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CAUSE NO. 2018-69816

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHWEST FWY, HOUSTON, TX 77074; and TEXAS PEARL., INC.,	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

CAUSE NO. 2018-82214

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC. d/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	§	
	§	
Defendants.	§	
	§	**334th JUDICIAL DISTRICT**

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTIONS OF DEFENDANT FACEBOOK, INC. TO DISMISS PURSUANT TO RULE 91A

I. INTRODUCTION

Defendant Facebook, Inc. ("Facebook") files this Supplemental Brief in support of its Rule 91a motions to dismiss the claims against it in these two cases, in response to an invitation from the Court at the close of the May 3, 2019 hearing in these matters.[1] This brief addresses four points that were raised at last Friday's hearing. First, contrary to comments by counsel for the two Jane Doe Plaintiffs ("Plaintiffs") at the hearing, Facebook works diligently to protect minors from sexual exploitation on the Facebook platform, as the Petitions acknowledge. Second, Plaintiffs concede that their claims here are barred under a mountain of federal and state case law interpreting Section 230 of the Communications Decency Act. Third, nothing in the 2018 amendments to Section 230 changed that result—on the contrary, those amendments only further confirm that Plaintiffs' claims against Facebook are inconsistent with the immunity created by Section 230. Finally, the preemptive language in Section 230 applies squarely to all of Plaintiffs' claims against Facebook in these cases. Accordingly, the Court should dismiss those claims with prejudice.

II. ARGUMENT

A. Plaintiffs' Petitions Show that Facebook Works Diligently to Protect Minors from Sexual Exploitation

During the May 3 hearing, Plaintiffs' counsel made several inaccurate and inflammatory statements about Facebook. Specifically, Plaintiffs' counsel stated, in open court, that Facebook "has created a product that is being used to rape children. Facebook knows it. Facebook allows it. Facebook facilitates it." Exhibit A, May 3, 2019 Hearing Transcript ("Hearing Tr.") 49:23-50:10. Facebook has the deepest sympathy for all victims of human trafficking, but this rhetoric leveled by Plaintiffs' counsel is not only untrue, but is belied by the myriad allegations in Plaintiffs' own Petitions

[1] Facebook files this Supplemental Brief subject to and without waiving its previously filed Special Appearances to Contest Personal Jurisdiction, Object to Improper Venue and Motion to Dismiss for Improper Forum, and Answer.

acknowledging that Facebook has implemented significant controls and practices to prevent its site from being misused—including controls, such as content monitoring, specifically directed at various forms of exploitation of children.

For example, Plaintiffs admit that Facebook "do[es] not allow content that sexually exploits or endangers children," and that when such content is discovered, Facebook "will report it to the National Center for Missing and Exploited Children [("NCMEC")]." Cause No. 2018-69816, Third Amended Petition ("Third Am. Pet. (69816)") ¶ 161; Cause No. 2018-82214, Second Amended Petition ("Second Am. Pet. (82214)") ¶ 167. This is more than just a policy—Plaintiffs concede that Facebook does in fact "report instances" of "child abuse," "sexual assault of a child," and "child human trafficking" to NCMEC. Third Am. Pet. (69816) ¶¶ 40-42; Second Am. Pet. (82214) ¶¶ 40-42. NCMEC itself has acknowledged that Facebook is a key partner in this regard:

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

Partners, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/supportus/partners (last visited May 8, 2019).

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

- Facebook "has taken precautions specific to child users between the age of 13-17.[2] Third Am. Pet. (69816) ¶¶ 109-10; Second Am. Pet. (82214) ¶¶ 112-13.

[2] Plaintiffs admit that a user must be 13 or over to join Facebook. Third Am. Pet. (69816) ¶ 134; Second Am. Pet. (82214) ¶ 138. This comports with Congress's decision in the Children's Online Privacy Protections Act to require parental consent for children under 13 to share personal information on the internet, but not to require such consent for children 13 and over. *See* 15 U.S.C. §§ 6502(a)(1), 6501(1).

- Facebook "has monitored content" and continues to monitor content on its site regarding "sexual exploitation of minors" and "human trafficking of minors." Third Am. Pet. (69816) ¶¶ 45-46; Second Am. Pet. (82214) ¶¶ 45-46.

- Facebook prohibits any person that is involved in human trafficking from "having a presence on Facebook." Third Am. Pet. (69816) ¶ 160; Second Am. Pet. (82214) ¶ 165.

- Facebook has "provided information to Texas law enforcement agencies regarding the trafficking of minors in Texas." Third Am. Pet. (69816) ¶¶ 44; Second Am. Pet. (82214) ¶¶ 44.

- Facebook has blocked users on Facebook for explicit content, including that involving the sexual exploitation of minors. Third Am. Pet. (69816) ¶¶ 51; Second Am. Pet. (82214) ¶¶ 51.

- Facebook prohibits all nude images of children, even those (such as family photos) that might be shared with good intentions, due to the "potential for abuse by others and to help avoid the possibility of other people reusing or misappropriating the images." Third Am. Pet. (69816) ¶ 161; Second Am. Pet. (82214) ¶ 167.

- Facebook "work[s] with external experts, including the Facebook Safety Advisory Board, to discuss and improve [its] policies and enforcement around online safety issues, especially with regard to children." Third Am. Pet. (69816) ¶ 161; Second Am. Pet. (82214) ¶ 167.

- Facebook prohibits sexual solicitation on its platform. Third Am. Pet. (69816) ¶ 162; Second Am. Pet. (82214) ¶ 168.

One of the important objectives of Section 230 was to "encourage service providers to self-regulate the dissemination of offensive material over their services." *Bennett v. Google, LLC*, 882 F.3d 1163, 1165 (D.C. Cir. 2018). Among other objectives, Congress wanted to "incentivize companies to neither restrict content nor bury their heads in the sand in order to avoid liability." *Id.* As is clear from the above litany of policies that Plaintiffs acknowledge in their operative Petitions, Facebook is not burying its head in the sand.

To the contrary, Facebook is working diligently to protect minors from sexual exploitation in any form. Section 230 sweeps broadly to protect platforms from liability for civil claims that turn on third-party content—in part because Congress did not want to chill efforts such as those that Facebook has taken here to prevent human trafficking and the exploitation of children. Because

Plaintiffs' claims in these matters stem entirely from third-party content on Facebook's platform, and because none of the legal arguments that Plaintiffs' counsel has made against the application of Section 230 has merit, the Court should dismiss Plaintiffs' claims against Facebook.

B. This Court Should Decline Plaintiffs' Request That This Court Depart From the Consistent Interpretation of Section 230 by Texas and Federal Appellate Courts

At the May 3, 2019 hearing, Plaintiffs' counsel all but conceded that, under the last 22 years of Texas and federal Section 230 precedent, Plaintiffs' claims against Facebook are barred.[3] Rather than arguing otherwise, Plaintiffs ask this Court to hold that that all cases including and since *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), "were incorrectly decided," and to decline to follow the myriad cases from across the country holding that civil causes of action should be dismissed when an internet service provider did not directly or materially participate in creating the content at issue. Hearing Tr. 53:12–54:11 ("We think *Zeran* and all of the cases following it were incorrectly decided … [a]nd there are a lot of them, and we acknowledge that.").

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," and 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(c)(1), (e)(3). Since *Zeran*, courts across the country (including in Texas) have confirmed that Section 230 immunizes internet service providers—and in particular, social media platforms—from liability for allegedly harmful

[3] At last Friday's hearing, Plaintiffs' counsel effectively conceded that Plaintiffs' claims are barred for an additional reason by answering "Yes" to the question "you want to impose some affirmative duty [on Facebook] to protect children?". Hearing Tr. 37:11, 9–10. "As a general rule, a person has no legal duty to protect another from the criminal acts of a third person … ." *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). A "special relationship may sometimes give rise to a duty to aid or protect others," *Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 504 (Tex. 2017), but there is no such "special relationship" between an online platform and its users that would give rise to an affirmative duty to protect those users from third-party harm, *e.g.*, *Beckman v. Match.com, LLC*, 743 F. App'x. 142 (9th Cir. 2018) (men.), *cert. denied*, 139 S. Ct. 1394 (2019).

third-party communications conveyed through their services.

For example, in 2008, the Fifth Circuit addressed this issue in *Doe v. MySpace, Inc.*, a remarkably similar case in which the plaintiff claimed that her daughter joined MySpace (a social medial platform) at age 13 by lying about her age, and then was contacted by another user on the site, agreed to meet with him off-line, and was sexually assaulted by the other user during the off-line encounter. 528 F.3d 413, 416 (5th Cir. 2008). She alleged that MySpace had "failed to implement basic safety measures to prevent sexual predators from communicating with minors on its Web site," including measures to prevent underage individuals from lying about their age to join the site. *Id.* at 414–17.

The Fifth Circuit held that the claim was barred by Section 230. The court looked to both the plain language and the consistent judicial interpretations of the statute to conclude that Section 230 extends "broad immunity … to Web-based service providers for all claims stemming from their publication of information created by third parties." *Id.* at 418. And the plaintiffs' claims, though couched in terms of "failure to implement basic safety measures to protect minors," were "merely another way of claiming that MySpace was liable for publishing the communications" of third parties. *Id.* at 419–20. Accordingly, the Court held that these claims were barred by Section 230 "notwithstanding [the plaintiffs'] assertion that they only sought to hold Myspace liable for its failure to implement measures that would have prevented Julie Doe from communicating with [the sexual predator]." *Id.*

The Texas Court of Appeals in Beaumont came to the same conclusion in 2014 in *GoDaddy.com LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied). In *GoDaddy*, a class of women alleged that they were victims of non-consensual postings of pornographic images of themselves on two "revenge porn" websites that were hosted by GoDaddy. *Id.* at 753. The plaintiffs alleged that GoDaddy "knew of the content, failed to remove it, and then profited from the activity on the websites." *Id.* GoDaddy filed a Rule 91a Motion to Dismiss, arguing that it was immune from

civil liability under Section 230. The trial court denied the motion (*id.*), but the Court of Appeals reversed, finding that "[a]llowing [the] plaintiffs to assert any cause of action against GoDaddy for publishing content created by a third party, or for refusing to remove content created by a third party would be squarely inconsistent with section 230." *Id.* 758.

Finally, just 10 days ago, in *Daniel v. Armslist, LLC*, ---N.W.2d---, the Wisconsin Supreme Court reaffirmed that Section 230 bars any claim—"no matter how artfully pled," and even if allegedly based on an internet platform's "own actions"—where the claim turns on an allegation that the platform "provided an online forum for third-party content and failed to adequately monitor that content." 2019 WL 1906193, at *11 (Wisc. April 30, 2019). The Court employed this legal framework to hold that Section 230 barred claims by a shooting victim that the online gun merchant from which the shooter purchased the weapon had deliberately designed its website to enable "prohibited persons" such as the shooter (i.e., persons prohibited by law from possessing a firearm) to avoid federal background checks and waiting periods by guiding them to the "private sale" option, which did not include those restrictions. The plaintiff argued, and the mid-level Wisconsin appellate court agreed, that Section 230 did not apply because plaintiff was challenging the website's "own conduct in facilitating user activity" through the design of its site, not the underlying content of the advertisements. *Daniel v. Armslist*, 913 N.W.2d 211, 214 (2018). The Wisconsin Supreme Court reversed, holding that the Court of Appeals' reading did not give effect either to the plain language of Section 230, or to the many judicial decisions construing it. The Court noted that the purpose of Section 230 was to "prevent[] the specter of tort liability from undermining an interactive computer service provider's willingness to host third-party content." *Id.* Because all of the plaintiffs' claims

"require[d] Armslist to be treated as the publisher or speaker of information posted by third parties on armslist.com, her claims are barred by § 230(c)(1)."[4]

In short, both the text of Section 230 and all relevant precedent are clear: Section 230 provides broad immunity to internet service providers for state law claims stemming from their publication of information created by third parties. Because Plaintiffs' claims against Facebook stem entirely from content created by third parties, this Court should dismiss Plaintiffs' claims against Facebook under Section 230. Plaintiffs have cited no authority for holding otherwise. And, the arguments Plaintiffs presented at the hearing in an effort to justify a departure from over two decades of Section 230 precedent should be rejected for the reasons set forth below.

C. Plaintiffs' Claims Are Inconsistent with Section 230 Even Under the 2018 Amendments to Section 230

In addition to asking the Court simply to ignore decades of adverse precedent, Plaintiffs contend that this precedent no longer applies because their claims are now allowed by the 2018 Amendments to Section 230 in the Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA"). But the amendments in FOSTA only further confirm that Section 230 bars private civil actions under state law, including the claims against Facebook in these cases.

As noted in Facebook's reply, Congress enacted FOSTA in response to overwhelming information presented by advocacy groups and affected parties to document and highlight the growing problem of child trafficking. Presented with extensive evidence regarding the proliferation of child

[4] Plaintiffs' response briefs relied on the Wisconsin Court of Appeals decision that this case reversed. Resp. 16. Just two days ago, Eric Goldman, a well-regarded expert on Section 230 and Professor of Law and Director of the High Tech Law Institute in Santa Clara University, wrote that the Wisconsin Supreme Court had "corrected" a "bizarre opinion" from the Wisconsin intermediate court to "restor[e] sanity to Wisconsin's Section 230 jurisprudence." E. Goldman, *Wisconsin Supreme Court Fixes a Bad Section 230 Opinion—Daniel v. Armslist*, TECH. & MARKETING LAW BLOG (May 7, 2019), https://blog.ericgoldman.org/archives/2019/05/ wisconsin-supreme-court-fixes-a-bad-section-230-opinion-daniel-v-armslist.htm.

trafficking on the internet—and after much discussion and compromise—Congress amended both the underlying federal substantive law and Section 230 to address the problem.

The 2018 amendments added three exemptions to the immunity created by Section 230:

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

Crucially, ***none*** of these exemptions applies to state-law civil actions brought by private plaintiffs.

Despite Congress's enacting of three express exemptions and its failure to enact an exemption covering state-law civil claims, Plaintiffs ask this Court to read into FOSTA an *implied* exemption for state-law civil claims brought by private plaintiffs. *See* Hearing Tr. at 51:4–10, 54:12–18. Plaintiffs point to the language in section (e)(5) that states that Section 230 does not bar enforcement of "any State law that is consistent with this section"—language that, notably, has been in the statute since the inception. They argue that this language applies because FOSTA created an exemption for federal civil claims to enforce the federal anti-trafficking statute and Texas's anti-trafficking statute is substantively "very similar to the federal" anti-trafficking statute. Hearing Tr. at 51:8–9. Thus, Plaintiffs contend, their state-law claims are "consistent with" Section 230 and therefore not barred. *See* Ps' Resp. Br. at 28–30.

This argument fails for three reasons. ***First***, FOSTA did not create an exemption to Section 230 for state-law civil claims, and where Congress has expressly created a limited number of exceptions

to a statute, it is "inconsistent with" the statute for a court to create additional exceptions by implication. *See* 47 U.S.C. § 230(e)(3). As noted above, Congress created three express exemptions to Section 230 for human-trafficking claims: one for a federal civil claim; one for certain state criminal prosecutions; and one for certain state-law civil actions brought in *parens patriae* by state attorneys general. Congress did ***not*** create a fourth exemption for state-law civil claims brought by private plaintiffs. The "meticulous … enumeration of exemptions" in FOSTA "confirms that courts are not authorized to create additional exceptions." *See Law v. Siegel*, 571 U.S. 415, 424 (2014); *accord Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (the existence of an "express exception" "precludes the [creation] of implicit" exceptions); *see also Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

Second, the legislative history of FOSTA shows that Congress's omission of any exemption for state civil actions such as this one was no accident. The original version of the Bill that became FOSTA, introduced in April 2017, would have included a broad exemption that expressly carved out from the scope of Section 230(e) "any other Federal or State law that provides a cause of action, restitution, or other civil remedies to victims of [trafficking]." *See* H.R. 1865 115th Cong. (1st Sess. 1997). But a year later, when Congress enacted FOSTA, Congress ***dropped*** the exemption for state civil claims**.** In other words, Congress expressly considered the very exemption to Section 230 that Plaintiffs now ask the Court to create—an exemption for civil actions under state law brought by private plaintiffs—but rejected such a provision in the final version of FOSTA. It would be inappropriate for this Court (or any court) to amend the statute judicially to create an exception that Congress considered and rejected. *See Camacho v. Samaniego*, 831 S.W.2d 804, 814 (Tex. 1992) ("The deletion of a provision in a pending bill discloses the legislative intent to reject the proposal." (quoting *Smith v. Baldwin*, 611 S.W.2d 611, 616–17 (Tex. 1980))); *Russello v. United States*, 464 U.S. 16, 24–25 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to

enactment, it may be presumed that the limitation was not intended."). If Congress had wanted to create an additional exception to Section 230 for civil claims by private plaintiffs under state anti-trafficking statutes, it would have written that exception into FOSTA.

