly in all cases arising from the publication of user-generated content …."); *Backpage.com*, 817 F.3d at 19 ("[C]ourts have invoked the prophylaxis of section 230(c)(1) in connection with a wide variety of causes of action …."). This "broad construction accorded to section 230 as a whole has resulted in a capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party." *Backpage.com*, 817 F.3d at 16-17, 19, 24 (claims related to websites' active participation in human trafficking enterprise barred by Section 230).

The ever-expanding reading of Section 230 has led courts to grant immunity to defendants in startling circumstances that bear little resemblance to those that gave rise to Section 230. For example, in *Herrick*

v. Grindr, the plaintiff raised claims that the defendant's dating application had been defectively designed. 765 F. App'x 586, 588-89 (2d Cir.), *cert. denied*, 140 S. Ct. 221 (2019). Because the application lacked basic safety features, it allowed the plaintiff's ex-boyfriend to pose as the plaintiff and send other users of the application directly to the plaintiff's exact location using its geolocation feature. *Id.* at 588, 590-91. As a result, hundreds of men showed up at the plaintiff's home and workplace demanding sex over the course of multiple months. *Id.* Although the plaintiff's claims faulted the defendant for the defective design of its application—not for publishing third-party communications—the court nonetheless held that Section 230 barred those claims. *Id.* at 588-91.

Additionally, in multiple cases, courts have immunized defendants from claims arising out of their affirmative conduct in contributing to deadly terrorist attacks. In *Force v. Facebook, Inc.*, the plaintiffs alleged that Facebook's algorithms that suggest friends and content aided in terrorist attacks by connecting users with terrorist groups and recommending content by terrorists. *See* 934 F.3d 53, 58-59 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020). Specifically, plaintiffs—who were injured or killed in terrorist attacks—alleged that Facebook's algorithms directed terrorist content "to the personalized newsfeeds of the individuals who harmed the plaintiffs," enabling a terrorist organization to "disseminate its messages directly to its intended audiences" and "carry out the essential communication components of [its] terrorist attacks." *Id.* at 59. A majority of the Second Circuit panel, however, concluded that Face-

book's affirmative use of algorithms to suggest terrorist content and connections was protected by Section 230. *Id.* at 65-71.

A divided panel of the Ninth Circuit reached the same result in comparable circumstances in *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021). There, the plaintiffs were family members of five persons who were killed in terrorist acts orchestrated by ISIS. *Id.* at 879-85. The plaintiffs' claims were based in part on allegations that Google used algorithms in connection with its YouTube product to recommend ISIS videos and connect users to ISIS-related YouTube accounts. *Id.* at 881. Although the plaintiffs alleged that YouTube's algorithms had an active role in promoting ISIS's terrorist agenda and in assisting ISIS in recruiting new members, a majority of the Ninth Circuit panel nonetheless held in relevant part that Section 230 barred those claims. *See id.* at 890-97.[2]

In short, significant precedent interpreting Section 230 has immunized defendants from claims based on *their own* misconduct in the design and operation of their products, going far beyond claims that seek to hold the defendants liable as publishers or speakers of third-party information.

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[2] The court held that Section 230 did not bar the plaintiffs' claims premised on a separate theory that Google shared advertising revenue with ISIS. *Gonzalez*, 2 F.4th at 897-99.

B. As Several Judges And Scholars Have Recently Recognized, The Prevailing Interpretation Of Section 230 Is Not Supported By The Statute's Plain Text.

Although an extraordinarily broad understanding of Section 230 has prevailed in the lower courts, a number of jurists and scholars have begun to question that interpretation.

1. Justice Thomas recently highlighted the discrepancy between Section 230's text and the current state of the law applying the statute. In a statement respecting the denial of certiorari, Justice Thomas noted that "many courts have construed [Section 230] broadly to confer sweeping immunity on some of the largest companies in the world." *Malwarebytes*, 141 S. Ct. at 13. Justice Thomas observed that those courts have "emphasized nontextual arguments" concerning the "purpose and policy" of Section 230 in applying the provision, "leaving questionable precedent in their wake." *Id.* at 13-14. He encouraged the Court to take up the interpretation of Section 230 in an appropriate case to "consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms." *Id.*

Justice Thomas's statement emphasized multiple ways in which lower courts have strayed far from the statutory language. First, Justice Thomas noted that courts have "discarded the longstanding distinction between 'publisher' liability and 'distributor' liability." *Id.* at 15. "Although the text of §230(c)(1) grants immunity only from 'publisher' or 'speaker' liability, the first appellate court to consider the statute held that it eliminates distributor liability too." *Id.* (citing *Zeran*, 129 F.3d at 331-34). Justice Thomas identified

several reasons to question this interpretation. He noted that a different provision of the CDA, Section 502, makes distributors (as opposed to publishers) liable for knowingly displaying obscene material to children. *Id.* He criticized courts that have held that Congress "implicitly eliminated distributor liability" in Section 230, given that "Congress explicitly imposed it" in Section 502. *Id.* He also observed that Section 230 was enacted in the wake of *Stratton Oakmont*, which itself distinguished between the terms "publisher" and "distributor." *Id.* at 15-16. And he further explained that "had Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in §230(c)(1): No provider 'shall be held liable' for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content." *Id.* at 16.

Second, Justice Thomas observed that "courts have also departed from the most natural reading of the text by giving Internet companies immunity for their *own* content," even though Section 230(c)(1) provides protection only with respect to content provided by "*another* information content provider." *Id.* (emphasis added). For example, courts have erroneously held that Section 230(c)(1) protects a publisher's decisions to *alter* content, including by editing content and adding its own commentary. *Id.* (citations omitted). Justice Thomas concluded that "[t]o say that editing a statement and adding commentary in this context does not 'creat[e] or develo[p]' the final product, even in part, is dubious." *Id.*

Third, Justice Thomas explained that courts have erroneously interpreted Section 230 to shield companies for removing content other than for the specific

reasons permitted by Section 230. *See* 47 U.S.C. § 230(c)(2)(A) (permitting "good faith" removal of "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" content). He explained that Section 230(c) is most naturally read to protect companies when they (1) "unknowingly *decline* to exercise editorial functions" over third-party content," § 230(c)(1), or (2) "when they *decide* to exercise those editorial functions in good faith," § 230(c)(2)(A). *Malwarebytes*, 141 S. Ct. at 17. But because Section 230(c)(1) has been construed "to protect *any* decision to edit or remove content, courts have curtailed the limits Congress placed on decisions to remove content." *Id.* (citation omitted). Courts have left "no limits on an Internet company's discretion to take down material." *Id.*

Fourth, Justice Thomas observed that courts extended Section 230 to protect companies from an array of product defect claims. *Id.* He explained that "[a] common thread through all these cases is that the plaintiffs were not necessarily trying to hold the defendants liable 'as the publisher or speaker' of third-party content. §230(c)(1). Nor did their claims seek to hold defendants liable for removing content in good faith. §230(c)(2). Their claims rested instead on alleged product design flaws—that is, the defendant's own misconduct." *Id.* at 18. Nonetheless, "courts, filtering their decisions through the policy argument that 'Section 230(c)(1) should be construed broadly,' give defendants immunity." *Id.* (citation omitted).

Justice Thomas correctly predicted that "[e]xtending §230 immunity beyond the natural reading of the text can have serious consequences"—namely, giving companies broad immunity from civil claims based on various forms of egregious misconduct having nothing

to do with the concerns that led Congress to enact Section 230. *Id.*; *see infra* Section II.

2. Justice Thomas's discussion of the flaws in the lower courts' interpretation of Section 230 is exactly right—and he is not alone. His opinion reflects an emerging view among judges on the lower federal courts as well.

As noted above, a majority of the Second Circuit panel in *Force* held that Facebook was immune from claims that its friend and content suggestion algorithms aided terrorists by connecting users with terrorist groups and recommending terrorist content. *See supra* at 17-18. However, a powerful dissent from then Chief Judge Katzmann strongly disagreed with the majority's interpretation. *Force*, 934 F.3d at 76-89 (Katzmann, C.J., concurring in part and dissenting in part).

Chief Judge Katzmann explained that while Facebook's algorithms ultimately show users content written by other users, "it strains the English language to say that in targeting and recommending these writings to users—and thereby forging connections, developing new social networks—Facebook is acting as 'the *publisher* of … information provided by another information content provider.'" *Id.* at 76-77 (quoting 47 U.S.C. § 230(c)(1)). The dissent highlighted the absurdity of the majority's conclusion: "we today extend a provision that was designed to encourage computer service providers to shield minors from obscene material so that it now immunizes those same providers for allegedly connecting terrorists to one another." *Id.* at 77. Chief Judge Katzmann concluded that the plaintiffs' claims "would hold Facebook liable for its affirmative role in bringing terrorists together,"

far from any role as a "publisher." *Id.*; *see also id.* at 82-83 ("Facebook uses the algorithms to create and communicate its own message: that it thinks you, the reader … will like this content," and Facebook's suggestions "contribute to the creation of real-world social networks," conduct "far beyond the traditional editorial functions that the CDA immunizes.").

A majority of the Ninth Circuit panel in *Gonzalez* similarly held that Section 230 immunized Google from claims arising out of its algorithms' recommendation of terrorist content that assisted ISIS. *See supra* at 18. But the opinion drew both a concurrence and a dissent echoing the observations made by Chief Judge Katzmann in *Force*.

Judge Berzon concurred in the result, concluding that binding Ninth Circuit precedent compelled the outcome in the case. *Gonzalez*, 2 F.4th at 913 (Berzon, J., concurring). She explained, however, that if not bound by Ninth Circuit precedent, she "would hold that the term 'publisher' under section 230 reaches only traditional activities of publication and distribution—such as deciding whether to publish, withdraw, or alter content—and does not include activities that promote or recommend content or connect content users to each other." *Id.* at 913. Judge Berzon explained that "targeted recommendations and affirmative promotion of connections and interactions among otherwise independent users are well outside the scope of traditional publication." *Id.* at 914. She concluded that "[n]othing in the history of section 230 supports a reading of the statute so expansive as to reach these website-generated messages and functions" regarding what content users might like or who they might like to interact with. *Id.* at 914-15.

Judge Gould separately dissented in part, concluding that existing Ninth Circuit precedent did not control. *Id.* at 918-25 (Gould, J., concurring in part and dissenting in part). He 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." *Id.* at 920. Although he acknowledged that the use of "neutral tools" may be immunized by Section 230, he explained that "where the website (1) knowingly amplifies a message designed to recruit individuals for a criminal purpose, and (2) the dissemination of that message materially contributes to a centralized cause giving rise to a probability of grave harm, then the tools can no longer be considered 'neutral.'" *Id.* at 923. Judge Gould concluded that social media companies who use content-generating algorithms to effectively send messages to their users, such as delivering terrorist content to those users, should not be immunized under Section 230. *Id.* at 925.

Both the *Force* and *Gonzalez* cases have obvious and strong parallels to the circumstances present in this case—where Facebook's algorithms and features connected sex traffickers to their minor victims. *See* MR8-10, 20-21.

3. Much like the jurists in those cases, legal scholars have likewise recognized that the prevailing interpretation of Section 230 is irreconcilable with the statute's plain words. As written, Section 230(c)(1) protects an interactive computer service "from claims that it acted as a publisher or speaker of content created by a third party. That is to say, essential to the analysis of a claim against a service is whether the claim treats the provider as a publisher or speaker of

another's words." Leary, *supra*, at 563. Rather than enforce this "limited protection," however, the jurisprudence in this area has come unmoored from the statutory text, creating "de facto absolute immunity" from civil suit for defendants engaging in sex trafficking. *See id.* at 554-58, 563-65, 573-603.