Finally, with no exemption for Plaintiffs to fall back on, it is clear that their claims against Facebook in this case are "inconsistent with this section" within the meaning of 47 U.S.C. § 230(e)(3) because those claims would hold Facebook liable for harm allegedly caused by third-party content and are therefore barred by 47 U.S.C. § 230(c)(1). If section (c)(1) did not, by its terms, bar civil claims against interactive computer service providers under these anti-trafficking statutes, there would have been no reason for Congress to create the express carve-out in section (e)(5)(A) for civil claims to enforce the ***federal*** anti-trafficking statute. Plaintiffs concede that their state-law claims are "very similar to the federal civil remedy for human trafficking" (Hearing Tr. at 51:8–9) for which Congress chose to create a statutory exemption. But Congress chose not to create a similar exemption for private state civil claims. Any attempt to override that choice and allow Plaintiffs to proceed with their claims against Facebook would be inconsistent with the immunity created by Section 230 and the carefully crafted remedial scheme that Congress created with FOSTA.

D. The Express Preemption Provision in Section 230 Preempts All of Plaintiffs' Claims, Including Their Common Law Claims

At the hearing, Plaintiffs argued that—despite 22 years of contrary precedent—Section 230 does not preempt state law claims because its preemption provision is not sufficiently "specific" and there should be a "presumption" against preemption in this context. Hearing Tr. 40:16-19. But Section 230(e)(3) is an express preemption provision, and where, as here, a "statute contains an express preemption clause,' [courts] do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent,'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011)). And in any event, there is no need for a

"presumption" here because, as multiple courts have held, the plain wording of Section 230 could not be clearer: "***no*** cause of action may be brought and ***no*** liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3) (emphasis added). Given this unambiguous language, the Court need not employ any presumption for or against preemption—if a state-law cause of action is "inconsistent with" Section 230 (as all of Plaintiffs' causes of action are), it is necessarily preempted. *See Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018) ("[T]he best course is simply to follow as faithfully as we can the wording of the express preemption provision, without applying a presumption one way or the other.").

Equally unavailing is Plaintiffs' argument that Section 230(e)(3) does not preempt her non-statutory claims because it does not use the phrase "common law" or state "a specific state act [that] is being preempted." Hearing Tr. 40:16-19; 45:1-5. That argument fails for two reasons. First, the Beaumont Court of Appeals has already found that Section 230 preempts Texas statutory and common law. *See e.g.*, *GoDaddy*, 429 S.W.3d at 756 ("We recognized that [Section 230] 'overrides the traditional treatment of publishers, distributors, and speakers under *statutory and common law*.'" (emphasis added) (quoting *Milo v. Martin*, 311 S.W.3d 210, 214–15 (Tex. App.—Beaumont 2010, no pet.)). Plaintiffs lean heavily on the fact that these decisions are not formally binding on this Court, but a Texas court "should not ignore a case in point from a sister court," *Eubanks v. Mullin*, 909 S.W.2d 574, 576 (Tex. App.—Fort Worth 1995, no writ).

Second, Plaintiffs' argument runs counter to precedent construing other federal preemption statutes, none of which has adopted the kind of "magic words" requirement Plaintiffs ask this Court to require. The phrase "common law" does not appear in the text of ERISA's preemption provision, *see* 29 U.S.C. § 1144(a), and "ERISA preempts state common law causes of action," *Colo. v. Tyco Valves & Controls, L.P.*, 432 S.W.3d 885, 891 (Tex. 2014) (quotation marks and citations omitted)). Likewise, that phrase does not appear in the preemption provision of the Airline Deregulation Act, yet the

Supreme Court had "little difficulty rejecting th[e] argument" that ADA preemption does not apply "to a common-law rule," *Northwest., Inc. v. Ginsberg*, 572 U.S. 273, 281 (2014). The same is true of the preemption provision in the Federal Cigarette Labeling and Advertising Act: the phrase "common law" does not appear in the statute, *see* 15 U.S.C. § 1334, and the statute "easily encompass[es]" certain "obligations that take the form of common-law rules," *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992). As these cases make clear, Congress meant exactly what it said: "***no*** cause of action may be brought and ***no*** liability may be imposed"—by state statute, common law, or otherwise—that is inconsistent with Section 230. 47 U.S.C. § 230(e)(3) (emphasis added).

III. CONCLUSION

For all of the reasons stated herein, Facebook respectfully asks this Court to grant its Motions to Dismiss Pursuant to Rule 91a.

Dated: May 10, 2019

Respectfully submitted,

/s/ Russ Falconer

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th of May, 2019, this document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Russ Falconer
Russell H. Falconer

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NO. 2018-69816

Jane Doe	§	IN THE DISTRICT COURT OF
	§	
vs.	§	HARRIS COUNTY, TEXAS
	§	
Facebook, Inc; et al	§	334th JUDICIAL DISTRICT

NO. 2018-82214

Jane Doe,	§	IN THE DISTRICT COURT OF
	§	
vs.	§	HARRIS COUNTY, TEXAS
	§	
Facebook, Inc., dba Instagram, Inc. et al	§	334th JUDICIAL DISTRICT

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*, 841F.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 pre-dated 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:
5/23/2019

STEVEN KIRKLAND
Judge Presiding

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District Clerk
MAY 22 2019
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CAUSE NO. 2018-69816

JANE DOE,	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
vs.	§	**HARRIS COUNTY, TEXAS**
FACEBOOK, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHWEST FWY, HOUSTON, TX 77074; and TEXAS PEARL., INC.,	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

CAUSE NO. 2018-82214

JANE DOE,	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
vs.	§	**HARRIS COUNTY, TEXAS**
FACEBOOK, INC. d/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

DEFENDANT FACEBOOK INC.'S AMENDED MOTION FOR RECONSIDERATION

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Subject to and without waiving its previously-filed Special Appearance to Contest Personal Jurisdiction, Defendant Facebook Inc. ("Facebook") moves for reconsideration of the Court's May 23, 2019 order denying Facebook's motion to dismiss under Rule 91a (the "Order").[1]

INTRODUCTION

Facebook asks that the Court reconsider its Order denying Facebook's Rule 91a motion to dismiss Plaintiffs' claims pursuant to Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"). The Court denied Facebook's motion on the grounds that Plaintiffs' petitions include claims based on an alleged duty to warn, the cases cited by Facebook did not specifically address claims under the Texas anti-trafficking statute, and those cases also pre-dated Congress's recent amendments to Section 230 through the Allow States And Victims To Fight Online Sex Trafficking Act of 2017 ("FOSTA"), Pub. L. 115-164, Apr. 11, 2018, 132 Stat. 1254, § 4 (codified at 47 U.S.C. § 230(e)(5)(A)). Order at 2.

Facebook respectfully submits that the Court erred on these points for the following reasons:

First, multiple cases have held that Section 230 applies to duty to warn claims, just as it does to the myriad other legal theories parties have offered in an effort to avoid the scope of Section 230. The critical question in deciding whether a claim is barred by Section 230 is not how the plaintiff's cause of action is styled, but rather whether the plaintiff's legal theory necessarily seeks to hold a defendant liable for third-party content transmitted or posted through the defendant's internet platform. Where the claim turns on third-party content, Section 230 applies, even if the claim is phrased in terms of something that the defendant should have done differently—such as monitoring content on the platform, implementing different policies or protocols to prevent bad actors from

[1] Concurrently with this motion, Facebook is filing a motion in the alternative for permission to take an interlocutory appeal from the Court's Order.

using the platform, or warning users that bad actors may transmit harmful content or use the platform for harmful purposes. And Plaintiffs' duty to warn theories—like their assertions that Facebook failed to monitor or take down content or to design its platform to prevent harmful communications—necessarily turn on the assertion that Plaintiffs were harmed by third-party content transmitted via the Facebook or Instagram platforms.

Second, like the duty to warn claim, Plaintiff's claim under the under the Texas anti-trafficking statute is barred by Section 230 because, again, it necessarily turns on the alleged use of Facebook's platform by bad actors to transmit harmful content relating to Plaintiffs. Courts have held that nearly identical statutory claims asserted against platforms are barred by Section 230.

Third, FOSTA does not change the applicability of Section 230 to Plaintiff's claims. With FOSTA, Congress created limited exceptions to Section 230 for a newly-created federal civil cause of action for sex trafficking, and for certain other non-civil proceedings and state Attorney General actions, but it created no such exception for state private civil actions such as this one.

In light of these considerations, Facebook respectfully submits that the Court should amend its Order to grant Facebook's motion pursuant to Rule 91a.

ARGUMENTS AND AUTHORITIES

The Court should reconsider its Order because its reasons for finding that Section 230 does not apply were mistaken. This Court has plenary power to reconsider interlocutory orders at any point before a final judgment is signed. *Callaway v. Martin*, 2017 WL 2290160 at *3 n.3 (Tex. App.—Fort Worth 2017, no pet.); *see also Flagstar Bank, FSB v. Walker*, 451 S.W.3d 490, 504 (Tex. App.—Dallas 2014, no pet.) ("[A] trial court has the inherent right to change or modify any interlocutory order or judgment until the judgment on the merits of the case becomes final."). Facebook respectfully submits that the Court erred in its application of Section 230 to these cases, and requests that it reconsider its Order and grant Facebook's motion to dismiss under Rule 91a.

The Court's Order offers several reasons for denying Facebook's motion. The Order first concludes that "the failure to warn cause of action presented in this case mirrors that presented in the 9th Circuit case" of *Doe v. Internet Brands*, 824 F.3d 846 (9th Cir. 2016). Order at 2. It further notes that none of the cases cited by the parties specifically addresses the statutory cause of action at issue here, and that all of these cases pre-date the FOSTA amendments that Congress adopted in 2018. Finally, the Order notes that the Texas cases that have addressed Section 230, and on which Facebook relied, "come out of the Beaumont Court of Appeals" and do not "deal with the same causes of action or facts as are presented in this case." Order at 2. As shown below, these reasons do not, either individually or together, support the conclusion that Facebook is not entitled to immunity under Section 230.

I. Section 230 immunity applies regardless of the specific cause of action alleged when the claims seek to hold the defendant liable for third-party content

Section 230 bars the types of civil claims asserted in these cases because they seek to hold Facebook liable as the publisher or speaker of third-party content. Plaintiffs do not allege any involvement by Facebook in the acts of violence that Plaintiffs suffered at the hands of the unnamed traffickers and assailants who injured them. Rather, they seek to hold Facebook liable for the fact that communications by some of these perpetrators were transmitted on the Facebook or Instagram platforms, including under theories that Facebook failed to verify the identity of Facebook and Instagram users; to engage in sufficient monitoring of messages, including detecting "red flags" such as the words used by the other user; or to warn Plaintiffs about, block, or remove the content that the traffickers allegedly created and transmitted on the Facebook or Instagram platforms. Third Am. Pet. (Case No. 2018-69816) ¶¶ 201–210; Second Am. Pet. (Case No. 2018-82214) ¶¶ 213–22. All of these claims necessarily depend on communications by third parties on Facebook or Instagram—not on messages or content created by Facebook or Instagram, and not on any offline conduct by Facebook.

Courts across the country, both state and federal, have held that Section 230 immunizes online

platform providers such as Facebook from claims, however styled, where the plaintiff alleges that a third party used the defendant's platform to communicate harmful content generated by that third party. As one court recently put it, such a claim "derives from [the platform's] role as a publisher and is therefore prohibited by § 230(c)(1), no matter how artfully pled." *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 726 (Wis. 2019); *see also Doe v. MySpace, Inc.*, 528 F.3d 413, 419–20 (5th Cir. 2008) (claims couched in terms of "failure to implement basic safety measures to protect minors" online were "merely another way of claiming that [the defendant] was liable for publishing the communications" of third parties). Because Plaintiff's underlying theory of liability necessarily seeks to hold Facebook liable for the communication of third-party messages, Section 230 immunity applies.

The Court's Order notes that the cases from the Beaumont Court of Appeals construing Section 230 do not "deal with the same causes of action or facts as are presented in this case." Order at 2. But as courts universally have recognized, immunity under Section 230 does not turn on the specific causes of action a plaintiff has pled. Rather, "[w]hat matters" for Section 230 is not the "label[]" placed on the claim but "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101–03 (2009); *see also GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 758 (Tex. App.—Beaumont 2014, pert. Denied) ("Allowing [the] plaintiffs to assert any cause of action against GoDaddy for publishing content created by a third party, or for refusing to remove content created by a third party[,] would be squarely inconsistent with section 230.");[2] *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) ("[Plaintiff's] effort to circumvent the CDA's protections through 'creative' pleading fails, and the district court did not err in granting Yelp's motion to dismiss."); *MySpace,* 528

[2] That these cases issued from the Beaumont Court of Appeals does not make them any less deserving of this Court's attention: a Texas court "should not ignore a case in point from a sister court," *Eubanks v. Mullin*, 909 S.W.2d, 574, 576 (Tex. App.—Fort Worth 1995, no writ).

F.3d at 420 (Section 230 applied "notwithstanding [the plaintiff's] assertion that they only sought to hold Myspace liable for its failure to implement measures that would have prevented Julie Doe from communicating with [the sexual predator]"); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) (Section 230 bars claim that depends on the assertion that the online service was used as an "intermediar[y]" for "other parties' potentially injurious messages"); *Gibson v. Facebook, Inc.*, Cause No. 6:19-CV-00169, Order Granting Defendants' Motion to Dismiss with Prejudice (Dkt. No. 7) (W.D. Tex. June 3, 2019) (plaintiff's claim against Facebook for "fail[ing] to enforce its own safety polic[y] that requires it to monitor and delete harmful content" was barred by Section 230); *Murphy v. Twitter, Inc.*, Case No. CGC-19-573712 (Cal. Super. June 14, 2019) (plaintiff cannot avoid Section 230 by recasting claims as "breach of contract, promissory estoppel, and unfair competition"); *Grossman v. Rockaway Twp.*, 2019 N.J. Super. Unpub. LEXIS 1496, *11–*12, *38–*39 (June 10, 2019) (Section 230 applied to a products-liability claim based in part on the allegation that the online platform "[f]ail[ed] to have adequate warnings on the product").

Under these cases—including the applicable Texas cases—Section 230 bars all of Plaintiffs' claims against Facebook because each of those claims seeks to hold Facebook liable based on allegedly harmful third-party content published on the Facebook or Instagram platform. A contrary reading would frustrate Congress's purposes in enacting Section 230. *See generally Klayman v. Zuckerberg*, 753 F.3d 1354, 1355 (D.C. Cir. 2014).

II. Section 230 immunity applies to failure to warn claims that turn on the risk of harm created by third-party content and Internet Brands does not hold otherwise

The Court's suggestion that Section 230 does not apply to failure to warn claims is incorrect. The Second Circuit reached precisely that conclusion earlier this year in affirming the dismissal of failure to warn claims in *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579 (S.D.N.Y. 2018). In that case, as here, the plaintiff alleged a "failure to warn claim—also pleaded as products liability and negligence—based on Grindr's failure to warn that the app can be used as a tool for harassment and

that Grindr has limited ability to stop abuse." The district court held the claim barred by Section 230, reasoning that, to the extent that the plaintiff had "identified a defect in Grindr' design or manufacture or a failure to warn," those alleged flaws were "inextricably related to Grindr's role in editing or removing offensive content—precisely the role for which Section 230 provides immunity." *Id.* at 588. The court reasoned that the duty to warn claim necessarily required reference to the harmful third-party content itself, *id.* at 591, and moreover, requiring the platform to provide warnings would be no different functionally from requiring it to monitor or edit the content—either way, the claim would require a court to treat the platform as a publisher, *id.* at 591-92.