This "broad construction of the CDA's immunity provision adopted by the courts has produced an immunity from liability that is far more sweeping than anything the law's words, context, and history support." Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 408 (2017). While Section 230 was intended to encourage internet platforms to remove obscene content online, the effect of the sweeping interpretation of Section 230 has been quite the opposite: "[b]lanket immunity gives platforms a license to solicit illegal activity, including sex trafficking, child sexual exploitation, and nonconsensual pornography. Site operators … have no incentive to respond to clear instances of criminality or tortious behavior." *Id.* at 414. The "overbroad interpretation" of Section 230 "has left victims of online abuse with no leverage against site operators whose business models facilitate abuse." *Id.* at 404. But this problem can be resolved: "the solution would be for courts to interpret § 230 in a manner more consistent with its text, context, and history." *Id.* at 415.

C. The Texas Supreme Court Erred By Deferring To Misguided Jurisprudence Interpreting Section 230 To Create Broad Immunity, Rather Than Construing The Statute As It Is Written.

1. Most courts have erroneously jettisoned any analysis of whether a given claim actually "treat[s]" the defendant as the "publisher or speaker" of third-party information, as the statutory text provides. 47 U.S.C. § 230(c)(1). Instead, courts have granted defendants blanket "immunity" so long as the defendant is in any way involved in the publication of third-party content. As the Texas Supreme Court observed, "most federal cases interpreting Section 230 hold that it confers '*immunity from suit* rather than a mere defense to liability.'" Pet.App.11a (quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009)). And the prevailing view among lower courts "is that all claims against internet companies 'stemming from their publication of information created by third parties' effectively treat the defendants as publishers and are barred." Pet.App.17a (quoting *MySpace*, 528 F.3d at 418)).

Yet the text of Section 230 nowhere states that defendants are "immune" from all claims that "stem" from the publication of third-party information. That language comes purely from policy-laden, atextual interpretations of Section 230 that have expanded the statute well beyond its plain text. The actual text of Section 230(c)(1) indicates that the provision, at most, preempts certain claims that require the defendants to be "treated as" a publisher or speaker of third-party information.

In essence, courts have granted defendants immunity from suit in any case that in any way "arises from" the publication of information, regardless of whether the plaintiff's claims actually fault the defendant for its role as a publisher of that information. Facebook advocated for that view in the Texas Supreme Court. And the Texas Supreme Court agreed. The court dismissed Petitioner's common law claims on the basis that they "derive[ ] from" or "arise[ ] from the company's transmission of the harmful content." Pet.App.24a, 26a.

The view that Section 230 "immunizes" a defendant from suit is atextual. The Seventh Circuit rightfully observed that "[s]ubsection (c)(1) does not mention 'immunity' or any synonym." *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008). Therefore, "subsection (c)(1) does not create an 'immunity' of any kind. It limits who may be called the publisher of information that appears online." *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (citations omitted).

Similarly, the notion that Section 230 provides protection in any case that "stems," "derives," or "arises" from third-party content is unsupported by the statutory language. The Ninth Circuit noted that "[l]ooking at the text, it appears clear that neither this subsection nor any other declares a general immunity from liability *deriving from* third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (emphasis added); *see also HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) (Ninth Circuit has "rejected use of a 'but-for' test that would provide immunity under the CDA solely because a cause of action would not otherwise

have accrued but for the third-party content" (citing *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016))).

There is no question that Facebook does publish third-party content generally and did publish third-party content in this case. But that is not the end of the analysis. *See Force*, 934 F.3d at 83 ("The fact that Facebook also publishes third-party content should not cause us to conflate its two separate roles with respect to users and their information."). Here, Petitioner's allegations rest not on Facebook's role as a "publisher," but on Facebook's use of algorithms and recommendations that connect traffickers to their victims and its sustained failure to act in response to a known sex trafficking problem on its platforms. *See infra* at 30-32. Petitioner seeks to hold Facebook liable for its conscious decisions to profit by creating connections between traffickers and their victims and refusing to take any action to prevent its platform from serving as a breeding ground for trafficking. MR1, 3, 18, 24-25, 32-36. Simply put, Petitioner's claims do not "fault the defendant's activity as the publisher of specific third-party content." *Force*, 934 F.3d at 82. Therefore, they are not barred by the plain text of Section 230. Whether those claims in some way "derive" or "arise" from third-party content is irrelevant.

2. Granting sweeping immunity to any publisher also renders Section 230(c)(2)'s narrower limitation on liability meaningless. The Texas Supreme Court joined other courts in adopting an interpretation of Section 230(c)(1) that does not even attempt to preserve the specific limitations in Section 230(c)(2).

Section 230(c)(2) provides that an interactive computer service will not be held liable "on account of any

action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2).

The sweeping interpretation of Section 230(c)(1) advanced by the Texas Supreme Court effectively reads Section 230(c)(2) out of the statute. If Section 230(c)(1) immunizes an interactive computer service from liability anytime third-party content is involved or anytime the claim "stems," "derives," or "arises" from third-party content, then an interactive computer service is inevitably immune from any action taken with respect to third-party content. There would be no need to ever determine whether, under Section 230(c)(2), the interactive computer service had a "good faith" basis for taking down the third-party content or whether that content was "obscene" or "lewd" or "otherwise objectionable."

As Justice Thomas observed, "decisions that broadly interpret §230(c)(1) to protect traditional publisher functions also eviscerated the narrower liability shield" in Section 230(c)(2). *Malwarebytes*, 141 S. Ct. at 16. Because many courts have wrongly construed Section 230(c)(1) "to protect *any* decision to edit or remove content, courts have curtailed the limits Congress placed on decisions to remove content." *Id.* at 17 (citation omitted). The broad interpretation of Section 230(c)(1) has therefore left "no limits on an Internet company's discretion to take down material." *Id.* (Section 230(c)(1) has been held to protect the defendant from all liability in removing content, even when defendant did so on the basis of racial animus). It is axiomatic that a statutory provision should not be

read so broadly as to swallow and render meaningless another provision of the same statute. Yet the sweeping interpretation of Section 230(c)(1) that has prevailed in many courts, to whom the Texas Supreme Court deferred, has produced exactly that result with respect to Section 230(c)(2).

3. Properly construed, Section 230 does not immunize internet platforms from suit where, as here, claims arise from the platform's own participation in illegal or wrongful conduct. Courts have immunized defendants from liability for claims that involve their "own misconduct" and have nothing to do with acting as a mere passive "publisher." *See Id.* at 18. This problem is particularly pronounced in cases, like this one, where the defendants are faulted for affirmatively employing algorithms that cause harm to the plaintiff. These types of claims do not fault the defendants for passively "publishing" third-party material. Instead, they fault the defendants for conduct that in no way resembles traditional "publisher" functions.

Where a defendant deploys its own algorithms to promote connections that cause injury, that misconduct should not be protected by Section 230(c)(1). Petitioner's claims here seek to "hold Facebook liable for its *affirmative role*" in connecting sex traffickers with victims. *Force*, 934 F.3d at 77 (emphasis added). In suggesting such connections, Facebook communicated numerous messages to the victims—(1) that the traffickers were people that the victims would like to know and should know, and (2) that the traffickers were safe because they were part of the victims' circle through "shared" friends. These messages put Petitioner in *more* danger, amplifying the threat that traffickers pose to underage children on social media who

are especially susceptible to pressure and influence. *See Gonzalez*, 2 F.4th at 924 (Gould, J., concurring in part and dissenting in part) (Section 230 should not bar actions based on the defendant's use of algorithms to send messages that contribute to and amplify illegal conduct).

In these circumstances, Facebook is not acting merely as a passive conduit for third-party communications. Rather, it is communicating "its own message": that the reader will like the content it is recommending. *Force*, 934 F.3d. at 82; *Gonzalez*, 2 F.4th at 914-15 (Berzon, J., concurring) ("[A] plaintiff asserting a claim based on the way that website algorithms recommend content or connections to users is not seeking to treat the interactive computer service as a 'publisher' within any usual meaning of that term. Instead, the website is engaging in its own communications with users, composing and sending messages to users concerning what they might like to view or who they might like to interact with."); *id.* at 924 (Gould, J., concurring in part and dissenting in part) (algorithm conveyed message that "YouTube users may be interested in contributing to ISIS in a more tangible way"); *see also id.* at 921 (complaint was based on Google "repeatedly putting [terrorist content] in the eyes and ears of persons who were susceptible to acting upon it").

The recommendations and messages sent by Facebook's algorithms ultimately "contribute to the creation of real-world social networks"—in this case, networks between traffickers and their victims. *Force*, 934 F.3d at 82. Facebook knowingly created these new social networks between traffickers and their victims to maximize its profits, increasing engagement between its users and its advertising revenue. MR1,

3, 8-10, 18, 20-21, 24-25, 34-35. This affirmative conduct is far afield from any sort of traditional "publisher" function and is not protected by Section 230. *See Gonzalez*, 2 F.4th at 914 (Berzon, J., concurring) ("[T]argeted recommendations and affirmative promotion of connections and interactions among otherwise independent users are well outside the scope of traditional publication.").

4. Likewise, Petitioner's common law failure to warn theory should have survived dismissal under a proper Section 230 analysis. A claim that Facebook failed to warn its users about a known and well-documented problem of sex trafficking on its platform in order to maximize its profits does not fault Facebook for acting as a publisher generally or for publishing a particular third-party's communications. *See* MR1, 3-5, 19-26, 32-36 (Facebook knew about and acknowledged the problem of human trafficking on its platform, but failed to take appropriate action in response because doing so would decrease its profits). Facebook could have provided appropriate warnings, thereby satisfying its duty to warn, without in any way modifying or reviewing posted content. Imposing a duty to warn users about the known danger of sex trafficking on its platforms is not a duty to monitor or edit any of the content that its users post. *See, e.g.*, *HomeAway.com*, 918 F.3d at 682 (determining whether Section 230 applies entails looking at what "the duty *would necessarily require*" and it is not enough that "a legal duty *might* lead a company to respond with monitoring or other publication activities" (emphasis added)). Therefore, Petitioner's failure to warn theory would not have required Facebook to be treated as a "publisher" of third-party content, and it was not barred by Section 230.

* * *

The view that Section 230 confers broad immunity, divorced from its actual text, must be corrected. This interpretation immunizes defendants from complaints about their own misconduct that have nothing to do with the defendant's status as a "publisher" of third-party information. This Court should grant review to enforce the plain text of Section 230 and confirm that internet companies are not privileged to profit from causing affirmative harm to their customers while enjoying near-total immunity from civil liability.

II. The Proper Interpretation Of Section 230 Presents A Critical Question of Federal Law Whose Importance Has Increased Exponentially In The Decades Since Its Enactment.

Section 230's scope is an increasingly litigated legal issue that has now been addressed by many courts—including every U.S. court of appeals—since its enactment in 1996. While the prevailing interpretation of Section 230 is broad, a "growing chorus of voices" is now "calling for a more limited reading of the scope of section 230 immunity." *Gonzalez*, 2 F.4th at 913 (Berzon, J., concurring). More judges and scholars are calling on courts to reject atextual readings of Section 230 and to return to its plain terms. Moreover, some of the assumptions driving early policy-based judicial interpretations of Section 230—when "the Internet" involved little more than online bulletin boards—have long since become outdated as technology has changed drastically in the past-twenty five years. *See* Leary, *supra*, at 558 ("The Internet of 1996 is unrecognizable today."). The proper interpre-

tation of Section 230 has recently divided jurists, particularly with respect to how Section 230 applies to internet companies' use of algorithms to push specific messages to their users. *See supra* at 17-18, 22-24. The resolution of this critical and recurring issue warrants this Court's review.

Proper interpretation of Section 230 is particularly important because, under the current state of the law, most claims alleging serious wrongdoing by internet platforms are dismissed at the outset before plaintiffs have an opportunity to develop any evidence to reveal the true nature and extent of the companies' misconduct. Yet courts "do the legal system a disservice by dismissing a case before considering the evidence that can arise in a properly monitored discovery period." *Gonzalez*, 2 F.4th at 918 (Gould, J., concurring in part and dissenting in part).

This problem came into focus during the Senate investigation into Backpage.com—an internet platform that was routinely used for sex trafficking before it was seized and shut down by the Department of Justice. As one senator explained, the application of Section 230 prevented both government officials and civil plaintiffs from obtaining any documents to show what Backpage was actually doing: "All of the attorneys general around the country and various law enforcement agencies and individuals who were trying to sue [B]ackpage were met every time with a 230 defense. They were not even able to penetrate to get the documents from [B]ackpage in order to learn about what [B]ackpage was really up to." 164 Cong. Rec. S1830 (Mar. 20, 2018).

It is one thing to say that Section 230 provides internet companies with a defense from liability in some

circumstances; it is quite another to say that Section 230 provides internet companies with near complete immunity from the litigation process and hides their activities behind an impenetrable shroud of secrecy. As Justice Thomas observed, "[p]aring back the sweeping immunity courts have read into §230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place." *Malwarebytes*, 141 S. Ct. at 18.

The atextual interpretation of Section 230 that has taken hold has effectively allowed internet companies to exist outside the law and to knowingly profit from illegal activities on their platforms. These companies have been immunized from—and excused from even having the burden to respond to—well-documented allegations that they have assisted terrorist groups, knowingly hosted illegal child pornography, engaged in race discrimination, and intentionally structured their website to facilitate human trafficking. *See Malwarebytes*, 141 S. Ct. at 17-18; *see also* Citron & Wittes, *supra*, at 408, 413-14 ("Platforms have been protected from liability even though they republished content knowing it might violate the law, encouraged users to post illegal content, changed their design and policies for the purpose of enabling illegal activity, or sold dangerous products."). It should go without saying that, in enacting a law to protect children from online pornography, Congress never intended to sanction such horrific and illegal misconduct.

In light of the significant role that internet companies play in the modern economy (especially as compared to the role they played in 1996), the question of whether these entities are immune from most forms

of civil liability is of critical importance. As Justice Thomas emphasized, Section 230 has been used to "confer sweeping immunity on some of the largest companies in the world." *Malwarebytes*, 141 S. Ct. at 13. The operation of these companies affects the lives of millions of people every day, yet there is currently little if any legal recourse when the companies cause them injury. The correct interpretation of Section 230 is an important issue that this Court should address and resolve. *See id.* at 13-14, 18.

CONCLUSION

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

Respectfully submitted,

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September 23, 2021

APPENDIX

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APPENDIX A
IN THE SUPREME COURT OF TEXAS

No. 20-0434

IN RE FACEBOOK, INC. AND FACEBOOK, INC. D/B/A INSTAGRAM, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued February 24, 2021

JUSTICE BLACKLOCK delivered the opinion of the Court.

JUSTICE BUSBY AND JUSTICE HUDDLE did not participate in the decision.

Facebook seeks writs of mandamus directing the dismissal of three lawsuits pending against it in district court. The plaintiffs in all three cases allege they were victims of sex trafficking who became entangled with their abusers through Facebook. They assert claims for negligence, negligent undertaking, gross negligence, and products liability based on Facebook's alleged failure to warn of, or take adequate measures to prevent, sex trafficking on its internet platforms. They also assert claims under a Texas statute creating a civil cause of action against those who intentionally or knowingly benefit from participation in a sex-

trafficking venture. *See* TEX. CIV. PRAC. & REM. CODE § 98.002.

In all three lawsuits, Facebook moved to dismiss all claims against it as barred by section 230 of the federal "Communications Decency Act" ("CDA"), 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). Facebook contends that all the plaintiffs' claims are "inconsistent with" section 230(c)(1), which says that "[n]o 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."

For the reasons explained below, we deny mandamus relief in part and grant it in part. The plaintiffs' statutory human-trafficking claims may proceed, but their common-law claims for negligence, gross negligence, negligent undertaking, and products liability must be dismissed.

We do not understand section 230 to "create a lawless no-man's-land on the Internet" in which states are powerless to impose liability on websites that knowingly or intentionally participate in the evil of online human trafficking. *Fair Hous. Council v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc). Holding internet platforms accountable for the words or actions of their users is one thing, and the federal precedent uniformly dictates that section 230 does not allow it. Holding internet platforms accountable for their own misdeeds is quite another

thing. This is particularly the case for human trafficking. Congress recently amended section 230 to indicate that civil liability may be imposed on websites that violate state and federal human-trafficking laws. *See* Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA"), Pub. L. No. 115-164, 132 Stat. 1253 (2018). Section 230, as amended, does not withdraw from the states the authority to protect their citizens from internet companies whose own actions—as opposed to those of their users—amount to knowing or intentional participation in human trafficking.

Whether the plaintiffs can prove such a claim against Facebook is not at issue in this mandamus proceeding. At this early stage of these cases, we take the plaintiffs' allegations as true and construe them liberally against dismissal. We hold only that the statutory claim for knowingly or intentionally benefiting from participation in a human-trafficking venture is not barred by section 230 and may proceed to further litigation.

As for the plaintiffs' other claims, section 230 is no model of clarity, and there is ample room for disagreement about its scope. *See generally Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (statement of Thomas, J., respecting denial of certiorari). Despite the statutory text's indeterminacy, the uniform view of federal courts interpreting this federal statute requires dismissal of claims alleging that interactive websites like Facebook should do more to protect their users from the malicious or objectionable activity of other users. The plaintiffs' claims for negligence, negligent undertaking, gross

negligence, and products liability all fit this mold. The United States Supreme Court—or better yet, Congress—may soon resolve the burgeoning debate about whether the federal courts have thus far correctly interpreted section 230 to bar such claims. Nevertheless, the prevailing judicial interpretation of section 230 has become deeply imbedded in the expectations of those who operate and use interactive internet services like Facebook. We are not interpreting section 230 on a clean slate, and we will not put the Texas court system at odds with the overwhelming federal precedent supporting dismissal of the plaintiffs' common-law claims.

Facebook's petition for mandamus relief is denied in part and conditionally granted in part. The human-trafficking claims under section 98.002 of the Civil Practice and Remedies Code may proceed in accordance with this opinion, but the common-law claims must be dismissed.

I. Background

This proceeding involves three separate lawsuits against Facebook based on similar allegations, which must be "taken as true" for purposes of deciding Facebook's motions to dismiss. TEX. R. CIV. P. 91a. The facts alleged in each plaintiff's live petition are summarized below.

Cause No. 2018-69816 (334th Dist. Ct.). Plaintiff was fifteen years old in 2012 when she was "friended" by another Facebook user with whom she shared several mutual friends. The user's profile featured photographs of "scantily-clad young women in sexual positions" with money stuffed in their mouths,

as well as "other deeply troubling content." The user, who was "well over" the age of eighteen, contacted Plaintiff using Facebook's messaging system, which the two began using to communicate regularly. He told Plaintiff she was "pretty enough to be a model" and promised to help her pursue a modeling career. After Plaintiff confided in him about an argument with her mother, he again offered her a modeling job and proposed they meet in person. Shortly after meeting him, Plaintiff was photographed and her pictures posted to the website Backpage (which has since been shut down due to its role in human trafficking), advertising her for prostitution. As a result, Plaintiff was "raped, beaten, and forced into further sex trafficking."

Cause No. 2018-82214 (334th Dist. Ct.). Plaintiff was fourteen years old in 2017 and was a user of both Facebook and Instagram, which Facebook owns. She was contacted via Instagram by a male user who was "well over" eighteen years of age. Using "false promises of love and a better future," he lured Plaintiff "into a life of trafficking through traffickers who had access to her and sold her through social media." Her traffickers used Instagram to advertise Plaintiff as a prostitute and to arrange "'dates' (that is, the rape of [Plaintiff] in exchange for money)." As a result, Plaintiff was raped numerous times. Following Plaintiff's rescue from the trafficking scheme, traffickers continued to use her profile to attempt to entrap other minors in the same manner. Plaintiff's mother reported these activities to Facebook, which never responded.

Cause No. 2019-16262 (151st Dist. Ct.). Plaintiff was fourteen years old in 2016 and used an Instagram account, on which she identified herself as fourteen years old. She was not required to verify her age or to link her account to that of a parent or guardian. Another Instagram user, a man of about thirty with whom Plaintiff was not acquainted, "friended" her on Instagram. Between 2016 and 2018, the man and Plaintiff regularly exchanged messages. The correspondence was part of his alleged efforts to "groom" Plaintiff to ensnare her in a sex-trafficking operation. In March 2018, he convinced Plaintiff to sneak away from her home and meet him. Upon meeting her, he took her to a motel, photographed her, and posted the pictures to Backpage. Plaintiff was then raped repeatedly by men who responded to her traffickers' posting on the site.

Litigation Against Facebook. The plaintiffs in all three lawsuits ("Plaintiffs") brought essentially identical claims against Facebook. First, Plaintiffs allege Facebook owed them a duty to exercise reasonable care to protect them from the "dangers of grooming and recruitment on [its platforms] by sex traffickers." Plaintiffs argue that Facebook breached this duty by, among other omissions, its "[f]ailure[s] to warn" of those risks, "implement awareness campaigns" about "sex traffickers using its website," "verify the identity and/or age of users," "implement any safeguards to prevent adults from contacting minors," "report suspicious messages between a minor and an adult user," "require accounts for minors to be linked to those of adults," or "deprive known criminals from having accounts." "Facebook's duty could have been satisfied," Plaintiffs contend, "through warnings posted on users'

feeds, e-mails to accounts run by users under the age of 18, and/or through informing authorities of what it knew about red-flag activities and messages between users." Plaintiffs also brought gross-negligence and negligent-undertaking claims based largely on the same allegations. Finally, Plaintiffs brought products-liability claims under the theory that "[a]s a manufacturer, Facebook is responsible for the defective and unreasonabl[e] characteristics in its ... product[s]." Plaintiffs contend that these products, specifically Facebook and Instagram, were "marketed to children under the age of 18, without providing adequate warnings and/or instructions regarding the dangers of 'grooming' and human trafficking on [either platform]. These dangerous warning and marketing defects were both the direct and producing cause of [Plaintiffs'] trafficking."[1]

In addition to the foregoing common-law claims, Plaintiffs also sued under a Texas statute that creates a civil cause of action against anyone "who intentionally or knowingly benefits from participating in a ven-

[1] In Cause No. 2019-16262, the district court granted Facebook's motion to dismiss the products-liability claim on the ground that Facebook is not a "product" (an issue not raised here). In the other two suits, Facebook's briefing in support of its motions to dismiss argued for dismissal of the products-liability claims on section 230 grounds. We agree with Facebook that Plaintiffs' products-liability claims in Cause Nos. 2018-82214 and 2018-69816 are properly before this Court.

ture that traffics another person." TEX. CIV. PRAC. & REM. CODE § 98.002(a). Plaintiffs claim "Facebook breached this duty by knowingly facilitating ... sex trafficking." Facebook allegedly did so by "creating a breeding ground for sex traffickers to stalk and entrap survivors," "[r]aising advertising fees by extending its 'user base' to include sex traffickers," "[i]ncreasing profits by not using advertising space for public service announcements regarding the dangers of ... sex traffickers," and "[i]ncreasing profit margins due to lower operation cost by not implementing safeguards requiring verification of [users'] identit[ies]."