The district court in *Herrick* found *Internet Brands* inapplicable because, in *Internet Brands*, the alleged duty to warn claim had nothing to do with user-generated content: "[t]he bad actors … did not post any content to the website," they "contacted Doe offline," and there was "no allegation that [the defendant] transmitted any potentially harmful messages between … Doe and the [two men.]" 306 F. Supp. at 592 (alterations the court's). By contrast, the court held, the duty to warn claim in *Herrick* turned on user-generated content—harmful profiles and communications on the platform directed to the plaintiff—and also would result in dictating the platform's execution of its editorial functions. *Id.* Accordingly, the court held, *Internet Brands "*does not apply" to the duty to warn claims. *Id.* The Second Circuit affirmed, agreeing with the district court that the failure to warn claim, unlike that in *Internet Brands*, was "inextricably linked" to the claim that the defendant failed to edit, monitor, or remove the offensive content. *Herrick v. Grindr, LLC*, 765 F. App'x 586, 591 (2d Cir. 2019).

The Third Circuit reached a similar conclusion with respect to duty to warn claims in *Oberdorf v. Amazon.com Inc.*, —F.3d—, 2019 WL 2849153, at *12 (3d Cir. July 3, 2019). In *Oberdorf*, a pet owner was injured by a dog collar that she purchased pursuant to a third-party listing on Amazon.com. *Id.* at *1. She sued Amazon, alleging, among other claims, that Amazon failed to supplement the listing with warnings about the dog collar. *Id.* at *10. The court held the duty to warn claims barred by

Section 230 to the extent they rested on allegations "that Amazon failed to provide or to edit adequate warnings regarding the use of the dog collar," because that alleged activity "falls within the publisher's editorial function." *Id.* at *11. The court reasoned that such "failure to warn claims are barred by the CDA" because they would penalize Amazon for "fail[ing] to add necessary information to content o[n] the website." *Id.* at *12. As these cases show, Section 230 bars *any* claim that depends on third-party content that was transmitted via an online platform, whether the claim is styled as failure to monitor, failure to warn, failure to censor or edit, simple negligence, or any other theory. *See*, *e.g.*, *Herrick*, 765 Fed. Appx. at 590; *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Jones v. Dirty World Entertainment Recordings LLC*, 775 F.3d 398, 406-09 (6th Cir. 2014); *Daniel v. Armslist, L.L.C.*, 926 N.W.2d 710, 726 (Wisc. 2019).[3]

As the courts in *Herrick* made clear, *Internet Brands* does not create an exception to Section 230 for failure to warn claims. It held only that Section 230 does not apply where the alleged duty to warn does not arise from or relate to third-party content. *See Internet Brands*, 824 F.3d at 851. In *Internet Brands*, the plaintiff, an aspiring model, posted a profile on a modeling website. 824 F.3d at 846. Two predators found the profile, contacted her, lured her into a fake modeling audition, drugged her, and raped her. *Id.* at 848–49. There was no allegation that the predators posted anything on the platform or that the platform "transmitted any potentially harmful messages between Jane Doe" and the predators. *Id.* Accordingly, the plaintiff's duty to warn claims did not implicate any aspect of the platform's function as a platform for the publication of third-party content and for that reason Section 230 did not bar the claims. By contrast, in this case, as in *Herrick* and *Oberdorf*, the duty to warn claims do turn on third-party content—namely, the risk of harmful messages and posts that Plaintiffs allege

[3] *See also Estate of McCoy v. Will*, Case No. 15-CV-7342 (Wis. Cir. Ct. May 9, 2018) (claims alleging failure to investigate, vet, edit, or remove third party content was barred by Section 230); *Bell v. Care.com*, 2016 WL 12583333 at *4 (Neb. Dist. Ct. Mar. 22, 2016) (claim premised on failure to screen third-party content barred by Section 230).

were transmitted by their assailants and traffickers over the Facebook and Instagram platforms. As in *Herrick* and *Oberdorf*, those duty to warn claims—like Plaintiffs' claims for failure to monitor, failure to implement safety measures, failure to take down or censor content, and simple negligence—are barred by Section 230.

Nor would an exception to Section 230 for duty to warn claims comport with the rationale of the statute. Where the alleged duty is to warn about risks created by third-party content—such as users' profiles, posts, messages, or requests on Facebook's platforms—it is "inextricably linked to [the website's] alleged failure to edit, monitor, or remove the offensive content." *Herrick*, 765 Fed. Appx. at 591. A duty to warn about third-party content necessarily entails a duty to monitor third-party content (to locate content that should be the subject of a warning) or a duty to screen out content that would trigger a warning. And claims based on "failure to warn" about offensive third-party content ultimately reduce to claims that the website should be liable for publishing the content without a warning. Imposing liability on that basis unavoidably treats the website "as the publisher or speaker of … information provided by [third parties]," contrary to the mandate of Section 230.

Courts repeatedly have refused to allow Section 230 to be circumvented in this way. Section 230 "is implicated not only by claims that explicitly point to third-party content but also by claims which, though artfully pleaded to avoid direct reference, implicitly require recourse to that content to establish liability." *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150 (N.D. Cal. 2017) (brackets omitted) (quoting *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156 (E.D.N.Y. 2017)).[4]

[4] *Huon v. Denton*, the other case cited in the Order, is inapposite. 841 F.3d 733 (7th Cir. 2016). In that case, the Seventh Circuit held that Section 230 does not immunize an internet service provider from claims arising out of content posted on its website by its own employees, because in that context the defendant is an "information content provider" to which Section 230 does not apply. *See id.* at 742–43. *Huon* is inapplicable here. Plaintiffs have not (and could not have) alleged that Facebook or any of its employees created or developed any of the allegedly harmful messages that led to their injuries. And allegations that Facebook's warnings were inadequate also does not make this case about Facebook-generated content, because the liability that Plaintiffs allege still flows from the third-party content to which the warnings would relate. *Herrick*, 765 F. App'x. at 591.

III. Section 230 applies to claims brought under the Texas anti-trafficking statute

For the same reasons, the Court's observation that there are no cases applying Section 230 to claims under the Texas anti-trafficking statutes is not a reason for denying Facebook's motion. For Section 230 purposes, statutory claims of this sort are no different from the other legal theories discussed above: to the extent they turn on a defendant's alleged role in allowing third-party content to appear on its platform or to be transmitted via its messaging service, they are barred by Section 230. In fact, the First Circuit held that Section 230 barred claims brought under a very similar Massachusetts anti-trafficking statute. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (2d Cir. 2016).[5] The court found that Section 230 immunity applied because "third-party content … appears as an essential component of" the plaintiff's claims and the claims therefore treated the defendant "as the publisher or speaker of content provided by third parties." *Id.* at 22 & n.7. That the claims were based on a statute, as opposed to the common law, was immaterial.

Here, Plaintiffs concede that the Texas anti-trafficking statute "tracks the language of the federal human trafficking statute—Sections 1591 and 1595 of Title 18." Plaintiff's Responses to Rule 91a Motion to Dismiss at 29; *see also* Hearing Tr. at 43:19–23 ("our human trafficking statute, is very, very similar to the federal human trafficking statute"). Before Congress amended Section 230 through FOSTA in 2018 (the FOSTA amendments are discussed in more detail below), federal courts had held that Section 230 barred claims against internet platforms under the federal anti-trafficking law. *See Jane Doe No. 1*, 817 F.3d at 18–24; *M.A. ex rel P.K. v. Village Voice Media Holdings*, 809 F. Supp. 2d 1041, 1048–50 (E.D. Mo. 2011). Indeed, one of Congress's main changes to Section 230 in FOSTA was to exempt federal anti-trafficking claims from Section 230 (an exception that, as discussed below, does not extend to private civil claims under state anti-trafficking statutes). *See* 47 U.S.C. § 230(e)(5)(A).

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[5] *Compare* Mass. Gen. Laws ch. 265, § 50(d), with Tex. Civ. Prac. & Rem. Code § 98.002(a).

Congress thus acknowledged that, absent such an exemption, Section 230 immunity would bar state statutory anti-trafficking claims.

IV. The FOSTA amendments confirm that Plaintiffs' claims are barred

The Court's Order next notes that the cases Facebook cited "pre-dated the amendments adopted in 2018" through FOSTA. Order at 2. That is true, but FOSTA only confirmed that Section 230 bars private civil actions under state law, including the claims against Facebook here. Section 230 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). As explained above, any claim that treats an online platform as the publisher or speaker of third-party content is inconsistent with Section 230 unless an exemption applies. *See supra* § I.A.

FOSTA created three exemptions to Section 230: one for certain federal civil causes of action; one for *parens patriae* claims brought by state Attorneys General; and one for certain types of state-law criminal prosecutions. *See* FOSTA § 4, 47 U.S.C. § 230(e)(5); *see also* Facebook's Post-Hearing Mem. at 7–8.

Crucially, FOSTA did *not* create an exemption for state law civil actions brought by private plaintiffs, and where, as here, a statute contains an express "enumeration of exemptions," the "courts are not authorized to create additional exceptions," *Law v. Siegel*, 571 U.S. 415, 424 (2014). In fact, Congress considered and rejected a version of FOSTA that would have added a broad exemption for state-law civil claims, further showing its intent that immunity under Section 230 continue to bar such claims. *See* Facebook's Post-Hearing Memo at 9–12. Congress's rejection of an exception to Section 230 that would have applied here confirms that Section 230 continues to apply to the instant claims.

PRAYER

Defendant respectfully requests that the Court reconsider its May 23, 2019 Order and grant Facebook's motion to dismiss pursuant to Rule 91a.

Dated: August 1, 2019

Respectfully submitted,

/s/ Kristin A. Linsley

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2019, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Russ Falconer
Russell H Falconer

I

CAUSE NO. 2018-69816

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHWEST FWY, HOUSTON, TX 77074; and TEXAS PEARL., INC.,	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

CAUSE NO. 2018-82214

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC. d/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

DEFENDANT FACEBOOK INC.'S AMENDED MOTION
FOR PERMISSION TO TAKE AN INTERLOCUTORY APPEAL

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Subject to and without waiving its previously-filed Special Appearance to Contest Personal Jurisdiction, Defendant Facebook Inc. ("Facebook") moves for permission to take an interlocutory appeal of the Court's May 23, 2019 order denying Facebook's motion to dismiss under Rule 91a (the "Order"). In the alternative to its concurrently filed motion for reconsideration, Facebook respectfully requests that the Court amend the Order to allow Facebook to seek an interlocutory appeal.

INTRODUCTION

Concurrent with the filing of this motion, Facebook has filed a motion asking the Court to reconsider its Order denying Facebook's Rule 91a motion to dismiss Plaintiffs' claims pursuant to Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"). If this Court does not reconsider its Order, Facebook respectfully requests that the Court amend the Order with the findings necessary to allow Facebook to seek an interlocutory appeal from the Court of Appeals. *See* Tex. Civ. Prac. & Rem. Code § 51.014(d); Tex. R. Civ. P. 168.

The Section 230 issue raised by Facebook's motion is well-suited to resolution by an interlocutory appeal and meets all of the criteria for such treatment. The applicability of Section 230 is a controlling issue of law, there is "substantial ground for difference of opinion" as to whether the Court's resolution of that issue was correct, and an immediate appeal may result in the "ultimate termination of the litigation." *Id.* § 51.014(d)(2); Order at 1. Tex. Civ. Prac. & Rem. Code § 51.04(d)(1); *see also* Order at 2. More broadly, it makes sense for the Court of Appeals to evaluate the Section 230 issue at this stage. Section 51.014(d) reflects a "legislative intent favoring early, efficient resolution of determinative legal issues in [appropriate] cases." *See Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 732 (Tex. 2019).

Section 230 creates an immunity that, if applicable, will decide all of Plaintiffs' claims against Facebook, and Texas courts have long recognized that immunities should be addressed at the earliest stage of a case—as both the district court and the Beaumont Court of Appeals recognized in allowing

an interlocutory appeal of the Section 230 issue in *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 759 (Tex. App.—Beaumont 2014, pet. denied). Early resolution of the Section 230 issue also allows the Court of Appeals to provide guidance and direction on an important legal issue that will affect a number of similar cases pending in Texas trial courts.

ARGUMENTS AND AUTHORITIES

If the Court does not reconsider its ruling, it should amend the Order to allow Facebook to take an immediate interlocutory appeal. To promote efficiency and conserve resources, the Texas Legislature has provided for permissive interlocutory appeals of certain trial court orders. *See* Tex. Civ. Pract. & Rem. Code § 51.014(d); *Sabre Travel*, 567 S.W.3d at 733. Where, as here, the order at issue does not contain such permission for an interlocutory appeal, it "may be amended to include such permission." Tex. R. Civ. P. 168; *see also Heinrich v. Strasburger & Price, L.L.P.*, 2015 WL 5626507, at *1 (Tex. App.—Houston [1st Dist.] Sept. 24, 2015, no pet.). Once a trial court issues an order with permission to appeal, the Court of Appeals can decide whether to accept the case for interlocutory review. *Colvin v. B. Spencer & Associates*, P.C., 2015 WL 2228728, at *1 (Tex. App.—Houston [1st Dist.] May 12, 2015, no pet.).

The Texas Supreme Court has emphasized that permissive interlocutory appeals advance important public policies and has encouraged district courts to allow them where appropriate. *Sabre Travel*, 567 S.W.3d at 732–33 (section 51.014(d) evinces a "legislative intent favoring early, efficient resolution of determinative legal issues"). An interlocutory appeal allows the "parties and the courts [to] be spared the inevitable inefficiencies of the final judgment rule in favor of early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation." *Id.* at 733. "Indeed, the Legislature enacted section 51.014 to provide 'for the efficient resolution of certain civil matters in certain Texas courts' and to 'make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all

taxpayers.'" *Id.* Thus, "in many instances, courts of appeals should do exactly what the Legislature has authorized them to do—accept permissive interlocutory appeals and address the merits of the legal issues certified." *Id.*

Here, as in *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, all of the criteria for an interlocutory appeal are present, and allowing such an appeal would further all of these policies.

I. All three prerequisites to a permissive immediate interlocutory appeal are present here.

These cases satisfy each of the statutory requirements for an immediate interlocutory appeal. Section 51.014(d) provides that the Court may, "by written order, permit an appeal from an order that is not otherwise appealable if" three criteria are satisfied: (1) "the order to be appealed involves a controlling question of law;" (2) "there is a substantial ground for difference of opinion" as to that question of law; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Tex. Civ. Prac. & Rem. Code § 51.014(d). All of these factors are present here.

A. This Court's Order addresses a controlling question of law

As the Court recognized, the issue presented by Facebook's motion is a legal one, in that, "[a]t 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." Order at 1. The immunity provided by Section 230 is an absolute defense to liability and its availability is a pure question of law. *See, e.g.*, *GoDaddy.com*, 429 S.W.3d 752. Likewise, the preemption questions that are triggered by Section 230 immunity also are controlling questions of law appropriate for interlocutory appeal. *See Sabre Travel*, 567 S.W.3d at 733 (accepting interlocutory appeal to determine whether a federal statute preempted the plaintiff's state tort claim). And whether Section 230 applies is a "controlling" question because, if resolved in Facebook's favor, it would resolve all of Plaintiffs' claims against Facebook, as this Court recognized. *See* Order at 1.