In all three lawsuits, Facebook moved under Rule 91a to dismiss all claims as barred by section 230. The motions were denied in relevant part by the district courts. Facebook sought mandamus relief in the court of appeals. A divided panel denied relief without substantive explanation. 607 S.W.3d 839 (Tex. App.—Houston [14th Dist.] 2020). One justice would have granted relief based on section 230. *Id.* at 839–40 (Christopher, J., dissenting). Facebook petitioned this Court for writs of mandamus.[2]

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[2] On January 14, 2021, this Court was informed that the district judge who denied Facebook's Rule-91a motions in Cause Nos. 2018-69816 and 2018-82214 no longer holds office. Since this "case is an original proceeding under Rule 52," we "must abate the proceeding to allow the successor [judge] to reconsider the original [judge's] decision." TEX. R. APP. P. 7.2(b). Accordingly, on January 22nd, we abated this mandamus proceeding in part "until further order of th[is] Court," instructing the parties to report back within 60 days. The partial abatement did not affect Cause No. 2019-16262, and oral argument proceeded as scheduled on February 24th. On March 23rd, the parties submitted a status report explaining that the plaintiffs in both affected cases filed motions on February 11th "asking [the successor

II. Analysis

A. Standard of Review

"Mandamus relief is appropriate" to correct "a clear abuse of discretion" for which a relator "has no adequate remedy by appeal." *In re Geomet Recycling LLC*, 578 S.W.3d 82, 91 (Tex. 2019). In this proceeding, the principal point of contention is whether the district courts abused their discretion by denying Facebook's motions to dismiss based on section 230. The

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judge] to adopt [her predecessor's] order[s]," and that "Facebook filed ... responses in opposition" on March 8th. As far as this Court is aware, both motions remain pending.

Although the judge now presiding over Cause Nos. 2018-69816 and 2018-82214 has not made a ruling of which we are aware, Rule 7.2(b) does not require indefinite abatement. It requires only that we "abate the proceeding to allow [the new judge] to reconsider the original [judge's] decision." That requirement has been met here. Over four months have passed since the plaintiffs asked the new judge to adopt the original judge's decision, and over three months have passed since Facebook responded. The intervening time has been sufficient to "allow the successor to reconsider the original [judge]'s decision." "[M]andamus is a discretionary writ," the availability of which depends in part on our equitable judgment as to whether mandamus relief is an "efficient manner of resolving the dispute." *In re Blevins*, 480 S.W.3d 542, 544 (Tex. 2013). Our decision today resolves Facebook's mandamus petition with respect to Cause No. 2019-16262, and under these circumstances Rule 7.2(b) does not require us to refrain from doing the same in the heretofore abated portions of this proceeding. This Court's January 22nd abatement order regarding Cause Nos. 2018-69816 and 2018-82214 is lifted, and Facebook's entire mandamus petition regarding all three trial-court cases is disposed of as described in this opinion.

answer depends on the meaning of section 230, a federal statute immunizing "interactive computer service[s]" from certain liability stemming from content created "by [ ]other information content provider[s]." 47 U.S.C. § 230(c), (e)(3).[3] 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. *In re Geomet*, 578 S.W.3d at 91–92.

Although mandamus relief is often unavailable to correct the erroneous denial of a motion to dismiss, it may nevertheless be warranted if a litigant would suffer "impairment or loss" of "important substantive ... rights" while awaiting the error's correction on appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004). Among the rights that can only be vindicated by dismissal are those conferred by "federal statutes [that] provid[e] covered defendants with immunity from suit." *In re Academy, Ltd.*, ___ S.W.3d ___, ___ (Tex. 2021). As we held today in *Academy*, for example, the federal "Protection of Lawful Commerce in Arms Act" ("PLCAA") created such an entitlement to dismissal because the Act provided that certain actions "may not be brought" against covered

[3] The parties agree that Facebook is an "interactive computer service." The CDA defines "information content provider" as anyone "responsible, in whole or in part, for the creation or development of information provided through" an "interactive computer service." § 230(f)(3). No party disputes that the messages sent to Plaintiffs through Facebook or Instagram by sex traffickers qualify as "information provided by another information content provider."

defendants. *Id.* at ___. In that case, mandamus relief was warranted to correct erroneous denial of a motion to dismiss based on the PLCAA because requiring a defendant to "proceed[ ] to trial" and await the error's correction on appeal "'would defeat the substantive right' granted by the [statute]" to be free from burdensome litigation. *Id.* at ___, (quoting *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008)).

The same is true here. Just as the PLCAA provides that certain actions "may not be brought," section 230 contains a materially identical instruction that "[n]o cause of action may be brought...." The two provisions are indistinguishable with respect to whether they create a substantive right to be free of litigation, not just a right to be free of liability at the end of litigation. Moreover, most federal cases interpreting section 230 hold that it confers "*immunity from suit* rather than a mere defense to liability," which is "effectively lost if a case is erroneously permitted to go to trial." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (quoting *Brown v. Gilmore*, 278 F.3d 362, 366 n.2 (4th Cir. 2002)). For this reason, federal courts urge "resol[ution of] the question of § 230 immunity at the earliest possible stage" of litigation so as to vindicate the provision's protections against "costly and protracted legal battles." *Id.* at 255 (quoting *Roommates.Com*, 521 F.3d at 1175). As in *Academy*, if the denials of Facebook's motions to dismiss were erroneous, the company lacks an adequate appellate remedy because its federal statutory right to avoid litigation of this nature would be impaired if it had to await relief on appeal. *In re Prudential*, 148 S.W.3d at 136.

Facebook moved for dismissal based solely on section 230, not on the ground that Plaintiffs' allegations do not state a cognizable claim under section 98.002 or under any of their other legal theories. As a result, we do not consider whether Plaintiffs' allegations are sufficient to support the claims asserted. We consider only whether Plaintiffs' claims, as pleaded, "treat[ ]" Facebook "as the publisher or speaker" of third-party content in conflict with section 230. If they do, the claims "may [not] be brought" and must be dismissed. 47 U.S.C. § 230(c)(1), (e)(3).

B. Governing Principles

When interpreting a federal statute, this Court generally follows the decisions of the U.S. Supreme Court. *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 189 (Tex. 2009). The Supreme Court has not addressed the scope of section 230. It has, however, often stated principles of statutory interpretation with which we agree. The first is that "when the statutory language is plain," courts "must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). "[U]nless otherwise defined, words will be interpreted as taking their ordinary ... meaning.... at the time Congress enacted the statute." *Perrin v. United States*, 444 U.S. 37, 42 (1979). It is a "cardinal rule," as well, "that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). We therefore "consider not only the bare meaning of [each] word" but also the relevant "statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995). In addition, the objective meaning conveyed by text may depend on the "backdrop

against which Congress enacted [it]." *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 487 (2005). Understanding this backdrop is crucial in construing "term[s] of art" with "established meaning[s]" in the law. *Id.* We presume, absent a contrary indication, that "Congress intends to incorporate the well-settled meaning of [such] common-law terms." *Neder v. United States*, 527 U.S. 1, 23 (1999). Still, "the authoritative statement is the statutory text." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).[4]

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[4] Both parties and *amici* ask us to rely on legislative history when interpreting federal statutes, an invitation we decline. The use of legislative history to ascertain congressional "intent" has been quite controversial, and the Supreme Court observed recently that the practice "is vulnerable to ... serious criticisms." *Allapattah*, 545 U.S. at 568. "First, legislative history is itself often murky, ambiguous, and contradictory." *Id.* It "serves as an ever-present judicial mercenary, embraced when helpful and ignored when not," and courts' consultation of it often devolves into "'looking over a crowd and picking out your friends.'" *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 457 n.5 (Tex. 2012) (Willett, J., concurring). "Second, judicial reliance" on legislative history permits "strategic manipulation[ ]" of the lawmaking process by unrepresentative factions of legislators or legislative staff in order "to secure results they were unable to achieve through the statutory text." *Allapattah*, 545 U.S. at 568. More fundamentally, judicial reliance on legislative history risks attaching authoritative weight to statements not subject to "the constitutionally prescribed process of bicameralism and presentment." John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 676 (1997). We therefore agree with the U.S. Supreme Court's venerable observation that, "[i]n expounding [a] law," a "court cannot, in any degree, be influenced by ... debate which took place on its passage.... The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself." *Aldridge v. Williams*, 44 U.S. 9, 24 (1845).

In addition to construing the CDA, we must also "inquir[e] whether the laws" of Texas "have, in their application to this case, come into collision with [this] act of Congress, and deprived [Facebook] of a right to which that act entitles [it]. Should this collision exist," state law "must yield to the law of Congress." *Gibbons v. Ogden*, 22 U.S. 1, 210 (1824) (construing U.S. CONST. art. VI, cl. 2). Because "[p]re-emption ... shield[s] the system from conflicting regulation of conduct," it is "the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 292 (1971). Thus, the determination of whether state tort suits are preempted by federal law depends not merely on how the claims are labelled, but also on careful consideration of the substance of the claims. Simply because a "cause[ ] of action," under some circumstances, "might escape ... preemption" does not mean that the "particular ... claims" of a given plaintiff necessarily do. *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819, 820 (Tex. 1995). We therefore look beyond a cause of action's name to the underlying conduct or duty on which it is based. *Id.* at 821.[5]

[5] The parties dispute whether the presumption against preemption should guide our analysis of whether the CDA bars Plaintiffs' claims. Facebook points to recent Supreme Court cases holding that if a "statute 'contains an express pre-emption clause'" (as the CDA does), courts "do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of

C. The Federal Statute

Section 230 was enacted in 1996 as part of the "Communications Decency Act" ("CDA"). *See* Pub. L. No. 104-104, § 509, 110 Stat. 56. Having determined that the "Internet ... ha[d] flourished, to the benefit of all Americans, with a minimum of government regulation," Congress passed section 230 with the stated purposes of "preserv[ing] [a] vibrant and competitive free market ... for the Internet ..., unfettered by Federal or State regulation"; "remov[ing] disincentives" for "utiliz[ing] ... blocking and filtering technologies"; and "ensur[ing] vigorous enforcement of Federal criminal laws" against "obscenity, stalking, and harassment by means of computer." 47 U.S.C. § 230(a)(4), (b). It is widely acknowledged that section 230's liability protections were primarily a response to *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). In that case, a New York court held that an online bulletin board could be held strictly liable for third parties' defamatory posts. Rejecting the defendant's argument that it was a mere "distributor" of third-party content,

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Congress' pre-emptive intent.'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011)). Plaintiffs, on the other hand, rely on other cases explaining that the presumption applies even to statutes with an express preemption clause if "the text of the pre-emption clause is susceptible of more than one plausible reading," at least "when Congress has legislated in a field traditionally occupied by the States." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). We will not undertake to resolve this doctrinal dispute, as the outcome of this case would be the same whether the presumption applies or not.

the court reasoned that the defendant's occasional screening and editing of posts made it a primary publisher and therefore responsible for defamation by users on its platform. *See id.* at *4.

Section 230 "und[id] the perverse incentives created by this reasoning, which effectively penalized providers for monitoring content." *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1016 (N.Y. 2011). It did so by mandating that "[n]o provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" and that "[n]o cause of action may be brought and no liability may be imposed ... that is inconsistent with" this prohibition. 47 U.S.C. § 230(c)(1), (e)(3). In addition to shielding interactive computer services from liability that "treat[s]" them as "publisher[s]" or "speaker[s]" of third-party content, section 230 also shields them from liability for good-faith efforts to "restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable...." *Id.* § 230(c)(2)(A). Section 230's dual protections 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. *See Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003); *Roommates.Com*, 521 F.3d at 1163.

The meaning of section 230's prohibition on treating an interactive computer service as the "publisher" or "speaker" of third-party content is not entirely clear on the face of the statute. Neither "publisher" nor

"speaker" are defined terms, nor can those words' common meanings tell us precisely what it means for a cause of action to "treat[ ]" a defendant "as a publisher or speaker" of third-party content. Abundant judicial precedent, however, provides ample guidance, nearly all of it pointing in the same general direction. Federal and state courts have uniformly held that section 230 "should be construed broadly in favor of immunity." *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019). The overwhelming weight of precedent "has resulted in a capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party." *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016). The "national consensus," *Shiamili*, 952 N.E.2d at 1017, is that "all claims" against internet companies "stemming from their publication of information created by third parties" effectively treat the defendants as publishers and are barred, *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). As it has been interpreted, the provision "establishe[s] a general rule that" web service providers may not be held "legally responsible for information created ... by third parties" if such providers "merely enable[d] that content to be posted online." *Nemet Chevrolet*, 591 F.3d at 254. 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. *MySpace*, 528 F.3d at 420.

Plaintiffs contend that the courts have systematically misread section 230. They urge us to adopt the

view recently proffered by Justice Thomas, under which "the sweeping immunity courts have read into" section 230 should be scaled back or at least reconsidered. *Malwarebytes*, 141 S. Ct. at 18 (statement respecting denial of certiorari). Justice Thomas suggests that courts have erred by confusing "publisher" with "distributor" liability: "Traditionally, laws governing illegal content distinguished between publishers or speakers (like newspapers) and distributors (like newsstands and libraries). Publishers.... could be strictly liable for transmitting illegal content. But distributors" were "liable only when they knew (or constructively knew) that content was illegal." *Id.* at 14. Under this view, although section 230 "grants immunity only from 'publisher' or 'speaker' liability," cases interpreting the provision have incorrectly held "that it eliminates distributor liability too" by "confer[ring] immunity even when a company distributes content that it knows is illegal." *Id.* at 15.[6]

We agree that Justice Thomas's recent writing lays out a plausible reading of section 230's text. The fact remains, however, that this more restrictive view of section 230 was articulated in a statement respecting the denial of certiorari, not in the decision of a case, and every existing judicial decision interpreting section 230 takes the contrary position. If the more limited view of section 230 were compelled by a plain reading of the statutory text, we would be compelled,

[6] *Amici* the State of Texas and the Governor of Texas ask us to take the narrower view of section 230(c)(1) suggested by Justice Thomas. To the extent their interest in this case stems from their disagreement with recent actions by social media com-

despite the contrary precedent, to follow what the statute says. After all, it is our "right and duty ... to interpret and to follow ... all [federal] laws" according to our best understanding of their meaning, subject only "to a litigant's right of review in [the U.S. Supreme] Court." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (opinion of Kennedy, J.); *accord Allen v. McCurry*, 449 U.S. 90, 105, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). But if the more limited view is only one reasonable reading of the text—and if the broader view is also reasonable—we are hard pressed to cast aside altogether the universal approach of every court to examine the matter over the twenty-five years of section 230's existence.

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panies like Facebook to block political speech the company deems dangerous or misleading, *see* Brief of the Governor of Texas as Amicus Curiae at 1, their complaints seem better directed at section 230(c)(2)(A), which protects internet companies from liability for censoring content the company deems "objectionable." That provision is not at issue here. This case involves the protections of section 230(c)(1), which has been interpreted to insulate websites from liability for *declining* to censor dangerous, objectionable, or otherwise injurious content generated by third-party users. For those who believe Facebook and other such platforms should refuse to censor their users' speech, it would seem that dialing back the protections of section 230(c)(1)—and thereby *expanding* the civil liability these companies face for *failing* to censor allegedly objectionable posts—would be counterproductive. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (Wilkinson, C.J.) (If "[web] service providers [were] subject to liability only for the publication of information" but "not for its removal, they would have a natural incentive simply to remove messages," resulting in "a chilling effect on the freedom of Internet speech.").

Justice Thomas's view focuses on traditional distinctions in defamation law between "publishers" and "distributors." *Malwarebytes*, 141 S. Ct. at 15. But as the Fourth Circuit in *Zeran* observed, in some ways "distributor liability ... is merely a subset ... of publisher liability" within defamation law. 129 F.3d at 332. As Justice Thomas acknowledges, many authorities refer to "publishers" and "distributors," or equivalent categories, as "primary publishers" and "secondary publishers," respectively. *Id.* Section 230's text "precludes courts from treating internet service providers as publishers not just for the purposes of defamation law ... but in general." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1104 (9th Cir. 2009). Thus, it is not a clear departure from the statutory text to understand section 230's use of the word "publisher" to include both "primary" and "secondary" publishers—that is, to view "publisher" in the broader, generic sense adopted in *Zeran* and the many decisions following it. Neither would it be unreasonable to conclude that, in this context, the "publisher" liability covered by section 230 should be distinguished from "distributor" liability, which section 230 does not mention. As a textual matter, both the broad and the narrow senses of the word "publisher" are viable readings of section 230(c)(1).

Which reading is superior, given the statutory context and the other canons of construction, is a question the U.S. Supreme Court may soon take up. Justice Thomas may be correct that many courts interpreting section 230 have "filter[ed] their decisions

through ... policy argument[s]" or otherwise "emphasized nontextual" considerations. *Malwarebytes*, 141 S. Ct. at 14, 18. In the end, however, the construction of the provision at which these courts have arrived is a defensible reading of its plain language. Imposing 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. *See Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) (explaining that "decisions relating to the monitoring, screening, and deletion of content from" a platform or network are "actions quintessentially related to a publisher's role").

It also bears mentioning that Congress, with knowledge of the prevailing judicial understanding of section 230, has twice *expanded* its scope. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (When Congress "adopts a new law incorporating sections of a prior law, [it] normally can be presumed to have had knowledge of the interpretation given to the incorporated law[.]"). First, in 2002, Congress extended section 230 protections to an additional class of entities. 47 U.S.C. § 941(e)(1) (promoting a child-friendly segment of the internet and extending section 230's protections to many of those involved). Second, in 2010, Congress mandated that U.S. courts "shall not recognize or enforce" foreign defamation judgments that are inconsistent with section 230, while also making clear that "[n]othing in" the applicable sections of the 2010 statute "shall be construed to ... limit the applicability of section 230 ... to causes of action for defamation." 28 U.S.C. § 4102(c),

recognized that these legislative extensions of CDA immunity, modest as they were, are nonetheless some evidence of Congress's lack of objection to the courts' interpretation of section 230.[7]

Finally, the broader view of section 230, which originated with *Zeran*, has been widely accepted in both state and federal courts, including by the Fifth Circuit. *See MySpace*, 528 F.3d at 418–20. This Court, while bound only by decisions of the U.S. Supreme Court, is generally hesitant to contradict the "overwhelming weight of authority" from both lower federal courts and state courts on federal questions. *In re Morgan Stanley*, 293 S.W.3d at 189. We have been especially "reluctant to depart from the Fifth Circuit's" construction of federal statutes, as doing so "would allow parties in Texas to choose how the statute will be applied merely by choosing a court system." *W & T Offshore, Inc. v. Fredieu*, 610 S.W.3d 884, 892 n.1 (Tex. 2020). As a state court interpreting a federal statute where all existing precedent adopts one of multiple plausible readings of the statutory text, our best course is to follow the precedent.

None of this is to suggest that this Court or any other should "resolve questions such as the one before

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[7] *See Barrett v. Rosenthal*, 146 P.3d 510, 523 (2006); *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 155–56 (D. Mass. 2015), *aff'd*, 817 F.3d 12; *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014); *see also Roommates.Com*, 521 F.3d at 1187–88 (McKeown, J., concurring in part and dissenting in part).

us by a show of hands." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 715 (2011) (Roberts, C.J., dissenting). No "weight of authority" is overwhelming enough to justify departure from unequivocal statutory text. But when faced with a statute that reasonably lends itself to multiple readings, we promote stability and predictability in the law by adopting the position unanimously taken by other courts if the text permits. Here in particular, we must be mindful that "across the country, ... entities and individuals doing business" using the internet "have for many years relied on" the broad immunity from suit conferred by section 230 as interpreted by the courts, "negotiating their contracts and structuring their ... transactions against a backdrop of [that] immunity." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798–99 (2014). Plaintiffs' narrow view of section 230, while textually plausible, is not so convincing as to compel us to upset the many settled expectations associated with the prevailing judicial understanding of section 230.[8]

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[8] Even if we were to adopt the position that section 230 affords protection from "publisher" but not "distributor" liability, it is not clear that Plaintiffs' common-law claims would survive. The common law imposed on a distributor "no duty to examine the various publications that he offers ... to ascertain whether they contain any defamatory items. Unless there are special circumstances" suggesting "a *particular* publication is defamatory, he is under no duty to ascertain its ... character." RESTATEMENT (SECOND) OF TORTS § 581, cmt. d (1977) (emphasis added). Proof of Facebook's actual or constructive knowledge of any *particular* communication's wrongful character is not an element of Plaintiffs' claims (nor do Plaintiffs allege such specific knowledge on Facebook's part). As a result, interpreting section 230 to allow traditional distributor liability to be imposed on Facebook might not save these claims from dismissal.

D. Plaintiffs' Common-Law Claims

The essence of Plaintiffs' negligence, gross-negligence, negligent-undertaking, and products-liability claims is that, because Plaintiffs were users of Facebook or Instagram, the company owed them a duty to warn them or otherwise protect them against recruitment into sex trafficking by other users. Facebook violated that duty, Plaintiffs contend, by its failures to "implement any safeguards to prevent adults from contacting minors," "report suspicious messages," "warn[ ] of the dangers posed by sex traffickers," or "identify[ ] sex traffickers on its Platforms." Under the view of section 230 adopted in every published decision of which we are aware, these claims "treat[ ]" Facebook "as the publisher or speaker" of third-party communication and are therefore barred.

Plaintiffs argue that their common-law claims do not treat Facebook as a "publisher" or "speaker" because they "do not seek to hold [it] liable for exercising any sort of editorial function over its users' communications," but instead merely for its own "failure to implement any measures to protect them" from "the dangers posed by its products." Yet this theory of liability, while phrased in terms of Facebook's omissions, would in reality hold the company liable simply because it passively served as an "intermediar[y] for other parties' ... injurious messages." *Zeran*, 129 F.3d at 330–31. Put differently, "the duty that [Plaintiffs] allege[ ] [Facebook] violated" derives from the mere fact that the third-party content that harmed them was transmitted using the company's platforms, which is to say that it "derives from [Facebook's] status ... as a 'publisher or speaker'" of that content. *Barnes*, 570 F.3d at 1102. These claims seek to impose

liability on Facebook for harm caused by malicious users of its platforms solely because Facebook failed to adequately protect the innocent users from the malicious ones. All the actions Plaintiffs allege Facebook should have taken to protect them—warnings, restrictions on eligibility for accounts, removal of postings, etc.—are actions courts have consistently viewed as those of a "publisher" for purposes of section 230. Regardless of whether Plaintiffs' claims are couched as failure to warn, negligence, or some other tort of omission, any liability would be premised on second-guessing of Facebook's "decisions relating to the monitoring, screening, and deletion of [third-party] content from its network." *Green*, 318 F.3d at 471.