B. There are substantial grounds for difference of opinion regarding the application of Section 230 to Plaintiffs' claims

Although the Court found against the application of Section 230 immunity, it acknowledged that the question was uncertain and that there are substantial authorities supporting a contrary result. The Court acknowledged that "[t]he language of the statute is broad and both parties have cited cases that support their positions." Order at 2. And the Court acknowledged that Facebook's position finds support in other cases, including, "among others," "*Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) ... and *Zeran v, America Online Inc.*, 129 F.3d 327 (4th Cir. 1997)." Plaintiffs themselves have acknowledged that the overwhelming weight of case law supports an outcome different from the one the Court reached in its Order. *See* Hearing Tr. at 53:12–54:11 ("We think *Zeran* and all of the cases following it were incorrectly decided …[a]nd there are a lot of them, and we acknowledge that."). And, as set out above, there are substantial authorities holding, contrary to the Court's conclusion, that duty to warn claims are covered by Section 230.

C. An interlocutory appeal may end this litigation

Finally, an immediate interlocutory appeal will materially advance the ultimate termination of the litigation, as the Order notes: "a ruling in Facebook's favor may end the case for Facebook." Order at 1; *accord GoDaddy.com*, 429 S.W.3d at 761 (dismissing all claims with prejudice under Section 230); *MySpace*, 528 F.3d at 415 (affirming dismissal of Texas-law claims under Section 230).

II. The Court should exercise its discretion to permit an interlocutory appeal

An immediate appeal here not only would satisfy the statutory criteria, but it would advance the legislative policies outlined above. At least three factors weigh heavily in favor of allowing an immediate appeal of the Section 230 issue.

A. An immediate appeal is essential to ensure that the immunity from suit that Section 230 creates will not be lost

Most importantly, immunities such as Section 230 are ideal candidates for interlocutory review

because an immunity, by its nature, should protect a defendant not just from liability but from having to stand trial—so that the question should be resolved at the outset of a case to prevent a defendant that is entitled to the immunity from having to litigate the case against it. That is precisely the nature of Section 230, which, "[b]y its plain language," creates "a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service," *Zeran*, 129 F.3d at 330, and which has been interpreted as not only an immunity from liability, "but also the right to be immune from being sued," *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 155 n.4 (D. Mass. 2015), *aff'd*, 817 F.3d 12 (1st Cir. 2016). For that reason, courts "aim to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from ultimate liability, but also from having to fight costly and protracted legal battles." *Nemet Chevrolet Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009).

The Texas Legislature has recognized in an analogous context the indispensable role that interlocutory appeals play in ensuring full vindication of a statutory right to be immune from suit. Under Texas law, officers and employees of the state enjoy official immunity from certain kinds of civil suits. *See generally Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 422–24 (Tex. 2004). The Legislature has provided for an interlocutory appeal of right from any order denying a motion for summary judgment on grounds of official immunity. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(5). As the Texas Supreme Court has explained, interlocutory appeals are a critical component of this immunity from suit because "[t]he very reasons for the grant of immunity are effectively unsalvageable if the official is determined to be immune from liability only after a trial on the merits." *Travis v. City of Mesquite*, 830 S.W.2d 94, 102 n.4 (Tex. 1992); *accord Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("an immunity from suit ... is effectively lost if a case is erroneously permitted to go to trial" (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The same policy concerns that led the Legislature to enact § 51.014(a)(5) weigh in favor of permitting an immediate interlocutory appeal in cases presenting

immunity questions under Section 230.

Other Texas courts agree. As noted above, in *GoDaddy.com*, after the district court denied the defendant's Rule 91a motion to dismiss under Section 230, the court amended its order to grant the defendant's motion for permission to appeal. *See* Petition for Order Permitting Interlocutory Appeal at iv–v, viii, *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied) (No. 09-13-1285-CV), available here. The Beaumont Court of Appeals then "granted GoDaddy's request to file an interlocutory appeal" and held that the defendant was entitled to immunity under Section 230. *GoDadd.com*, 429 S.W.3d at 753. To ensure that "the policies set forth in the CDA" receive the fullest protection in these cases, *see id.* at 761, this Court should follow the same path.

B. Concerns about judicial resources counsel in favor of permitting an immediate appeal

A single question of federal law controls whether this action and others like it will go forward. If the Court of Appeals holds that Section 230 applies to Plaintiffs' claims against Facebook, that ruling would fully resolve these cases as between Plaintiffs and Facebook and thereby "forestall burdensome and costly ... discovery," motions practice, expert reports, and trial. *See Sabre Travel*, 567 S.W.3d at 736. On the other hand, if the Court of Appeals were to accept the appeal and affirm the Court's Order, the parties and the Court could proceed towards trial without any uncertainty about how the Section 230 issue should be addressed.[1] Either way, "[t]he pure legal question at issue here is precisely the sort of question section 51.014(d) was enacted for." *Id.* Allowing an immediate appeal

[1] Furthermore, under Texas's proportionate responsibility scheme, "each defendant," "each settling person," and "each responsibility third party" who has been properly designated must be listed on the verdict form, and the jury must assign a percentage of responsibility to each one. *See* Tex. Civ. Prac. & Rem. Code § 33.003(a). It is not clear that a non-party may be listed on the verdict form and assigned a percentage of responsibility if that party is immune from liability. *See id.* § 33.004(g)(1); *see also Holland v. Lovelace*, 352 S.W.3d 777, 795 (Tex. App.—Dallas 2011, pet. denied); *but see Elliot v. Turner Const. Co.*, 381 F.3d 995, 1003 (10th Cir. 2004). If, after a trial, Facebook were held to be immune from liability under Section 230, that holding could necessitate a new trial with Facebook omitted from the verdict form.

of the Section 230 issue is the best way to minimize the risk of unnecessary trial proceedings.

C. The Section 230 issue presented here is relevant and important to a number of cases pending in Texas courts

Finally, this case involves an important question of law that will affect multiple cases pending in Harris County and elsewhere in Texas. Plaintiffs' counsel in this case have named Facebook as a defendant in three trafficking cases here in Harris County, and have brought similar trafficking claims against at least one other technology company in Harris and Nueces Counties.[2] The question whether Section 230 immunity bars these claims is a central issue in all of these cases. And there appears to be no appellate-level precedent in Texas or elsewhere on the question of how Section 230 applies to claims under state-law anti-trafficking statutes following the 2018 FOSTA amendments. In light of the recurring nature and exceptional importance of the Section 230 issue, an interlocutory appeal is warranted. *See, e.g.*, *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014) (the fact that an "appeal will permit the resolution of an unsettled legal question of general importance" weighs in favor of interlocutory review) (quotation omitted);*Coll. of Dental Surgeons of Puerto Rico v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 39 (1st Cir. 2009) (accepting an interlocutory appeal of an "important, unsettled, and recurrent" question that "[a]bsent an interlocutory appeal" would "in all probability escape meaningful appellate review").

An interlocutory appeal is particularly appropriate because the Order is in tension with several decisions from the Beaumont Court of Appeals. *See GoDaddy.com,* 429 S.W.3d at 759 ("Allowing [the] plaintiffs to assert any cause of action against GoDaddy for publishing content created by a third party, or for refusing to remove content created by a third party[,] would be squarely inconsistent with section 230."); *Davis v. Motiva Enterprises, L.L.C.*, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr.

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[2] *Jane Doe #4 v. Salesforce.com, Inc. et al.*, Cause No. 2018-12747 (Harris County); *Jane Doe #8 v. Salesforce.com, Inc. et al.*, Cause No. 2018-CCV-61041 (Nueces County).

2, 2015, pet. denied) (Section 230 barred plaintiff's negligence claims because the "theory of liability" was "based on [the defendant] allowing [a third party] access to the Internet … to publish fake Craig's List posts and failing to prevent those posts from being published"); *Milo v. Martin*, 311 S.W.3d 210, 215 (Tex. App.—Beaumont 2010, no pet.) (following *Zeran* and other federal cases that "applied section 230 broadly"). Allowing an immediate appeal would give the Houston Courts of Appeals the opportunity to address this conflict.

For all of these reasons, Facebook respectfully requests that the Court amend its Order to state that whether the application of Section 230 immunity applies to Plaintiffs' claims against Facebook is a controlling question of law about which there is a substantial ground for difference of opinion and that an interlocutory appeal will materially advance the ultimate termination of the litigation, and to provide that Facebook may petition the Court of Appeals for leave to file an immediate interlocutory appeal.

PRAYER

Defendant respectfully requests that the Court reconsider its May 23, 2019 Order and grant Facebook's motion to dismiss pursuant to Rule 91a or, in the alternative, amend the Order to grant permission for Facebook to petition the Court of Appeals for leave to file an immediate interlocutory appeal.

Dated: August 1, 2019

Respectfully submitted,

/s/ Kristin A. Linsley

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2019, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Russ Falconer
Russell H Falconer

J

No. 2018-69816

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc.; Michael Lacey;	§	Harris County, Texas
James Larkin; John Brunst;	§	
America's Inns, Inc. d/b/a America's	§	
Inn 8201 Southwest Freeway,	§	
Houston, TX 77074; and	§	
Texas Pearl, Inc.	§	334th Judicial District

No. 2018-82214

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc. d/b/a Instagram, Inc.;	§	Harris County, Texas
Backpage.com, LLC d/b/a Backpage;	§	
Carl Ferrer; Michael Lacey;	§	
James Larkin; John Brunst; and	§	
Babasai, Inc. d/b/a Siesta Inn	§	334th Judicial District

Plaintiff's Response to Amended Motion to Reconsider the Ruling on Facebook's 91a Motion to Dismiss

The Court denied Facebook's Rule 91a motion to dismiss after considering substantial pre and post-hearing briefing, lengthy oral argument, and innumerable legal authorities. It should deny Facebook's motion for reconsideration because:

(1) The Court does not have authority to reconsider its order denying Facebook's motion to dismiss under Rule 91a;

(2) Courts are never required to reconsider their prior rulings;

(3) Facebook mischaracterizes the Court's order; and

(4) Facebook has not raised any new arguments in support of its motion.

First, Rule 91a sets specific deadlines for motions, responses, and rulings, all of which have long since passed. In particular, "[a] motion to dismiss must be . . . granted or denied within 45 days after the motion is filed." Tex. R. Civ. P. 91a.3(c). The Court granted Facebook's motion to enlarge the time for that ruling until May 24, 2019.[1] Any ruling on Facebook's Rule 91a motion therefore had to be entered by that date, and Facebook should not be permitted to reset the statutory deadlines under the guise of reconsideration. While courts generally have power to reconsider their prior rulings, they may not do so in direct violation of the rules of procedure. *See In re Med. Carbon Research Inst., L.L.C.*, 14-07-00935-CV, 2008 WL 220366, at *1 (Tex. App.—Houston [14th Dist.] Jan. 29, 2008, no pet.) (noting that procedural rules do not permit reconsideration of motions to transfer venue).

Second, courts are not required to reconsider their prior rulings and may deny motions for reconsideration without considering their substance.

[1] *See* Order of May 14, 2019.

E.g., *Oceanografia, S.A. de C.V.*, 492 S.W.3d 330, 337 n.6 (Tex. App.—Corpus Christi 2014, orig. proceeding) (denial of forum non conveniens), *rev'd on other grounds*, 494 S.W.3d 728 (Tex. 2016); *PNP Petroleum I, LP v. Taylor*, 438 S.W.3d 723, 729-30 (Tex. App.—San Antonio 2014, pet. denied) (summary judgment); *Elec. Data Sys. Corp. v. Tyson*, 862 S.W.2d 728, 737 n.5 (Tex. App.—Dallas 1993, orig. proceeding) (sanctions order); *J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Whittington*, 843 S.W.2d 77, 87 n.9 (Tex. App.—Dallas 1992, orig. proceeding) (no right to reconsider ruling requiring production of documents claimed to be privileged).

Third, Facebook mischaracterizes the Court's reasons for denying its motion and then argues those reasons were "mistaken." While the order makes several observations about the issues involved, it does not purport to explain the basis of the ruling. And it certainly does not make the sweeping pronouncements Facebook attributes to it. In particular, the Court's observation that "the failure to warn cause of action presented in this case mirrors that presented in the 9th Circuit case" is not a conclusion, as Facebook asserts, that Section 230 can never apply to failure to warn claims. *See* Amended Motion for Reconsideration at 3-8.

Finally, Facebook does not raise any new arguments. Rather, it repeats its previous positions that Jane Doe's claims are based on third-party content and that the 2018 amendments to Section 230 did not create an "exception for state private civil actions." Both of those positions are wrong for the reasons explained at length previously. And Facebook has wholly failed to address the issue of preemption, which it must establish to prevail under Section 230.

Prayer

Jane Doe respectfully request that the Court deny Facebook's amended motion to reconsider the Court's denial of Facebook's Rule 91a motion to dismiss without explanation, and that the Court grant Jane Doe any other relief to which she is entitled.

Respectfully submitted,

/s/ Annie McAdams

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Certificate of Service

I certify that on September 11, 2019, true and correct copies of the foregoing document were served via ProDoc EFiling service and email on the following counsel of record:

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No. 2018-69816

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc.; Michael Lacey;	§	Harris County, Texas
James Larkin; John Brunst;	§	
America's Inns, Inc. d/b/a America's	§	
Inn 8201 Southwest Freeway,	§	
Houston, TX 77074; and	§	
Texas Pearl, Inc.	§	334th Judicial District

Order

Defendant Facebook, Inc.'s motion to reconsider the Court's order of May 23, 2019 denying its motion to dismiss under Rule 91a is hereby DENIED.

SIGNED this _____ day of _____, 2019.

Signed:
9/16/2019

Hon. Steven Kirkland,
Judge Presiding

MR243

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No. 2018-69816

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc.; Michael Lacey;	§	Harris County, Texas
James Larkin; John Brunst;	§	
America's Inns, Inc. d/b/a America's	§	
Inn 8201 Southwest Freeway,	§	
Houston, TX 77074; and	§	
Texas Pearl, Inc.	§	334th Judicial District

Plaintiff's Response to Facebook's Amended Motion for Permissive Appeal

Section 51.014 of the Texas Civil Practice and Remedies Code must be strictly construed "as an exception to the general rule that only final judgments are appealable." *Hebert v. JJT Const.*, 438 S.W.3d 139, 142 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *City of Houston v. Estate of Jones*, 388 S.W.3d 663, 666 (Tex. 2012) (per curiam)). And under the plain language of the statute, a trial court is never required to grant permission to appeal an otherwise non-appealable interlocutory order. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d) (stating that a trial court "may" permit an appeal); Tex. R. Civ. P. 168 (same). There are two broad reasons the Court should deny Facebook's amended motion for permission to appeal the order denying its Rule 91a motion to dismiss.

First, the Rule 91a order does not involve "a controlling question of law as to which there is a substantial ground for difference of opinion." Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d)(1). As discussed at length in response to the 91a motion, Congress passed FOSTA in 2018 to amend the CDA to exclude human trafficking claims from the immunity provided interactive computer services. All of Jane Doe's claims against Facebook involve allegations of human trafficking. Whether those claims are barred under the CDA as amended was not an uncertain question, as Facebook contends. Under Congress's express mandate in FOSTA, the Court's ruling was clearly correct.

Facebook is simply wrong that "there are substantial authorities supporting a contrary result" and that "the overwhelming weight of case law supports an outcome different from the one the Court reached in its Order." *See* Motion at 4. No authority supports a contrary result. Since the 2018 amendments, no other court in the country that we know of has considered whether human trafficking claims can ever be barred under the CDA. Facebook only cites one case involving human trafficking, and it predates the amendments by a decade. *See Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008). There is also no tension between the Court's order and the decisions from Beaumont, because they all predate the amendments and none

involved human trafficking.[1] Any case predating the amendments is irrelevant, as is any case not involving human trafficking.

Given the clear language of FOSTA and the complete absence of any authority to the contrary, Facebook has not shown that there is a substantial ground for difference of opinion on a controlling legal issue.

Second, even if the statutory requirements were met, the Court should deny permission to appeal for reasons of efficiency and fairness. Facebook claims the "most important" reason for granting permission to appeal is that it should not have to stand trial if it is correct that all of Jane Doe's claims are preempted by the CDA. Motion at 4-6. But Facebook is a long way off from standing trial. As noted in the Court's order, Facebook's Rule 91a motion was just "one of several" procedural motions Facebook has or intends to file to avoid "full litigation of the underlying claims."