This is no less true simply because Facebook's alleged negligent omissions include failures to "require accounts for minors to be linked to those of adults" or "deprive known criminals from having accounts." These claims may be couched as complaints about Facebook's "design and operation" of its platforms "rather than ... its role as a publisher of third-party content," but the company's "alleged lack of safety features 'is only relevant to [Plaintiffs'] injur[ies] to the extent that such features'" would have averted wrongful communication via Facebook's platforms by third parties. *Herrick v. Grindr LLC*, 765 Fed. Appx. 586, 590 (2d Cir. 2019) (quoting *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 591 (S.D.N.Y. 2018)). At bottom,

these "claims seek to hold" Facebook" liable for its failure to combat or remove offensive third-party content, and are barred by § 230." *Id.*[9]

Plaintiffs' failure-to-warn theory suffers from the same infirmities. The warnings Plaintiffs seek would only be necessary because of Facebook's allegedly inadequate policing of third-party content transmitted via its platforms. "Although it is indirect, liability under such a theory nevertheless" ultimately arises from the company's transmission of the harmful content. *Herrick*, 306 F. Supp. 3d at 591. Moreover, "a warning about third-party content is a form of editing, just as much as a disclaimer printed at the top of a page of classified ads in a newspaper would be." *Id.* at 592 n.8; *accord McDonald v. LG Elecs. USA, Inc.*, 219 F. Supp. 3d 533, 538 (D. Md. 2016).

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[9] Plaintiffs argue that their claims may proceed because they "are not based on Facebook's decision[s] to publish or alter certain content." But it is irrelevant whether the allegedly tortious conduct relates to "certain" third-party content or to third-party content in general. "If the cause of action ... would treat the [defendant] as the publisher of a particular posting, [section 230] immunity applies not only for ... decisions with respect to that posting, but also for ... decisions about how to treat postings generally." *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007). Facebook's decision not to combat potentially harmful communication "by changing its web site policies" on warnings, flagging of messages, or who may establish an account on its platforms "was as much an editorial decision" regarding third-party content "as a decision not to delete a particular posting." *Id.*; *cf. Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Plaintiffs' products-liability claims are likewise premised on the alleged failure by Facebook to "provid[e] adequate warnings and/or instructions regarding the dangers of 'grooming' and human trafficking" on its platforms. Like Plaintiffs' other common-law claims, these claims seek to hold Facebook liable for failing to protect Plaintiffs from third-party users on the site. For that reason, courts have consistently held that such claims are barred by section 230. This has been the unanimous view of other courts confronted with claims alleging that defectively designed internet products allowed for transmission of harmful third-party communications. *See Herrick*, 765 Fed. Appx. at 590; *Inman v. Technicolor USA, Inc.*, No. 11-cv-666, 2011 WL 5829024, at *8 (W.D. Pa. Nov. 18, 2011); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663 (E.D. Tex. 2009).[10]

[10] While there have been a few instances in which products-liability claims against websites have been allowed to proceed despite defendants' CDA objections, *see Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 626–27 (Ct. App. 2020); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139–40 (4th Cir. 2019); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 973–74 (W.D. Wis. 2019), plaintiffs in those cases alleged that defendants provided *tangible goods* that caused physical injury or property damage. Here, by contrast (as in other cases in which products-liability claims have been held barred by section 230), the allegedly harmful attribute of Facebook's "products" was that they permitted transmission of third-party communication that resulted in harm to Plaintiffs.

This result aligns with the Fifth Circuit's 2008 decision in a case involving very similar facts. There, the plaintiff and a sexual predator "met and exchanged personal information" using the defendant's website, "which eventually led to an in-person meeting and the sexual assault of [the plaintiff]." *MySpace*, 528 F.3d at 419 (quoting *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007)). The court held that the plaintiff's claims were "barred by the CDA" because her allegation that the defendant was "liable for its failure to implement measures that would have prevented [the plaintiff] from communicating with [her attacker]" was "merely another way of claiming that [the defendant] was liable for publishing the communications." *Id.* at 420. Courts around the country have consistently held that section 230 protects defendants from similar claims of failure to warn of harmful third-party content or negligent failure to protect users from third-party content.[11]

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[11] For cases involving failure to warn, see *Herrick*, 765 Fed. Appx. 586; *Doe v. Kik Interactive, Inc.*, 482 F. Supp. 3d 1242 (S.D. Fla. 2020); *McMillan v. Amazon.com, Inc.*, 433 F. Supp. 3d 1034, 1045 (S.D. Tex. 2020); *McDonald*, 219 F. Supp. 3d at 538; *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 687, 692 (S.D. Miss. 2014); and *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 153 (3d Cir. 2019), *reh'g en banc granted, opinion vacated*, 936 F.3d 182 (3d Cir. 2019). For cases involving negligence or related causes of action, see *Zeran*, 129 F.3d at 332; *Green*, 318 F.3d at 471; *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 725–26 (Wis. 2019); *MySpace*, 528 F.3d at 420; *Barnes*, 570 F.3d at 1103; and *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014).

Plaintiffs rely heavily on one federal appellate decision that denied CDA immunity to a website operator sued for failure to warn of the risk that sexual predators would use the site to lure victims. In that case, however, the plaintiff's failure-to-warn claim had "nothing to do with [the defendant's] efforts, or lack thereof, to edit, monitor, or remove user generated content." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852, 853 (9th Cir. 2016). Instead, the plaintiff claimed that the defendant was liable based on its actual knowledge of the particular rape scheme of which she was a victim. The defendant obtained that knowledge not "from any monitoring of postings on [its] website," but instead "from an outside source of information." *Id.* at 851, 853. Indeed, the plaintiff did not "allege that [her rapists] posted anything to the website" or that she was "lured by any posting that [the defendant] failed to remove." *Id.* at 851. *Internet Brands* is therefore "best read as holding that the CDA does not immunize an [interactive computer service] from a failure to warn claim when the alleged duty to warn arises from something other than user-generated content." *Herrick*, 306 F. Supp. 3d at 592. "By contrast," Plaintiffs' "proposed warning in this case would be about user-generated content itself." *Id.*

Plaintiffs further argue that section 230's prohibition on "treat[ing] an internet company as a 'publisher or speaker'" preempts only suits that "allege or implicate defamation," since this was the primary "kind of liability Congress had in mind" when it enacted the provision. This proposed limitation on section 230 has been rejected by every court that has considered it. *See Force*, 934 F.3d at 64 n.18. Given that "Congress

enacted the [CDA] in part to respond" to *Stratton Oakmont*, the "cause of action most frequently associated with ...section 230 is defamation." *Barnes*, 570 F.3d at 1101. "But statutory prohibitions often go beyond the principal evil.... Congress was concerned with when it enacted [them]...., and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Section 230's text neither mentions defamation nor "limit[s] its application to defamation cases." *Barnes*, 570 F.3d at 1101. Courts have recognized as much by extending section 230 to "a wide variety" of claims, "including housing discrimination," "securities fraud," and "cyberstalking." *Backpage.com*, 817 F.3d at 19.

In sum, Plaintiffs' claims for negligence, gross negligence, negligent undertaking, and products liability—all premised on Facebook's alleged failures to warn or to adequately protect Plaintiffs from harm caused by other users—are barred by section 230 and must be dismissed.

E. Statutory Claims

Plaintiffs also sued Facebook under a Texas statute creating a civil cause of action against anyone "who intentionally or knowingly benefits from participating in a venture that traffics another person." TEX. CIV. PRAC. & REM. CODE § 98.002(a). According to Plaintiffs, Facebook violated this statute through such "acts and omissions" as "knowingly facilitating the sex trafficking of [Plaintiffs]" and "creat[ing] a breeding ground for sex traffickers to stalk and entrap survivors." As explained below, we conclude that section 230 does not bar these claims.

The relevant language in section 98.002(a) is borrowed almost verbatim from the Texas statute criminalizing the same conduct. *See* TEX. PENAL CODE § 20A.02(a). The text of that law itself closely resembles a federal statute. *See* 18 U.S.C. § 1591(a).[12] Liability under these statutes requires a showing that a defendant acquired a benefit by "participat[ing]" in a human-trafficking "venture." Such "participation" connotes more than mere passive acquiescence in trafficking conducted by others. This much is evident from the common meaning of "participate," representative definitions of which include, "[t]o be *active* or involved in something; take part," AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016) (emphasis added); and, "to take part, be or become *actively* involved, or share (in)," COLLINS ENGLISH DICTIONARY (12th ed. 2014) (emphasis added). Definitions vary, of course, but a common thread among them is the understanding that "participation" consists, at a minimum, of some affirmative act.[13]

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[12] Section 1591 makes it a crime to "knowingly ... benefit[ ], financially or by receiving anything of value, from participation in a venture which has engaged in" sex trafficking, as defined by the statute. 18 U.S.C. § 1591(a).

[13] *See, e.g., Participation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The *act* of taking part in something....") (emphasis added); *Participation*, CAMBRIDGE BUSINESS ENGLISH DICTIONARY (2011) ("the act of taking part in an event or activity"); *Participation*, OXFORD ADVANCED AMERICAN DICTIONARY (2011) ("the act of taking part in an activity or event").

Courts analyzing what it means to "participate" in a "venture" in the criminal context have consistently required more than passive acquiescence in the wrongdoing of others. "Participation" typically entails, at a minimum, an overt act in furtherance of the venture. *See, e.g., United States v. Hewitt*, 663 F.2d 1381, 1385 (11th Cir. 1981) ("To prove participation, the evidence must show that the defendant committed an overt act designed to aid in the success of the venture.").[14] A similar standard is regularly applied in the civil context as well.[15] This overt-act conception of "participation" is further supported by a recent decision construing 18 U.S.C. § 1591(a), the federal-criminal analog of section 98.002(a) of the Civil Practice and Remedies Code. The Sixth Circuit held that in order to prove "participat[ion]" in a "venture" for section 1591(a) purposes, "a defendant [must have] actually ... commit[ted] some 'overt act' that furthers

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[14] *Accord United States v. Pope*, 739 F.2d 289, 291 (7th Cir. 1984); *United States v. Searan*, 259 F.3d 434, 444 (6th Cir. 2001); *United States v. Longoria*, 569 F.2d 422, 425 (5th Cir. 1978); *Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004); *Kutzner v. State*, 994 S.W.2d 180, 187 (Tex. Crim. App. 1999).