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[1] *See* Motion at 7-8 (citing *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.–Beaumont 2014, pet. denied); *Davis v. Motiva Enterprises, L.L.C.*, 2015 WL 1535694 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied); *Milo v. Martin*, 311 S.W.3d 210 (Tex. App.—Beaumont 2010, no pet.)). Facebook even acknowledges in the same paragraph that there is "no appellate-level precedent in Texas or elsewhere on the question of how Section 230 applies to claims under state-law anti-trafficking statutes following the 2018 FOSTA amendments." *Id.* at 7.

Facebook has also filed a special appearance, which is set for hearing at the same time as its motion for permissive appeal. If the Court denies the special appearance, Facebook will have an automatic right to appeal without the need to seek permission. Tex. Civ. Prac. & Rem. Code 51.014(7). A concurrent appeal from the 91a order would waste time and resources and further prejudice Jane Doe's right to obtain discovery and develop her case.[2]

And Facebook will have an opportunity to raise these arguments again via summary judgment—after the parties have conducted discovery and developed the factual record. *See ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 880 (Tex. 2018) (noting that arguments in 91a motions may be raised again at summary judgment stage). If Facebook's arguments are rejected as applied to facts and not just pleadings, it will have another opportunity to seek permission for interlocutory review.

Finally, Facebook argues: "The Texas Legislature has recognized in an analogous context the indispensable role that interlocutory appeals play in ensuring full vindication of a statutory right to be immune from suit." Motion

[2] Facebook has refused to provide even jurisdictional discovery relevant to its special appearance, for which the Court is hearing a motion to compel at the same time as the special appearance and motion for permissive appeal.

at 5. Facebook is referring to official immunity for government employees, which is not an analogous situation because the CDA does not grant Facebook any "immunity." And government employees denied official immunity are statutorily permitted an interlocutory appeal only after a denial of summary judgment. Tex. Civ. Prac. & Rem. Code § 51.014(a)(5). If there truly is a substantial ground for difference of opinion on whether the CDA protects Facebook, that question is also more appropriately raised to a court of appeals after summary judgment.

Prayer

Jane Doe asks that the Court deny Facebook's amended motion for permissive appeal and grant her any other relief to which she is entitled.

Respectfully submitted,

/s/ Annie McAdams

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CAUSE NO. 2018-69816

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHWEST FWY, HOUSTON, TX 77074; and TEXAS PEARL., INC.,	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

CAUSE NO. 2018-82214

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC. d/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

REPLY IN SUPPORT OF DEFENDANT FACEBOOK, INC.'S AMENDED MOTION FOR PERMISSION TO TAKE AN INTERLOCUTORY APPEAL

ARGUMENT

A. There are substantial grounds for a difference in opinion with regard to the controlling issue of law in this case.

Plaintiffs make the remarkable argument that interlocutory appeal is not warranted here because the applicability of CDA 230 to Plaintiffs' claims "was not an uncertain question." Resp. 2. This is an astonishing change of tune. Plaintiffs have made it no secret that they seek a dramatic re-interpretation of CDA 230, one that they admit *no other court has ever accepted.* This is the very definition of an "uncertain" issue of law.

On Facebook's Motion to Dismiss, Plaintiffs argued that "[t]he majority of the federal courts, and subsequently the state courts" "got [CDA 230] wrong" and that this Court should not follow these cases. Pltfs. Resp. to Mot. To Dismiss at 1; *see* also Hearing Tr. at 53:12–54:11 ("We think *Zeran* and all of the cases following it were incorrectly decided …[a]nd there are a lot of them, and we acknowledge that."). Indeed, this Court's Order denying Facebook's motion stated that there are substantial grounds for disagreement on this issue, with cases on both sides. Order at 2 ("The language of the statute is broad and both parties have cited cases that support their positions."); *see also, e.g., Herrick v. Grindr LLC*, 765 F. App'x. 586, 591 (2d Cir. 2019) (CDA 230 barred failure to warn claim); *Oberdorf v. Amazon.com Inc.*, 2019 WL 2849153, at *12 (3d Cir. July 3, 2019) (same).

Even now, Plaintiffs' Response does not cite a single case that has considered a CDA 230 defense to a claim brought under a state anti-trafficking statute since the enactment of FOSTA/SESTA in 2018, much less any case that supports Plaintiffs' position. And Plaintiff's own petition in Cause No. 2018-69816 is at odds with Plaintiffs' current position, pleading that Facebook "faces negligible risk in not warning . . . about human trafficking" because CDA 230 "protects it from liability for most private law claims," including those alleging failure "to warn of human trafficking." Third Amended Petition ¶¶ 214, 210.

In their Response, Plaintiffs argue, bizarrely, that that there is not a substantial ground for difference of opinion *because* there are no cases directly on point, essentially contending that there may never be an interlocutory appeal on an issue of first impression. *See* Resp. 3 & n.1. But the lack of authority to support Plaintiffs' position on this controlling issue of law renders their position *more* uncertain, not less so. *Gulf Coast Asphalt Co., L.L.C. v. Lloyd*, 457 S.W.3d 539, 545 (Tex. App. — Houston [14th Dist.] 2015, no pet.) ("Substantial grounds for disagreement exist when the question presented to the court is novel or . . . there simply is little authority upon which the district court can rely."). Indeed, the very purpose of § 51.014(d) is to permit "early, efficient resolution of controlling, uncertain issues of law," of which legal issues of first impression are a prime example. *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 733 (Tex. 2019); *Alpine Indus., Inc. v. Whitlock*, 554 S.W.3d 174, 177 (Tex. App. —Fort Worth 2018, pet. filed) (interlocutory appeal from "case of first impression"). Moreover, early appellate review will be particularly efficient here because resolution of this issue will also affect multiple other cases pending in this state. *See* Mot. for Permission to Take Interlocutory Appeal at 7 & n.2.

B. Immediate appellate review will serve the interests of efficiency and fairness.

Delaying appellate review of the controlling issue of law in this case will not advance the ultimate termination of the litigation. The immunity provided by Section 230 is an "immunity from suit" and its availability is therefore a pure question of law. *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 761 (Tex. App.—Beaumont 2014, pet. denied). Accordingly, there is no need to "develop[] the factual record" before resolving this purely legal issue. *See id.* (reversing the trial court's denial of the defendant's Rule 91a motion on interlocutory appeal). In that regard, Facebook's immunity defense here is analogous to a plea to the jurisdiction by a governmental entity. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) ("[I]mmunity [under CDA 230] is an immunity from suit rather than a mere defense to liability and ... is effectively lost if a case is

erroneously permitted to go to trial." (internal quotation marks omitted)). Thus, as in *GoDaddy*, an immediate interlocutory appeal is necessary to avoid prejudice to Facebook's "immunity from suit for its alleged conduct as an interactive computer service provider." *GoDaddy.com*, 429 S.W.3d at 761; *see also Nemet Chevrolet*, 591 F.3d at 255 (courts should resolve "the question of § 230 immunity at the earliest possible stage of the case").

Finally, piecemeal appeals, as advocated by Plaintiffs (Resp. 3-4), would be inefficient and potentially wasteful. If the Court were to deny Facebook's special appearance, Facebook would have an immediate appeal as of right from that ruling. Allowing Facebook to concurrently appeal the denial of its Rule 91a motion to dismiss would be far more efficient—for the parties and the Court—than the multiple-appeal approach Plaintiffs advocate. If this litigation were to continue and Facebook appealed and prevailed on the CDA 230 issue after summary judgment or post-trial, this case will have needlessly generated multiple appeals, and resolution of this case will have taken much longer than if the Court permits immediate appeal of the Rule 91a motion concurrently with an appeal on the special appearance. Such inefficiency can be avoided if the Court permits immediate appeal of the Rule 91a motion, concurrent with an appeal of a decision on Facebook's special appearance.

CONCLUSION

For all of these reasons, Facebook respectfully asks the Court to amend its Order to provide that Facebook may petition the Court of Appeals for leave to file an immediate interlocutory appeal.

Dated: September 19, 2019

Respectfully submitted,

/s/ Kelly Sandill

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2019, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Russell H. Falconer
Russell H. Falconer

N

DIMY

No. 2018-69816

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc.; Michael Lacey;	§	Harris County, Texas
James Larkin; John Brunst;	§	
America's Inns, Inc. d/b/a America's	§	
Inn 8201 Southwest Freeway,	§	
Houston, TX 77074; and	§	
Texas Pearl, Inc.	§	334th Judicial District

Order

Defendant Facebook, Inc.'s amended motion for permission to appeal the Court's order of May 23, 2019 denying its motion to dismiss under Rule 91a is hereby DENIED.

SIGNED this _____ day of _____, 2019.

Signed:
10/7/2019

Hon. Steven Kirkland,
Judge Presiding

MR257

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Cause No. 2018-82214

JANE DOE v. FACEBOOK, INC. d/b/a INSTAGRAM, INC.; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	In the District Court of 334th Judicial District Harris County, Texas

PLAINTIFF'S SECOND AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes Now, JANE DOE Plaintiff in the above-styled and numbered cause, complaining of FACEBOOK, INC. d/b/a INSTAGRAM, INC.; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN as Defendants, and respectfully shows the Court as follows:

SUMMARY OF CASE

1. The safety of our children is non-negotiable. Social media companies, websites, and the hotel industry should never place their quest for profits above the public good. Human trafficking has hit epidemic proportions in our communities, and it has had a devastating effect on the survivors and a crushing financial effect. Driven by profit, social media giants like Facebook have treated our children as a commodity and have participated in the trafficking of thousands of our children.

2. In response to a lawsuit by another human trafficking survivor, Facebook claimed:[1]

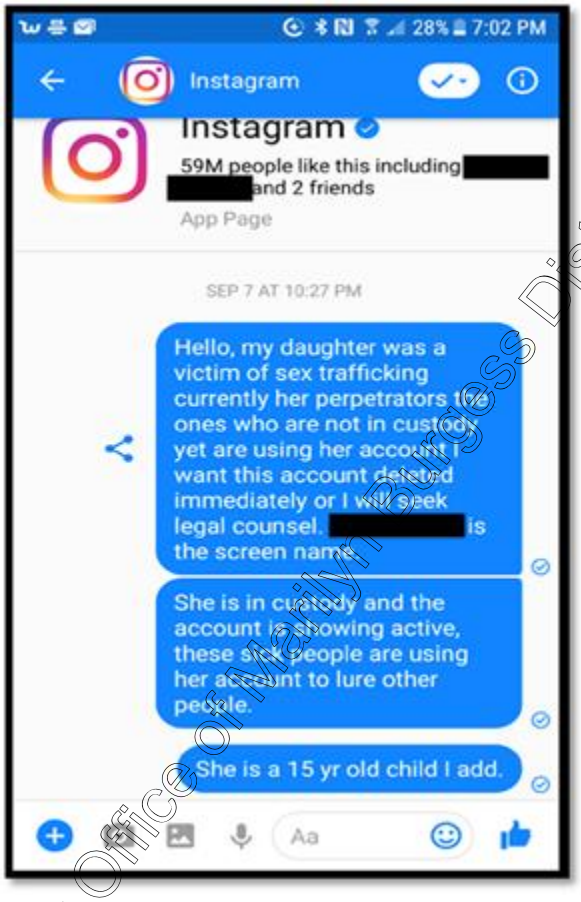
> Human Trafficking is abhorrent and is not allowed on Facebook. We use technology to thwart this kind of abuse and we encourage people to use the reporting links found across our site so that our team of experts can review the content swiftly.

3. What Facebook says in litigation today is not what it has been doing in reality.

[1] https://www.reuters.com/article/us-sex-trafficking-facebook-lawsuit/facebook-responding-to-lawsuit-says-sex-trafficking-banned-on-site-idUSKCN1ME038

4. Jane Doe was trafficked through Facebook's "Instagram" platform.

5. Her mother even reported trafficking to Facebook, requesting help because traffickers were using her daughter's account to lure other children into human trafficking:



6. In response, Facebook did nothing.

7. Facebook measures its' profits in "connections." Instagram's inaction shows it values those "connections" before the safety of its users. That makes these social media giants not altogether different than Backpage, which charged fees to broker sex. Or hotels, like the one in this lawsuit. All of them look the other way while children, like Jane Doe, are abused, exploited, and made available for sex acts to multiple perpetrators. It must stop.

DISCOVERY CONTROL PLAN

8. Jane Doe intends to conduct discovery pursuant to Texas Rule of Civil Procedure 190.4 (Level 3).

PARTIES

A. PLAINTIFF

9. Jane Doe is and was at all relevant times a resident of Harris County, Texas.

10. Jane Doe is a trafficked person as defined by Texas Civil Practice & Remedies Code § 98.

B. FACEBOOK

11. Facebook, Inc. ("Facebook") is a foreign corporation, incorporated in Delaware and with its headquarters and principal place of business in California.[2]

12. Facebook has conducted business in Texas.

13. Facebook maintains offices in Texas.

14. Facebook targets Texas as a marketplace for its business.

15. Facebook has made an appearance and is before this court.

C. THE BACKPAGE DEFENDANTS

16. At all relevant times, Backpage members, including but not limited to Daniel Hyer, Andrew Padilla, and Jalla Joye Vaught, have resided in Texas.

17. Defendant Michael Lacey is a natural person.

18. At all relevant times, Lacey transacted business in Texas, including in Harris County, Texas.

19. Lacey may be served at **3300 E. Stella Lane, Paradise Valley, Arizona 85253**, or wherever he may be found.

[2] It is undisputed that Instagram is one of Facebook Inc.'s products.

20. Defendant James Larkin is a natural person.

21. At all relevant times, Larkin transacted business in Texas.

22. Larkin may be served at **5555 N. Casa Blanca Drive, Paradise Valley, Arizona 85253**, or wherever he may be found.

23. Defendant John Brunst is a natural person.

24. At all relevant times, Brunst transacted business in Texas, including in Harris County, Texas.

25. Brunst may be served at **5830 East Calle Del Medio Phoenix Arizona 85018**, or wherever he may be found.

26. Lacey, Larkin, and Brunst, are referred to jointly as "The Backpage Defendants."

C.1. Alter Ego

27. To the extent any of the Backpage Defendants assert that they are not liable for the claims of Jane Doe because of their status as a business entity, or because they were acting on behalf of another person or business entity, any such protections must be disregarded because the Backpage Defendants have intentionally tried to use those protections to avoid liability for their knowingly illegal conduct, including profiting from conduct that they knew was illegal. The only way to prevent an unjustified loss to Jane Doe is to hold each of the Backpage Defendants liable and to disregard any protections that might otherwise be available because of the effort by the Backpage Defendants to abuse those protections. This is particularly true where the Backpage Defendants have taken significant profits from conduct that they know is illegal, yet they would attempt to use those protections in order to avoid any liability or accountability for their knowingly illegal conduct, and for knowingly accepting illegal profits. It is black letter law that individuals and entities, including corporate officers and owners, may be held liable if they participate in wrongful conduct or have knowledge of wrongful conduct and approve of the wrongful conduct. Each of the Backpage

Defendants knew all of the facts that are alleged in this complaint, including the fact they were accepting significant profits from the illegal advertisements for sex on the Backpage website, including the advertisements for sex of Jane Doe, a minor.

28. To the extent any of the Backpage Defendants assert that they are not liable for the claims of the Backpage Defendants because of their status as a business entity, or because they were acting on behalf of another person or business entity, any such protections must be disregarded because the Backpage Defendants are the alter ego of one another. The Backpage Defendants tried to use a wide range of entities to deflect the fact that a few individuals and entities owned and controlled the Backpage website and took the profits from its illegal operations. There has been such unity of ownership and interest that the separateness of the corporation has ceased to exist.

D. SIESTA INN

29. Defendant Babasai Inc. d/b/a Siesta Inn ("Siesta Inn") is a Texas Corporation with its principal place of business in Houston, Texas located at 1615 Wayside Drive Houston, TX 7701.

30. Siesta Inn may be served by serving one of its managing partners, **Minish Patel located at 6811 Avenue Q Houston Texas 77011**, or by any other method authorized by law.