[15] *See Landy v. Fed. Deposit Ins. Corp.*, 486 F.2d 139, 163–64 (3d Cir. 1973); *IIT, an Intern. Inv. Tr. v. Cornfeld*, 619 F.2d 909, 922, 925 (2d Cir. 1980), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 35–36 (D.C. Cir. 1987), *abrogated on other grounds by Morrison*, 561 U.S. 247; *In re Amaranth Nat. Gas Commodities Litig.*, 730 F.3d 170, 182 (2d Cir. 2013); *SEC v. Quiros*, No. 16-CV-21301, 2016 WL 11578637, at *15 (S.D. Fla. Nov. 21, 2016).

the sex trafficking aspect of the venture." *United States v. Afyare*, 632 Fed. Appx. 272, 286 (6th Cir. 2016). "[T]he statute d[oes] not criminalize ... 'mere negative acquiescence.'" *Id.* (quoting *United States v. Afyare*, No. 3:10-CR-00260, 2013 WL 2643408, at *12 (M.D. Tenn. June 12, 2013)).[16]

"In construing" section 98.002(a), "we presume that the Legislature acted with knowledge of th[is] background law and with reference to it." *City of Round Rock v. Rodriguez*, 399 S.W.3d 130, 137 (Tex. 2013). By employing terms such as "participat[ion]" and "venture," which have well-established meanings in related legal contexts, the legislature is presumed to have adopted the prevailing judicial understanding of those words. Thus, to charge Facebook with "intentionally or knowingly benefit[ting] from participating in a [trafficking] venture" is to charge it with "some affirmative conduct"—that is, "an overt act" beyond "mere negative acquiescence"—"designed to aid in the success of the venture." *Longoria*, 569 F.2d at 425. It follows that a claim under section 98.002 arises not

[16] Unlike TEX. CIV. PRAC. & REM. CODE § 98.002(a), section 1591 now expressly defines "participation in a venture" as "knowingly assisting, supporting, or facilitating a violation" of the statute's sex-trafficking prohibition. This definition, however, was added by FOSTA in 2018. *See* Pub. L. No. 115-164, § 5. *Afyare* reached its conclusion about the meaning of "participation" without the benefit of any statutory definition, so the case remains persuasive authority on the same word's meaning in section 98.002(a).

merely from a website's failure to take action in response to the injurious communications of others, but instead from the website's own affirmative acts to facilitate injurious communications.

This distinction—between passive acquiescence in the wrongdoing of others and affirmative acts encouraging the wrongdoing—is evident in Plaintiffs' allegations, which we construe liberally at the Rule-91a stage. *See City of Dallas v. Sanchez*, 494 S.W.3d 722, 725 (Tex. 2016). While many of Plaintiffs' allegations accuse Facebook of failing to act as Plaintiffs believe it should have, the section 98.002 claims also allege overt acts by Facebook encouraging the use of its platforms for sex trafficking. For instance, the petitions state that Facebook "creat[ed] a breeding ground for sex traffickers to stalk and entrap survivors"; that "Facebook ... knowingly aided, facilitated and assisted sex traffickers, including the sex trafficker[s] who recruited [Plaintiffs] from Facebook" and "knowingly benefitted" from rendering such assistance; that "Facebook has assisted and facilitated the trafficking of [Plaintiffs] and other minors on Facebook"; and that Facebook "uses the detailed information it collects and buys on its users to direct users to persons they likely want to meet" and, "[i]n doing so, ... facilitates human trafficking by identifying potential targets, like [Plaintiffs], and connecting trafficker s with those individuals." Read liberally in Plaintiffs' favor, these

statements may be taken as alleging affirmative acts by Facebook to encourage unlawful conduct on its platforms.[17]

The available precedent indicates that Facebook enjoys no CDA immunity from claims founded on such allegations. For instance, the Ninth Circuit has held that defendants lose their CDA immunity if they go beyond acting as "passive transmitter[s] of information provided by others." *Roommates.Com*, 521 F.3d at 1166. A defendant that operates an internet platform "in a manner that contributes to," or is otherwise "directly involved in," "the alleged illegality" of third parties' communication on its platform is "not immune." *Id.* at 1169. Here, Plaintiffs' statutory cause of action is predicated on allegations of Facebook's affirmative acts encouraging trafficking on its platforms. These allegations differ from Plaintiffs' common-law claims, under which Facebook is accused only of "providing *neutral* tools to carry out what may be unlawful or illicit" communication by its users. *Id.* The common-law claims are "based on [Facebook's] passive acquiescence in the misconduct of its users," for which the company is "entitled to CDA immunity." *Id.* at 1169 n.24. Like the Ninth Circuit, however, we understand the CDA to stop short of immunizing a defendant for its "affirmative acts ... contribut[ing] to any alleged unlawfulness" of "user-created content."

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[17] We do not address whether, at the Rule-91a stage, Plaintiffs' claims have "no basis in law, no basis in fact, or both" for some reason other than section 230. In this mandamus proceeding, we consider only the section 230 arguments raised in Facebook's motions to dismiss.

Id. Facebook's alleged violations of TEX. CIV. PRAC. & REM. CODE § 98.002(a) fall in the latter category. These allegations do not treat Facebook as a publisher who bears responsibility for the words or actions of third-party content providers. Instead, they treat Facebook like any other party who bears responsibility for its *own* wrongful acts. Other courts have drawn a similar line. *See, e.g., FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199–201 (10th Cir. 2009); *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 718 (2015); *Dirty World Entm't Recordings*, 755 F.3d at 413.

We find it highly unlikely that Congress, by prohibiting treatment of internet companies "as ... publisher[s]," sought to immunize those companies from *all* liability for the way they run their platforms, even liability for their own knowing or intentional acts as opposed to those of their users. Section 230 itself declares it "the policy of the United States ... to ensure vigorous enforcement of Federal criminal laws" against "obscenity, stalking, and harassment by means of computer." 47 U.S.C. § 230(b). Nothing in section 230's operative text goes so far as to "create a lawless no-man's-land on the Internet" in which online platforms like Facebook are free to actively encourage human trafficking. *Roommates.Com*, 521 F.3d at 1164.

This view of section 230 conflicts directly with the First Circuit's 2016 decision in *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12.[18] Congress, however, responded to the *Backpage* decision in 2018 by enacting the "Allow States and Victims to Fight Online Sex Trafficking Act" ("FOSTA"), Pub. L. No. 115-164, 132 Stat. 1253. FOSTA provides that "[n]othing in [section 230] (other than subsection (c)(2)(A)) shall be construed to impair or limit 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." 47 U.S.C. § 230(5).

Both parties argue that FOSTA's changes to section 230 support their positions. As Facebook understands FOSTA, the 2018 amendments carved out particular causes of action from the scope of what section 230 otherwise covers. These carved-out claims include a civil action under 18 U.S.C § 1595 and certain state criminal prosecutions but not civil human-trafficking claims under state statutes. Although a state-law claim under section 98.002 looks much like the federal cause of action created by section 1595, the similarity

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[18] In that case, the plaintiffs sued under 18 U.S.C § 1595, alleging that the defendant website operator "engaged in a course of conduct designed to facilitate sex traffickers' efforts to advertise their victims on [its] website," which allegedly "led to [the plaintiffs'] victimization." 817 F.3d at 16. The plaintiffs' pleadings laid out many ways in which the defendant had intentionally facilitated illegal activities on its site. *Id.* at 20. The First Circuit, however, held that the defendant was nevertheless entitled to section 230 immunity.

does not transform Plaintiffs' statutory claims into suits "brought under" section 1595. In Facebook's view, Congress's "meticulous ... enumeration of exemptions ... confirms that courts are not authorized to create additional exemptions." *Law v. Siegel*, 571 U.S. 415, 424 (2014).[19]

Plaintiffs disagree. They concede that FOSTA does not explicitly except civil human-trafficking claims under state statutes from section 230's reach. But FOSTA's silence in that regard does not answer whether such claims fell under section 230 to begin with. According to Plaintiffs, the effect of FOSTA was not, as Facebook assumes, to carve out discrete claims that would otherwise have been barred by section 230. Instead, FOSTA reflects Congress's judgment that such claims were never barred by section 230 in the first place. Under this reading, FOSTA's "exception" to section 230 immunity for federal section 1595 claims is not merely an exception. Instead, it is Congress's announcement of a rule of construction for section 230(c), under which human-trafficking claims like those found in section 1595 were never covered by section 230. In Plaintiffs' view, by indicating that *Backpage* was wrong and that section 230 should not

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[19] If section 230(c) did not cover Plaintiffs' statutory human-trafficking claims prior to FOSTA, it cannot be the case that FOSTA brought those claims back under section 230 by failing to specifically exclude them. FOSTA itself disclaims any such result: "Nothing in ... the[se] amendments ... shall be construed to ... preempt any civil action" filed after their enactment that was not "preempted by section 230" as it was "in effect on the day before" the amendments' enactment. Pub. L. No. 115-164, § 7.

be interpreted to bar federal civil statutory human-trafficking claims, Congress must also have been indicating that analogous state civil statutory human-trafficking claims likewise are not barred. After all, there is no conceivable difference between the two categories of claims with respect to whether they "treat" defendants as "speakers or publishers."

For two reasons, we find Plaintiffs' view of FOSTA's impact more convincing. First, what Facebook calls FOSTA's "exceptions" to section 230 are not introduced with statutory language denoting carve-outs (such as "notwithstanding" or "except that ..."). Instead, Congress instructed that "[*n*]*othing in* [*section 230*] *... shall be construed* to impair" certain claims. The U.S. Supreme Court, in interpreting a materially identical proviso, declined to view it "as establishing an exception to a prohibition that would otherwise reach the conduct excepted." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 582 (1988). Rather, the language in question "ha[d] a different ring to it." *Id.* A clause stating that the provision to which it applies " 'shall not be construed' to forbid certain [activity]," was, in the Court's view, better read as "a clarification of the meaning of [the provision] rather than an exception" to its general coverage. *Id.* at 586. The Court agreed with the Eleventh Circuit, which had also understood the "shall not be construed" clause as "explain[ing] how the [section] should be interpreted rather than creating an exception" to it. *Fla. Gulf Coast Bldg. & Constr. Trades Council v. NLRB*, 796 F.2d 1328, 1344 (11th Cir. 1986). Other courts have construed similar statutory language in the same way.[20]

Following this line of reasoning, we do not read FOSTA's instruction that "[n]othing in [section 230] ... shall be construed to impair or limit any ... civil action brought under [18 U.S.C §] 1595" to merely except section 1595 claims from the scope of what section 230 would otherwise cover. Rather, the FOSTA proviso announces a rule of construction applicable to section 230. Congress's mandate that section 230 not "be construed" to bar federal civil statutory human-trafficking claims necessarily dictates that section 230 must not be construed to bar materially indistinguishable state civil claims either. The elements of the two claims are very similar. If liability under federal section 1595 would not treat defendants as "speakers or publishers" within the meaning of section 230, it is hard to understand how liability under Texas's section 98.002 could possibly do so.

Second, another textual indicator favors Plaintiffs' understanding of FOSTA's effects. The "Sense of Congress," enacted as part of FOSTA's text, was that

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[20] *See, e.g., Garnett v. Renton Sch. Dist. No. 403*, 987 F.2d 641, 645 (9th Cir. 1993) (interpreting statutory proviso that began, "[n]othing in this [act] shall be construed ..." as announcing "not exceptions to the Act," but rather "rules of construction" that "instruct ... court[s] how to interpret the Act's central command[s]"); *accord Gov't of Guam ex rel. Guam Econ. Dev. Auth. v. United States*, 179 F.3d 630, 635 (9th Cir. 1999); *see also Hoffman v. Hunt*, 126 F.3d 575, 582 (4th Cir. 1997) (interpreting state statutory proviso that began, "[t]his section shall not prohibit [certain activities]" as "[b]y its terms, ... prohibit[ing] nothing; rather, it serves as a rule of construction.... designed to assure that the ... statute is not construed to reach" particular conduct); *Hammerman & Gainer, Inc. v. Bullock*, 791 S.W.2d 330, 333 (Tex. App.—Austin 1990, no writ) (similar).