E. Ratification/Vicarious Liability

31. The use of Facebook and Instagram, and the Backpage website for the advertising and recruitment of minors for sex was so pervasive and known to Facebook and the Backpage Defendants that it cannot be said such conduct was so unforeseen as to prevent Facebook and the Backpage Defendants from being liable for such conduct. Rather, Facebook and the Backpage Defendants knowingly aided and assisted sex traffickers, including the sex trafficker who trafficked Jane Doe on Instagram and posted the advertisements of Jane Doe on the Backpage website. Facebook and the Backpage Defendants knowingly benefited from this illegal and immoral activity.

32. Facebook and the Backpage Defendants are therefore liable for the conduct of the sex traffickers on Instagram and the Backpage website, including the sex trafficker who posted advertisements of Jane Doe because they ratified this conduct and knowingly reaped the benefits. Facebook and the Backpage Defendants knew that the sex traffickers were sexually abusing and exploiting children, including Jane Doe, yet did nothing because of their financial motive. Given these circumstances, Facebook and the Backpage Defendants should be held vicariously liable for the actions of the sex traffickers, including the sex trafficker of Jane Doe.

Jurisdictional Facts Regarding Facebook, Inc.

33. Facebook, Inc. (hereinafter referred to as "Facebook") provides products to users.

34. Facebook is in the business of building products.

35. Facebook's products include Instagram.

36. Facebook places its products in the stream of commerce.

37. Facebook targets Texas as a marketplace for its products, including but not limited to Instagram.

38. Facebook intends for Texas consumers to use its products.

39. Minors have been sexually exploited through Facebook on multiple occasions in Texas.

40. Facebook has reported instances of child abuse occurring in Texas to the National Center for Missing and Exploited Children (NCMEC).

41. Facebook has reported instances of sexual assault of a child occurring in Texas to the National Center for Missing and Exploited Children (NCMEC).

42. Facebook has reported instances of child human trafficking occurring in Texas to the National Center for Missing and Exploited Children (NCMEC).

43. Facebook has responded to Texas law enforcement subpoenas regarding the trafficking of minors in Texas.

44. Facebook has provided information to Texas law enforcement agencies regarding the trafficking of minors in Texas.

45. Facebook has monitored content on Facebook regarding the sexual exploitation of minors in Texas.

46. Facebook has monitored the content on Facebook regarding the human trafficking of minors in Texas.

47. Facebook has accessed user information of Texas residents.

48. Facebook has accessed user information of Texas residents and provided that information to third party marketing companies.

49. Facebook has responded to civil subpoenas from law firms in Texas regarding Facebook users in Texas.

50. Facebook has reviewed messages on Facebook of Texas based users.

51. Facebook has blocked Texas based users on Facebook for explicit content, including that involving the sexual exploitation of minors.

52. Child pornography has been exchanged via Facebook users in Texas.

53. Facebook has pulled down child pornography from Facebook users in Texas.

54. Facebook has investigated the sexual exploitation of minors in Texas on Facebook.

55. Facebook has investigated the human trafficking of minors in Texas on Facebook.

56. Facebook has sought protection from Texas Courts regarding responses to subpoenas issued in civil lawsuits involving Texas residents.

57. Facebook has sought protection from Texas Courts regarding responses to subpoenas issued in criminal proceedings in Texas.

58. Facebook has millions of users in Texas on the Facebook platform.

59. Facebook sells information collected by Texas residents to third party vendors.

60. Facebook targets customers in Texas.

61. Facebook targets businesses in Texas.

62. Facebook targets potential employees in Texas. These include, but are not limited to, managers, moderators, accountants, design specialist, IT support, lawyers, clerks, receptionists, financial advisors, insurance companies, sanitation engineers, purchasing agents, leasing agents, human resources specialists, and other employees who are integral to Facebook's operations throughout Texas and the United States.

63. Facebook has employees responsible for operational support of Facebook's products in Texas.

64. Facebook hires employees from Texas who reside in Texas.

65. Facebook fires employees from Texas who reside in Texas.

66. Facebook targets investors in Texas.

67. Facebook has investors who live in Texas.

68. Facebook has retained attorneys who reside in Texas.

69. Facebook currently has employees who are from and reside in Texas.

70. Facebook signs contracts with Texas businesses.

71. Facebook sends advertisements to Texas customers and advertise its services to Texas Customers.

72. Facebook pays taxes in Texas.

73. Facebook derives substantial revenue from Texas.

74. Facebook has trademarks that it enforces in Texas.

75. Facebook has hired independent contractors in Texas.

76. Facebook has ultimate control over this website.

77. This website is accessible in Texas.

78. Facebook has assisted and facilitated the trafficking of Jane Doe and other minors on Facebook.

79. Facebook has received payment for goods and services from banks in Texas.

80. Facebook makes payments to banks in Texas.

81. Facebook does business in Texas.

82. Facebook generates revenue from its business in Texas.

83. Facebook is registered to do business in Texas.[3]

84. Facebook has a registered agent for service in Texas.

85. Facebook's business in Texas is providing its products in Texas for commercial purposes.

86. Facebook has millions of users in Texas.

87. Facebook has multiple offices in Texas.

88. Facebook has received economic incentives from the State of Texas related to its offices in Texas.

[3] Even if Facebook was not subject to specific personal jurisdiction in Texas (it is), Facebook consented to general jurisdiction when it registered to do business here. Facebook registered to do business in Texas. By registering to do business in Texas, Facebook purposefully availed itself of the rights and privileges of the State of Texas. Therefore, based on more-than-a-century-old precedent from the United States Supreme Court, Facebook has consented to and is thus subject to general jurisdiction in Texas. *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93, 96, 37 S. Ct. 344, 345, 61 L. Ed. 610 (1917)("[W]hen a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act.").

Facebook's Business Model Targets Texas, Including Minors in Texas

89. Facebook's products allow users to create personalized experiences that are built on proprietary algorithms, analyzing information about users, including identifying information, photographs, videos, interests, recent activities, and links to content from other websites;

90. Once a user begins using a Facebook product, they can engage with other Facebook users in a number of ways, including by adding those users as "friends" and providing feedback to content provided by other users by "sharing," "liking" (i.e. applying a tag that is shared with other users), or commenting on that content;

91. Facebook users are able to view their contacts' activities using Facebook's products, including both information posted by those contacts as well as their contacts' interactions with other users and content;

92. Facebook users are also able to create "groups" with other users, which allows multiple users to join a shared website which has its own profile and information;

93. Members of a Facebook group can view, interact with, and share content posted in these group forums;

94. Facebook collects data as to its users' activities through the website, including but not limited to information regarding contacts and group associations, content that users post and interact with, and use of third party websites;

95. Using proprietary algorithms, Facebook generates targeted recommendations for each user, promoting content, websites, advertisements, users, groups, and events that may appeal to a user based on their usage history;

96. Each Facebook user has a personalized experience on Facebook;

97. No two Facebook users have the exact same experience on Facebook;

98. Facebook features (such as suggestions) allow users an option to opt-out if they don't want to use them;

99. If Facebook users do not opt-out, then they are automatically enrolled in Facebook's default programs;

100. Facebook has the ability to change its opt-out option to an opt-in option;

101. An opt-in option would require affirmative action on the part of a user before Facebook could enroll users in Facebook's programs;

102. Facebook made a conscious decision to use opt-out as opposed to opt-in for its programs and features;

103. Data gathered from Facebook's proprietary software allows Facebook to recommend content;

104. Data gathered from Facebook's proprietary software allows Facebook to recommend friends;

105. Data gathered from Facebook's proprietary software allows Facebook to recommend groups;

106. Data gathered from Facebook's proprietary software allows Facebook to recommend 3rd party apps;

107. Facebook allows advertisers to use data gathered from Facebook's proprietary software to target specific customers and demographics;

108. Facebook is aware that minors use its platform and advertise to minors using its platform;

109. One of the largest target segments for advertisers on Facebook is children between 13 and 17.

110. Facebook profits off advertisements directed towards minors in Texas on its platform;

111. Facebook recognizes that minors face more foreseeable risk from misuse of Facebook than adult users;

112. Facebook has taken precautions specific to child users between the age of 13-17;

113. Facebook has taken precautions specific to child users between the age of 13-17 in the State of Texas;

114. Jane Doe has alleged she was a Facebook user between the age of 13-17 in Texas;

115. Facebook connects users with other individuals and groups based on projected common interests, activities, contacts, and patterns of usage;

116. Facebook connects minor users between the age of 13-17 with other users;

117. Facebook connects minor users between the age of 13-17 with users who over the age of 18;

118. Facebook connects minor users in Texas between the age of 13-17 with other users;

119. Facebook connects minor users in Texas between the age of 13-17 with users who over the age of 18;

120. Facebook presents users with content posted by other users, groups, and third parties (e.g., advertisers) that is likely to be of interest to them, again based on prior usage history;

121. Facebook measures use of its products based on the number of Daily Average Users (DAUs) of each of its platforms, including but not limited to Facebook;

122. Facebook measures use of its products based on the number of Monthly Average Users (MAUs) of each of its platforms, including but not limited to Facebook;

123. Facebook generates reports of its users' demographics;

124. Facebook generates reports of its DAUs that break down DAUs by demographics;

125. Facebook generates reports of its MAUs that break down MAUs by demographics;

126. Location of users by country is a demographic is a demographic tracked and used by Facebook;

127. Location of United States Facebook users by region (e.g., Northwest, Northeast, Southwest, etc.) is a demographic tracked and used by Facebook;

128. Location of United States Facebook users by State is a demographic tracked and used by Facebook;

129. Location of United States Facebook users by city is a demographic tracked and used by Facebook;

130. Location of United States Facebook users by zip code is a demographic tracked and used by Facebook;

131. Location of United States Facebook users by telephonic area codes is a demographic tracked and used by Facebook;

132. Facebook has the ability to identify a user's physical location through a user's IP address;

133. Facebook does not require a user to provide a physical address to open a Facebook account;

134. Facebook does not require a user to provide a home state location to open a Facebook account;

135. Facebook could require a user to provide a physical address to open a Facebook account;

136. Facebook could require a user to provide the state in which the user resides to open a Facebook account;

137. Facebook is available to people over the age of 13;

138. Facebook is aware that it has minor users;

139. Facebook is aware that it has minor users in Texas;

140. Facebook made a conscious decision to allow minor users, including in Texas;

141. Facebook targets customers/users in Texas;

142. Facebook targets minor users in Texas;

143. Facebook targets businesses in Texas;

144. Facebook generates revenue from its social networking business in Texas;

145. Facebook pays taxes to the State of Texas on the revenue generated by the commercial use Facebook's social networking products in Texas;

146. Facebook has received tax incentives in Texas related to its social networking products in Texas;

147. Facebook has trademarks related to its social networking business that it enforces in Texas;

148. Facebook has hired independent contractors to work on its social networking business in Texas;

149. Facebook has provided information to Texas law enforcement agencies regarding the trafficking of minors in Texas.;

150. Facebook has monitored content on its platforms regarding the sexual exploitation of minors in Texas;

151. Facebook has monitored the content on its platforms regarding the human trafficking of minors in Texas;

152. Facebook has accessed user information, including but not limited to users who are below the age of majority, of Texas residents;

153. Facebook has accessed user information of Texas residents and provided that information to third party marketing companies;

154. Jane Doe has alleged that Facebook has assisted and facilitated the trafficking of Jane Doe and other minors in Texas;

155. Jane Doe has alleged that Facebook has permitted sex traffickers unfiltered access to the most vulnerable members of our society;

156. Jane Doe has alleged that Facebook has continually been used to facilitate human trafficking by allowing sex traffickers an unrestricted platform to stalk, exploit, recruit, groom, recruit, and extort children into the sex trade;

157. Jane Doe has alleged that Facebook is now the first point of contact between sex traffickers and child victims;

158. An article titled "Sex Traffickers Are Using Social Media to Target Children" contains the following quotes from Inspector Jim Klein, commander of the NYPD's Vice Enforcement Unit:

> "These predators are watching, and they're listening. They're friending. They're seeing, 'Oh, she's not happy with school,' 'Oh, he's upset against his parents,' 'Oh, he has issues with his sexuality,' or, 'She's having problems with her friends.'"
>
> "Next thing you know, these predators pick up on this, and they start becoming friendly to the point they're now separating these victims from everybody that's important to them."
>
> "We've had cases where our pimps are . . . friends with [their victims'] relatives, and they're posting about pimping out girls and making money[.]".

159. Mark Zuckerberg is the CEO of Facebook;

160. Mr. Zuckerberg provided testimony to Congress in his capacity as CEO; and

161. All of Mr. Zuckerberg's Congressional testimony was truthful.

162. Facebook publishes "Community Standards" for its platform.

163. Facebook's "Community Standards" are specifically designed to promote safety:

The goal of our Community Standards is to encourage expression and create a safe environment. We base our policies on input from our community and from experts in fields such as technology and public safety. Our policies are also rooted in the following principles:

Safety: People need to feel safe in order to build community. We are committed to removing content that encourages real-world harm, including (but not limited to) physical, financial, and emotional injury.

164. This same sentiment is shared by Facebook's subsidiary Instagram:

Community Guidelines

The Short

We want Instagram to continue to be an authentic and safe place for inspiration and expression. Help us foster this community. Post only your own photos and videos and always follow the law. Respect everyone on Instagram, don't spam people or post nudity.

165. Facebook's "Community Standards" specifically identify potential sources of harm as human trafficking and organized criminal activity:

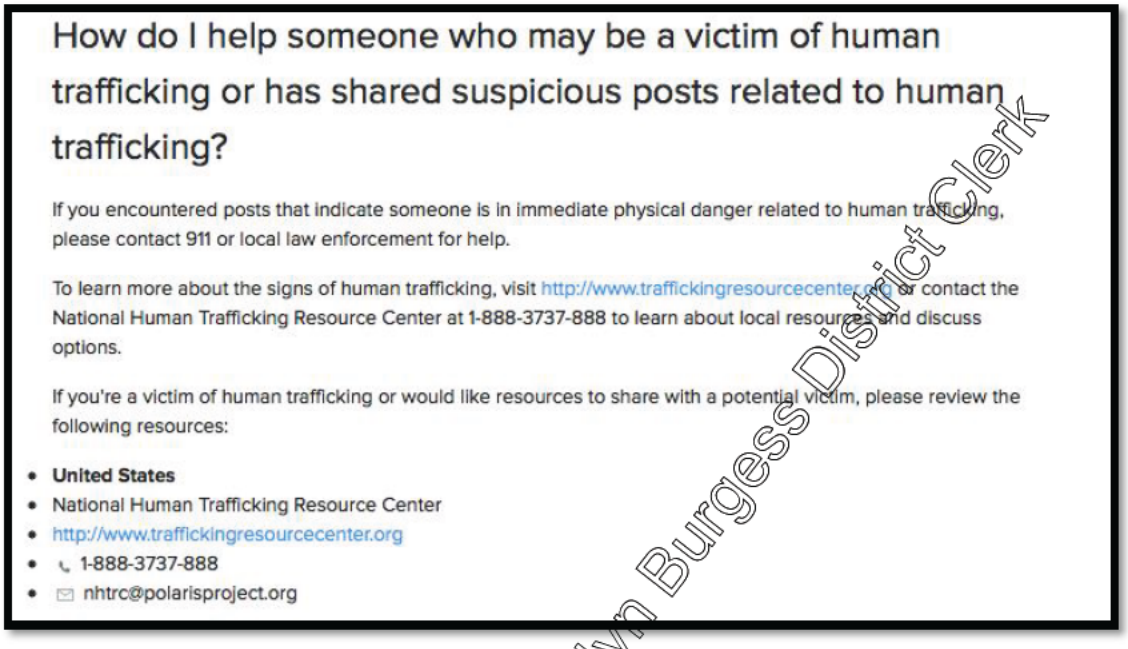
2. Dangerous Individuals and Organizations

In an effort to prevent and disrupt real-world harm, we do not allow any organizations or individuals that proclaim a violent mission or are engaged in violence, from having a presence on Facebook. This includes organizations or individuals involved in the following:

- Terrorist activity
- Organized hate
- Mass or serial murder
- Human trafficking
- Organized violence or criminal activity

We also remove content that expresses support or praise for groups, leaders, or individuals involved in these activities.

166. Facebook's wholly owned subsidiary Instagram shares the same sentiment:



How do I help someone who may be a victim of human trafficking or has shared suspicious posts related to human trafficking?

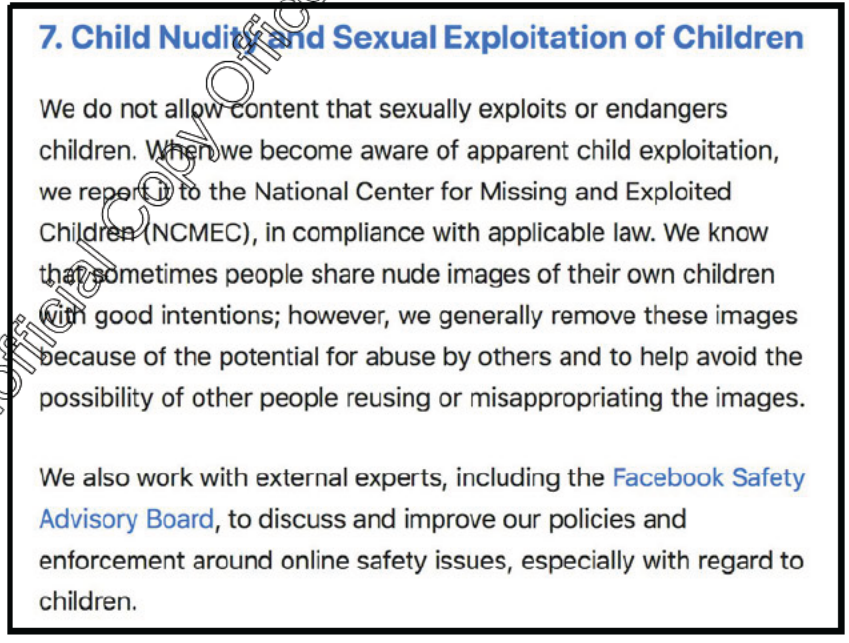
If you encountered posts that indicate someone is in immediate physical danger related to human trafficking, please contact 911 or local law enforcement for help.

To learn more about the signs of human trafficking, visit http://www.traffickingresourcecenter.org or contact the National Human Trafficking Resource Center at 1-888-3737-888 to learn about local resources and discuss options.

If you're a victim of human trafficking or would like resources to share with a potential victim, please review the following resources:

- **United States**
- National Human Trafficking Resource Center
- http://www.traffickingresourcecenter.org
- 1-888-3737-888
- nhtrc@polarisproject.org

167. Facebook's "Community Standards" specifically identify and recognize the sexual exploitation of minors.

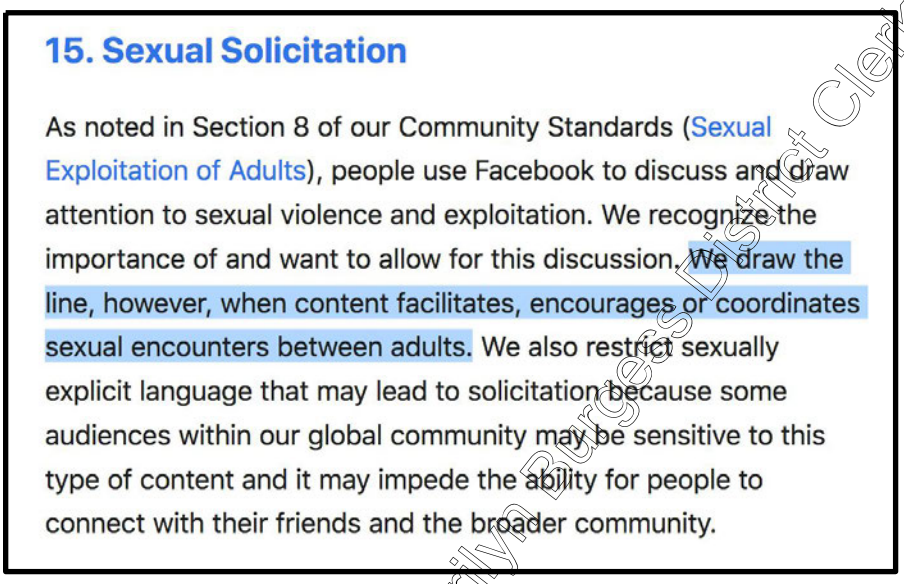


7. Child Nudity and Sexual Exploitation of Children

We do not allow content that sexually exploits or endangers children. When we become aware of apparent child exploitation, we report it to the National Center for Missing and Exploited Children (NCMEC), in compliance with applicable law. We know that sometimes people share nude images of their own children with good intentions; however, we generally remove these images because of the potential for abuse by others and to help avoid the possibility of other people reusing or misappropriating the images.

We also work with external experts, including the Facebook Safety Advisory Board, to discuss and improve our policies and enforcement around online safety issues, especially with regard to children.

168. Facebook recognizes that sexual solicitation occurs on its platform, including Instagram and draws the line at content that "facilitates, encourages or coordinates sexual encounters between adults":

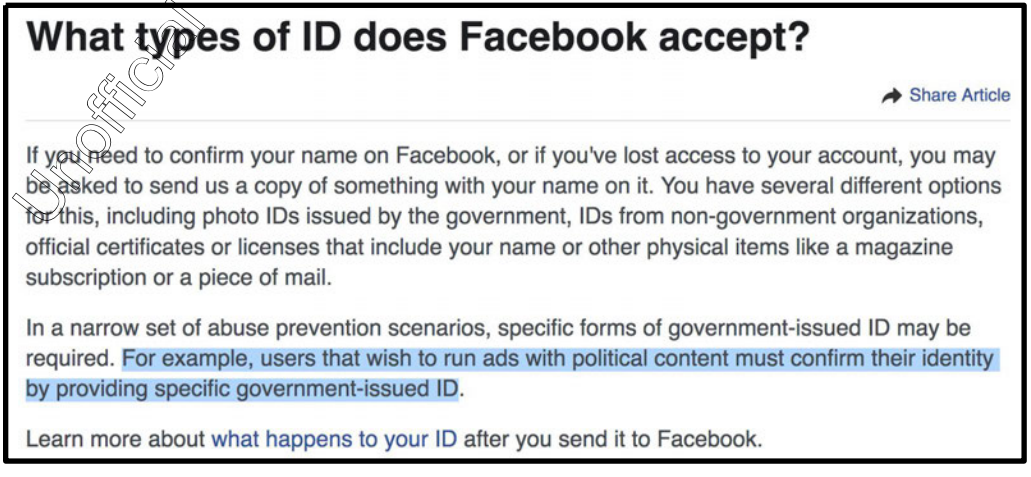


15. Sexual Solicitation

As noted in Section 8 of our Community Standards (Sexual Exploitation of Adults), people use Facebook to discuss and draw attention to sexual violence and exploitation. We recognize the importance of and want to allow for this discussion. We draw the line, however, when content facilitates, encourages or coordinates sexual encounters between adults. We also restrict sexually explicit language that may lead to solicitation because some audiences within our global community may be sensitive to this type of content and it may impede the ability for people to connect with their friends and the broader community.

169. Facebook recognizes the risk to minor users and sexual exploitation, but Facebook does not "draw any lines" on content that "facilitates, encourages or coordinates sexual encounters" between adults and minor users.

170. Facebook can, and does, require photo identification for certain users, such as political advertisers:



What types of ID does Facebook accept?

Share Article

If you need to confirm your name on Facebook, or if you've lost access to your account, you may be asked to send us a copy of something with your name on it. You have several different options for this, including photo IDs issued by the government, IDs from non-government organizations, official certificates or licenses that include your name or other physical items like a magazine subscription or a piece of mail.

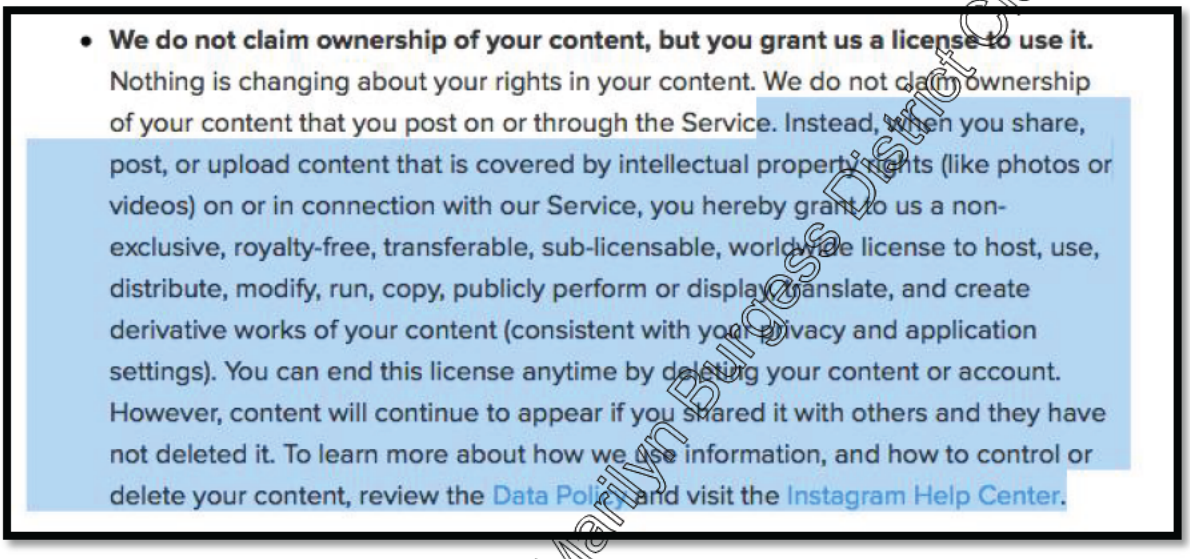
In a narrow set of abuse prevention scenarios, specific forms of government-issued ID may be required. For example, users that wish to run ads with political content must confirm their identity by providing specific government-issued ID.

Learn more about what happens to your ID after you send it to Facebook.

171. Facebook does not require photo identification for minor users.

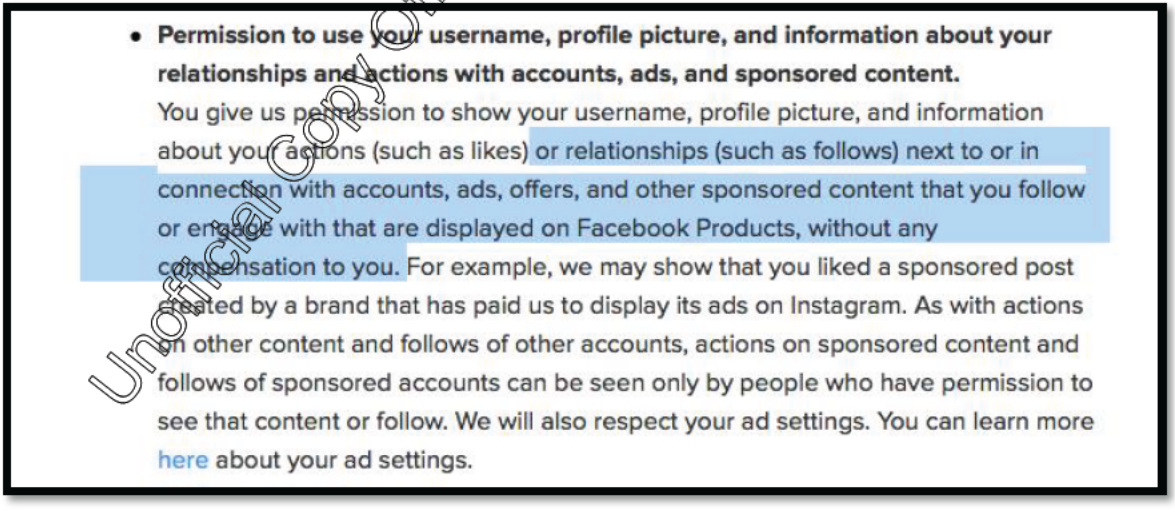
172. Facebook does not require photo identification for adult users who friend minor users.

173. Facebook targets and collects user data in Texas including the intellectual property rights in the form of a license to user data in Texas:



- **We do not claim ownership of your content, but you grant us a license to use it.** Nothing is changing about your rights in your content. We do not claim ownership of your content that you post on or through the Service. Instead, when you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings). You can end this license anytime by deleting your content or account. However, content will continue to appear if you shared it with others and they have not deleted it. To learn more about how we use information, and how to control or delete your content, review the Data Policy and visit the Instagram Help Center.

174. Facebook targets and collects user data on relationships of Texas users to use in its advertising efforts.



- **Permission to use your username, profile picture, and information about your relationships and actions with accounts, ads, and sponsored content.** You give us permission to show your username, profile picture, and information about your actions (such as likes) or relationships (such as follows) next to or in connection with accounts, ads, offers, and other sponsored content that you follow or engage with that are displayed on Facebook Products, without any compensation to you. For example, we may show that you liked a sponsored post created by a brand that has paid us to display its ads on Instagram. As with actions on other content and follows of other accounts, actions on sponsored content and follows of sponsored accounts can be seen only by people who have permission to see that content or follow. We will also respect your ad settings. You can learn more here about your ad settings.

175. Based upon the facts above, as well as those in the facts section of this petition, this Court has specific personal jurisdiction over Facebook. Specific personal jurisdiction is proper over

Facebook because Facebook marketed its platform in Texas and actively sought out Texas as a marketplace for its platform (i.e. product).[4] Moreover, the sexual exploitation and harm that came from the misuse of Facebook's platform that forms the basis of this suit occurred in Texas.

VENUE & JURISDICTION

176. Venue is proper in Harris County, Texas pursuant to section 15.002(a)(1) of the Texas Civil Practice & Remedies Code, because a substantial part of the acts and omissions that gave rise to the sexual exploitation, human trafficking, and sexual assault of Jane Doe, a minor, occurred in Harris County, Texas.

177. Plaintiff further adopts and incorporates all other factual allegations contained elsewhere in this petition in support of its venue allegations.

178. Venue is proper as to all Defendants under Texas Civil Practice & Remedies Code § 15.005.

179. Jane Doe alleges damages in excess of $10,000, and jurisdiction is proper in this Court.

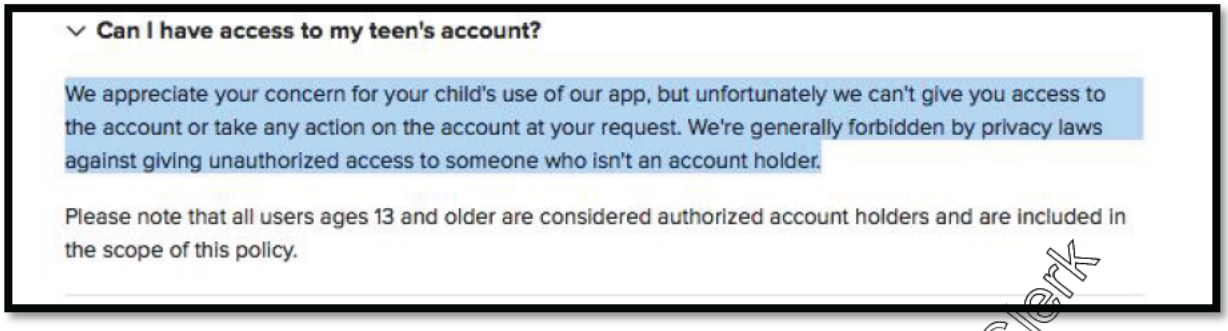
FACTUAL BACKGROUND

A. ALLEGATIONS REGARDING FACEBOOK

180. With each passing day, the gateway to our community's children is increasingly social media—and Facebook through its Instagram Platform in particular.

181. Facebook targets minors for its services. This includes allowing any child above the age of 13 full and complete access to Instagram while forbidding adult supervision.