"section 230 of the [CDA] was never intended to provide legal protection to ... websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims." Pub. L. No. 115-164, § 2. If section 230 was "never intended" to immunize defendants against claims brought pursuant to 18 U.S.C § 1595, it stands to reason that the provision also never afforded immunity from analogous state-law causes of action. The "Sense of Congress" is merely a declaratory rather than an operative provision. But there is widespread agreement that "[a] preamble, purpose clause, or recital is a permissible indicator of meaning." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 193, 194 (2012). When the text itself is indeterminate, such a provision "is a key to open the mind of the makers, as to ... the objects, which are to be accomplished by ... [a] statute." *Id.* (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459 (1833)). Facebook is correct that such prefatory language "cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous." *Yazoo & M.V.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889). Yet as we noted above, the parties advance two competing understandings of FOSTA's impact on section 230. If both are plausible, courts are justified in consulting the enacted "Sense of Congress" when choosing between them.

FOSTA thus provides additional support for our conclusion that section 230(c) does not bar Plaintiffs' claims alleging Facebook's affirmative acts in violation of section 98.002. These claims may proceed to further litigation, although we express no opinion on

their viability at any later stage of these cases. Because Plaintiffs' common-law claims are barred by section 230, however, we hold that the district courts abused their discretion by failing to grant Facebook's motions to dismiss those claims. We further conclude, as explained above, that Facebook has no other adequate remedy for the district courts' improper refusals to dismiss those claims.

III. Conclusion

The internet today looks nothing like it did in 1996, when Congress enacted section 230. The Constitution, however, entrusts to Congress, not the courts, the responsibility to decide whether and how to modernize outdated statutes. Perhaps advances in technology now allow online platforms to more easily police their users' posts, such that the costs of subjecting platforms like Facebook to heightened liability for failing to protect users from each other would be outweighed by the benefits of such a reform. On the other hand, perhaps subjecting online platforms to greater liability for their users' injurious activity would reduce freedom of speech on the internet by encouraging platforms to censor "dangerous" content to avoid lawsuits. Judges are poorly equipped to make such judgments, and even were it otherwise, "[i]t is for Congress, not this Court, to amend the statute if it believes" it to be outdated. *Dodd v. United States*, 545 U.S. 353, 359–60 (2005).

The petition for writ of mandamus is denied in part and conditionally granted in part. The district courts are directed to dismiss Plaintiffs' claims against Facebook for negligence, gross negligence,

negligent undertaking, and products liability. Plaintiffs' claims under section 98.002 of the Civil Practice and Remedies Code may proceed. We are confident the district courts will comply, and the writ will issue only if they do not.

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James D. Blacklock
Justice

OPINION DELIVERED: June 25, 2021

APPENDIX B

Petitions for Writ of Mandamus Denied and Memorandum Majority and Dissenting Opinions filed April 28, 2020.

THE STATE OF TEXAS

In the

FOURTEENTH COURT OF APPEALS

NO. 14-19-00845-CV

NO. 14-19-00847-CV

IN RE FACEBOOK, INC. AND FACEBOOK, INC. D/B/A INSTAGRAM, Relators

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ORIGINAL PROCEEDING
WRIT OF MANDAMUS
334th District Court
Harris County, Texas
Trial Court Cause Nos. 2018-69816, 2018-82214

NO. 14-19-00886-CV

IN RE FACEBOOK INC. D/B/A INSTAGRAM, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
151st District Court
Harris County, Texas
Trial Court Cause No. 2019-16262

MEMORANDUM MAJORITY OPINION

Each plaintiff in the underlying cases is a minor who connected on Facebook or Instagram (collectively, "Facebook") with individuals who forced them into human trafficking. The plaintiffs seek to hold Facebook liable for damages resulting from being victimized by trafficking. Facebook filed a Rule 91a[1] motion to dismiss each plaintiff's case against Facebook based on an immunity provision under a Federal statute known as the Communications Decency Act. *See* 47 U.S.C. § 230.

Facebook filed two petitions for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221; *see also* Tex. R. App. P. 52. In the first petition filed in our case numbers 14-19-00845-CV and 14-19-00847-CV, Facebook asks this court to compel the Honorable Steven Kirkland, presiding judge of the 334th District Court of Harris County, to set aside his May 23, 2019 orders denying Facebook's Rule 91a motions to dismiss.

[1] *See* Tex. R. Civ. P. 91a.

In the second petition filed in our case number 14-19-00886-CV, Facebook asks this court to compel the Honorable Mike Engelhart, presiding judge of the 151st District Court of Harris County, to set aside his October 4, 2019 order denying Facebook's Rule 91a motion to dismiss.

Facebook has not established that it is entitled to mandamus relief. Accordingly, we deny Facebook's petitions for writ of mandamus. We also lift our stays issued on November 14, 2019, and November 19, 2019.

PER CURIAM

Panel consists of Justices Christopher, Spain, and Poissant. (Christopher, J., dissenting).

Petitions for Writ of Mandamus Denied and Memorandum Majority and Dissenting Opinions filed April 28, 2020.

THE STATE OF TEXAS

In the

FOURTEENTH COURT OF APPEALS

NO. 14-19-00845-CV

NO. 14-19-00847-CV

IN RE FACEBOOK, INC. AND FACEBOOK, INC. D/B/A INSTAGRAM, Relators

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ORIGINAL PROCEEDING
WRIT OF MANDAMUS
334th District Court
Harris County, Texas
Trial Court Cause Nos. 2018-69816, 2018-82214

NO. 14-19-00886-CV

IN RE FACEBOOK INC. D/B/A INSTAGRAM, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
151st District Court
Harris County, Texas
Trial Court Cause No. 2019-16262

MEMORANDUM DISSENTING OPINION

I respectfully dissent from these denials of mandamus and I urge the Texas Supreme Court to review these cases. Federal law grants Facebook immunity from suits such as these. *See* 47 U.S.C. § 230. Because Facebook has immunity, these suits have no basis in law, and dismissal under Texas Rule of Procedure 91a is proper.

The Real Parties in Interest urge our court to adopt a construction of Section 230 that has been adopted by only a few courts. The vast majority of the courts reviewing this law have adopted the arguments made by Facebook. The artful pleading by the Real Parties in Interest should not prevail over the statute.

Fewer cases discuss the 2018 amendments to Section 230 known as the Fight Online Sex Trafficking Act of 2017 ("FOSTA"). However, this exception to immunity—on its face—does not apply to a civil action in state court.

Because Facebook has federal statutory immunity from these suits, I respectfully dissent.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Spain, and Poissant.

APPENDIX C

NO. 2018-69816*

Jane Doe	**§**	**In the District Court**
	§	**of**
	§	
vs.	**§**	**Harris County, Texas**
	§	
Facebook, Inc., et al	**§**	**334th Judicial Dis-**
	§	**trict**

No. 2018-82214

Jane Doe	**§**	**In the District Court**
	§	**of**
	§	
vs.	**§**	**Harris County, Texas**
	§	
Facebook, Inc., dba	**§**	**334th Judicial Dis-**
Instagram, Inc. et al	**§**	**trict**

Order

Defendant Facebook seeks dismissal of these two cases pursuant to 91a of the Texas Rules of Civil Procedure. This motion is one of several procedural preliminary hurdles that the parties advise will be filed and argued in these cases prior to full litigation of the underlying claims. While a ruling in Facebook's favor may end the case for Facebook, a ruling for the Plaintiffs only allows the case to proceed to the next level.

Rule 91a requires dismissal of a claim if the action "has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle a claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." Tex. R. Civ. P. 91a.1. The Court may not consider evidence, but only the allegations in the petition and arguments of counsel in their motions and responses. At this stage, Facebook is not arguing the facts, but rather claims it is not liable to the Plaintiffs because of the immunity granted internet service providers under Section 230 of the Federal Communications Decency Act, 47 U.S.C. § 230 (the "Act").

47 USC§ 230(c)(1) provides: "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." In 2018, Congress added exclusions to this broad grant of immunity to ensure that sex trafficking laws were not impacted. The parties debate the extent of the exclusions.

The parties do not dispute that Facebook is an interactive computer service as defined in the statute at 47 § USC 230(f)(2). The question presented to the Court is whether the claims raised by Plaintiffs treat Facebook as the publisher or speaker of information provided by another.

Plaintiffs have brought causes of action sounding in negligence, gross negligence and statutory damages under the Texas Civil Practice and Remedies

Code Chapter 98, which allows for damages from persons who engage in trafficking or knowingly or intentionally benefit from such traffic. Plaintiffs contend that Facebook facilitates and/or was used by predators to find, groom, target, recruit and kidnap children into the sex trade. Plaintiffs allege that Facebook profits from the collection of data and the use of the data to target and promote interactions between Facebook users. These interactions include minors and sexual predators. Each of the Plaintiffs are victims of human trafficking to whom Plaintiffs contend Facebook owes a variety of duties which have been breached leading to the Plaintiffs being victimized in human trafficking. Plaintiffs contend they are not seeking to impose liability for the publication of the third party communications, but rather they seek to impose liability for Facebook's independent actions or failure to act, specifically failure to warn, negligence in undertaking to protect potential victims of sex trafficking, and for knowingly facilitating and benefiting from the sex trade.

Facebook contends that all of Plaintiffs' claims turn entirely on the communications Plaintiffs had with malicious third parties. Because Plaintiffs' injuries are dependent on those communications, Facebook contends they are all barred by the immunity granted internet service providers under the Act.

The language of the statute is broad and both parties have cited cases that support their positions. Facebook points to the broad grants of immunity articulated in *Zeran v. America Online Inc.* 129 F.3d 327 (4th Cir. 1997) (republishing defamation) and *Doe v.*

MySpace, Inc. 528 F.3d 413 (5th Cir. 2008) (negligence-failure to implement safety measures), among others. Plaintiffs points to the more narrow immunity recognized in *Doe v. Internet Brands, Inc.,* 824 F.3d 846 (9th Cir. 2016) (ISP not immune to failure to warn claim) and *Huon v. Denton,* 841 F.3d 733 (7th Cir. 2016) (ISP not immune to defamation in content it generated).

While the injuries presented in the 9th and 5th Circuit cases are similar to those presented in this case, the failure to warn cause of action presented in this case mirrors that presented in the 9th Circuit case. None of the cases deal with the statutory cause of action pled in this case, and all of the cases predated the amendments adopted in 2018.

The few Texas cases that have addressed the issue come out of the Beaumont Court of Appeals and none of these deal with the same causes of action or facts as are presented in this case. See *Milo v. Martin,* 311 S.W.3d 210 (Tex. App.—Beaumont 2010, no pet.) (defamation); *GoDaddy.com LLC v. Toups,* 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied) (intentional infliction of emotional distress); and, *Davis v. Motiva Enterprises LLC,* No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App.—Beaumont April 2, 2015, pet. denied) (failure to supervise employees' internet use).

In reviewing the statute and the cases cited by the parties, the Court concludes that Plaintiffs have plead causes of action that would not be barred by the immunity granted under the Act. Accordingly, Defendants' Rule 91A Motions to Dismiss are denied.

Signed:
05/23/2019 /s/*Steven Kirkland*
STEVEN KIRKLAND
Judge Presiding

APPENDIX D

47 U.S.C.A. § 230

§ 230. Protection for private blocking and screening of offensive material

Effective: April 11, 2018
Currentness

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

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;

(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;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services)

are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. 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.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications

Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(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.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.