[4] "The stream-of-commerce cases relate to exercises of specific jurisdiction in products liability actions, in which a nonresident defendant, acting outside the forum, places in the stream of commerce a product that ultimately causes harm inside the forum. Many state long-arm statutes authorize courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum State. ... Flow of a manufacturer's products into the forum may bolster an affiliation germane to ***specific*** jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2849 (2011) (citing *see, e.g., World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490).



182. People, including children, connecting with their friends, family, and communities are not the only ones passing through Facebook's gateway.

183. For years now, Facebook has permitted sex traffickers unfiltered access to the most vulnerable members of our society while actively blocking parental access to Instagram accounts.

184. It has continually been used to facilitate human trafficking by allowing sex traffickers an unrestricted platform to stalk, exploit, recruit, groom, and extort children into the sex trade.

185. Facebook is now the first point of contact between sex traffickers and these children.

186. Jim Klien, the commander of New York Police Department's Vice Enforcement Unit, explained how sex traffickers work on Facebook's platform:

> "These predators are watching and they're listening. They're friending. They're seeing 'oh she is upset at her parents' … next thing you know, these predators become friendly and separate the victims from everyone who is important to them."

187. Facebook not only provides an unrestricted platform for these sex traffickers to target children, but it also cloaks the traffickers with credibility.

188. Cathie Bledsoe, with the Indiana State Police Internet Crimes Against Children Task Force, detailed how traffickers "friend" a victim's real acquaintances, like people from the same middle and high schools, thereby providing credibility when approaching the victim through "shared" friends.

189. The FBI has joined New York and Indiana in shining a light on the dangers of social media by warning Americans that "online friendships on social networking can mean online peril" and in calling for safeguards for social media users.

190. The largest of the social media goliaths responsible for this danger is Facebook. Every day, over 1.4 billion people use Facebook—more than four times the population of the United States. Through this large sphere of influence, Facebook has accumulated a net worth of approximately $500 billion dollars.

191. Facebook has long viewed its company mission to connect people in order to create profit.

192. In his June 18, 2016, memo, Andrew Bosworth, a Facebook VP, laid out Facebook's "ugly truth:"

> So we connect … people.
>
> That can be bad if they make it negative. Maybe it costs a life by exposing someone to bullies. Maybe someone dies in a terrorist attack coordinated on our tools.
>
> And still we connect people….
>
> That isn't something we are doing for ourselves. Or for our stock price (ha!). It is literally just what we do. We connect people. Period.
>
> That's why all the work we do in growth is justified. All the questionable contact importing practices. All the subtle language that helps people stay searchable by friends. All of the work we do to bring more communication in…. All of it.

193. "Make no mistake," Bosworth added, "growth tactics are how we got here."

194. As Mark Zuckerberg testified before Congress, Facebook's single-minded focus on growth was a grave mistake: "The broadest mistake made was not taking a broad enough view of Facebook's responsibility to the community and content."

195. Zuckerberg continued, "it is not enough to just give people a voice. We [Facebook] need to make sure that people aren't using it to harm other people or to spread misinformation. Across the board we have a responsibility to not just build tools, but to make sure they're used for good."[5]

196. Facebook knows it has a duty to warn its most vulnerable users about human trafficking. In a power point from its January 29, 2019 "Content Standards Forum," Facebook noted that "[m]any experts believe that we have a responsibility to educate the public about the nature of human trafficking."[6]

197. But recognizing its duty and failures has come too late. Facebook has long ignored and continues to ignore its obligation to its online community of the dangers of human trafficking on its website.

198. Facebook has the tools and resources to warn its most vulnerable users about the human trafficking. It obtains detailed information about its users through users' use of its platforms and from detailed dossiers obtained from commercial data brokers about users' offline lives. ProPublica explained:

> Every time a Facebook member likes a post, tags a photo, updates their favorite movies in their profile, posts a comment about a politician, or changes their relationship status, Facebook logs it. When they browse the Web, Facebook collects information about pages they visit that contain Facebook sharing buttons. When they use Instagram or WhatsApp on their phone, which are both owned by Facebook, they contribute more data to Facebook's dossier.
>
> And in case that wasn't enough, Facebook also buys data about its users' mortgages, car ownership and shopping habits from some of the biggest commercial data brokers.

199. Facebook reports that it can target users "based on a variety of factors including age, gender, location, interests, and behaviors."[7] To do so, Facebook classifies its users into over 1,300

[5] Testimony of Mark Zuckerberg, Facebook Chairman and CEO, Hearing before the U.S. Senate Committees on the Judiciary and Commerce, Science and Transportation, April 10, 2018.

[6] https://fbnewsroomus.files.wordpress.com/2018/11/csf-final-deck_01.29.19.pdf

[7] https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm

categories. The categories are not just related to gender, age, or shopping habits but include categories such as "Away from Family."[8]

200. Facebook uses algorithms to categorize its users into tens of thousands of micro-targetable groups. Facebook can use its categories to micro-target groups "such as 40-year-old female motorcyclists in Nashville, Tennessee, (Facebook audience estimate: 1,300 people)."[9]

201. Facebook uses this information to sell ads that "enable marketers to reach people based on a variety of factors including age, gender, location, interests, and behaviors. Marketers purchase ads that can appear in multiple places including on Facebook, Instagram, Messenger, and third-party applications and websites."[10]

202. Facebook also uses the detailed information it collects and buys on its users to direct users to persons they likely want to meet. In doing so, Facebook facilitates human trafficking by identifying potential targets, like Jane Doe, and connecting traffickers with those individuals.

203. Although it knows its system facilitates human traffickers in identifying and cultivating victims, and it knows it has the capacity to target ads to specific groups, Facebook does not target warnings to its most vulnerable users.

204. Facebook did not exercise reasonable care when it made general statements about illegal or dangerous third-party content on its platform.

205. Facebook's system enabled Jane Doe's traffickers to target her. Facebook had extensive information about Jane Doe and knew she was a likely target for trafficking. Yet Facebook did not target warnings to Jane Doe about how its system helps traffickers find targets like her or

[8] https://www.propublica.org/article/breaking-the-black-box-what-facebook-knows-about-you

[9] https://www.propublica.org/article/help-us-monitor-political-ads-online

[10] https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm at p. 5.

about how traffickers lure victims through its platforms. As a result, Facebook increased the risk of harm to Jane Doe.

206. Facebook's acts and omissions—and its morally bankrupt corporate culture—already facilitated the sexual exploitation of Jane Doe and countless others.

207. Facebook has an obligation to safeguard and to warn its users, both through its online platform and otherwise—of the dangers of human traffickers using Facebook as a tool to entrap and enslave children into sex trafficking.

208. Facebook knows it is used to identify, cultivate, and then exploit human trafficking victims.

209. As noted by the University of Toledo Human Trafficking and Social Justice Institute, Social Media is increasingly being exploited to contact, recruit, and sell children for sex.

210. This study, conducted at the request of the Ohio Attorney General reveals how quickly traffickers target and connect with vulnerable children, such as Jane Doe through the internet.

211. The in-depth 2018 report notes that this epidemic is so pervasive that in 42% of the cases studied, the human trafficking victim was trafficked without having to meet their trafficker in person.

212. This is a result of trafficking techniques used by predators on these platforms who are provided unrestricted access to minors. Typically, these predators will reach out to underage girls all day, looking for minors to prey on.

213. These traffickers, once they identified their target minors, then engage in the "grooming process". This process includes strategic responses to the minor in an attempt to gain their trust, including but not limited to:

- I understand you
- I love you

- I think you're beautiful, I'll encourage you to show your body. Use your body
- I'll make your life better.
- I'll encourage you to take risks, you're an adult.
- I'll protect you.
- I'll make you successful.

214. Each of these phrases in messages raise red flags of inappropriate and abusive conduct towards minor children on Facebook. Even outside of a trafficking context, common sense dictates that red flags are raised when an adult male in his thirties tells a minor below the age of consent, "I love you," or "I think you are beautiful".

215. But to date, Facebook has failed to take any reasonable steps to mitigate the use of Facebook by human traffickers who recruit and exploit children on its platform. This includes but is not limited to: (a) requiring verification of the identity of Facebook users, (b) requiring minors to link their account to a parent or guardian's account, (c) implement filters that prevent adults over the age of 18 from communicating with minors under the age of 18; and (d) flagging buzzwords from those over 18 to minors under 18 that indicate human trafficking and blocking all further communications to that user.

216. This technology is not new to Facebook. For example, Facebook requires photographs of Government Identifications to verify government employees running campaigns.

217. Facebook furthermore started as a website requiring a verification process for users. Initially, Facebook was only accessible to members of Harvard. In 2004, this expanded to users from Yale, Stanford, and Columbia. It was not until Facebook saw the profit motive behind numerous users that Facebook dropped all verification requirements for users, which has been continued on its Instagram platform.

218. Moreover, Facebook has the technology to flag buzzwords in private messages and had this technology in 2015, which would have been available on Instagram.[11]

219. For example, in response to evidence that Facebook advertisers were using Facebook to illegally discriminate, Facebook began "test[ing] new technology that leverages machine learning to help [it] identify ads that offer housing, employment or credit opportunities." And it claimed to implement the following policy:

> When an advertiser attempts to show an ad that we identify as offering a housing, employment or credit opportunity and uses any other audience segment on Facebook, we will show the advertiser information about our updated anti-discrimination policy. We will then require the advertiser to certify that it is complying with that policy and with applicable anti-discrimination laws.[12]

220. To date, Facebook has failed to take reasonable steps to appropriately warn minors of the risk of sex trafficking posed by its platform.

[11] For example: Techniques that are designed to help infer a social media user's personality are discussed within U.S. Patent No. 9740752, titled *Determining User Personality Characteristics From Social Networking System Communications and Characteristics*. Issued to Facebook last August, it discloses a computer-implemented method of extracting linguistic data from communication between users of a communication network; retrieving a characteristic of the user from the user's profile on the communication network; applying a statistical model to the linguistic data and retrieved characteristic, the statistical model being determined by personality characteristics of a training set of users based on responses to surveys from those users; selecting personality characteristics for the user based on the characteristic being associated with a threshold value from the statistical model; storing the personality characteristic in the user's profile; and presenting content to the user based on the selected personality characteristic. As the patent's description notes, this system could be used to identify personality characteristics such as extroversion, agreeableness, conscientiousness, emotional stability and openness. However, it's not difficult to see how such a system could be utilized to determine the political views of an individual Facebook users.

[12] https://newsroom.fb.com/news/2017/02/improving-enforcement-and-promoting-diversity-updates-to-ads-policies-and-tools/

221. In fact, Facebook has taken the opposite approach on Instagram and prevented adults from (a) gaining access to their minor child's Instagram or (b) requiring a minor child to have parental authorization for having an Instagram.

222. Facebook has not taken these steps to warn of human trafficking or mitigate its occurrence on Facebook's website based upon profit motivations. Facebook obtains its profits through users. If additional restrictions were placed on user accounts and what was required to become a user, numbers would drop.

223. This drop in user numbers would lead to decreased profits.

224. Facebook also has a strong financial incentive not to warn its most vulnerable users about human trafficking. In its January 2019 Annual 10-K report, Facebook stated that its companies "generate substantially all of our revenue from selling advertising placements to marketers. It acknowledged that the "size of our user base and our users' level of engagement are critical to our success." Significant risk factors to Facebook's business included:

- decreases in the quality and frequency of content shared on our products and services
- decreases in user sentiment due to questions about the quality or usefulness of our products or our user data practices, or concerns related to privacy and sharing, safety, security, well-being, or other factors

This is because marketers pay for Facebook's ad products "based on the number of impressions delivered or the number of actions, such as clicks, taken by users." "Impressions are considered delivered when an ad is displayed to a user." It receives revenue from action-based ads when "user takes the action the marketer contracted for." Facebook, therefore, reported: "If we are unable to

maintain or increase our user base and user engagement, our revenue and financial results may be adversely affected."[13]

225. Because its profits derive from users of its products, Facebook has no incentive to warn users to be cautious about engaging with some of its users.

226. Facebooks also faces negligible risk in not warning its most vulnerable users about human trafficking. Facebook knows the Communications Decency Act protects it from liability for most private law claims.[14]

227. As early as 2003, in *Doe v. GTE Corp.*, Judge David Easterbrook asked: "Why should a law designed to eliminate [internet service providers'] liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?" 347 F.3d 655, 660 (7th Cir. 2003). As a result, those claiming to be "internet service providers", like Facebook, face virtually no civil liability despite making an enormous profit of the use of their products; the internet "lacks any kind of sensible allocation of risk."[15]

228. Due to the financial benefit and limited risk of not acting, Facebook is unlikely to actually change its conduct as it relates to its products. Even when Facebook has been exposed to risk for its conduct, it has not changed its behavior. On April 24, 2019, Facebook announced that it expected to be fined between three and five billion dollars for violating a privacy consent decree related to allowing third parties to harvest user data without users' consent.[16]

[13] https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm.

[14] *See* https://www.sec.gov/Archives/edgar/data/1326801/000132680119000009/fb-12312018x10k.htm

[15] Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 421 (2017) (quoting Benjamin Wittes and Gabriella Blum, The Future of Violence: Robots and Germans, Hackers and Drones at p. 216 (2015)).

[16] https://www.sec.gov/Archives/edgar/data/1326801/000132680119000037/fb-03312019x10q.htm at p. 21; https://www.nytimes.com/2019/04/24/technology/facebook-ftc-fine-privacy.html

229. Facebook and other supposed "internet service providers" argue that they need to be protected from civil liability. History suggests otherwise. "When courts began recognizing claims under Title VII for sexually hostile work environments, employers argued that the cost of liability would force them to shutter, and if not, would ruin the camaraderie of workspaces."[17] Most would agree that did not happen.

THE INTERNET HAS CHANGED SINCE 1996

230. The Communication Decency Act was enacted in 1996. At that time, commercial service providers had roughly twelve million subscribers.[18] Seventy-seven percent of online users sent or received an email "at least once every few weeks."[19] The first commercial spam message was sent only two years prior by two lawyers with the subject "Green Card Lottery -Final One?"

231. By 1999, only forty-one percent of Americans were using the internet and the most popular online news was the weather.

232. The cybermarket place we know today was unimaginable in 1996. Amazon launched the year before the CDA was enacted. But by 2000, still only forty-eight percent of internet users had purchased a product online.

233. Online social networking sites did not exist in 1996. MySpace and LinkedIn were launched in 2003. Facebook was created in 2004.

234. The cyberworld continued to expand. In 2005, YouTube was founded, Twitter was created in 2006, and Apple released the first iPhone in 2007.[20]

[17] Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 421 (2017)

[18] *Id.* at 411.

[19] https://www.pewinternet.org/2014/03/11/world-wide-web-timeline/

[20] *Id.*

235. In 2008, when only ten percent of American's had social media profiles,[21] the Ninth Circuit declared:

> The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.[22]

By 2016, two thirds of Americans had smart phones and one in five Americans reported being on line *almost constantly*.[23] Today, seventy-nine percent of American's have a social media profile and utlize these products in their daily life.[24]

JANE DOE'S ENTRAPMENT AND TRAFFICKING ON INSTAGRAM

236. Jane Doe was a Facebook/Instagram user in 2017, while she was 14 years old.

237. At 14 years old, Jane Doe was coerced and forced into a life of trafficking through traffickers who had access to her and sold her through social media.

238. The Instagram friend who coerced Jane Doe was well over the age of 18 years old.

239. This "friend" provided Jane Doe false promises of love and a better future.

240. If Facebook had warned Jane Doe about the dangers of human trafficking and how traffickers lure users like her into human trafficking through the use of Facebook's product, she would not have developed a relationship with the Instagram friend.

241. Each of these communications between a minor and adult well over the age of 18 would have raised red flags as identified by several well-known human trafficking studies, including

[21] https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/

[22] *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 n. 15 (9th Cir. 2008).

[23] https://www.propublica.org/article/breaking-the-black-box-what-facebook-knows-about-you

[24] https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/

the Ohio Attorney General. Facebook was aware that these sorts of messages were precisely the ones it should be warning against. Had Jane Doe been warned of these red flags, she would not have engaged in conversations with the Instagram Friend.

242. Jane Doe's traffickers used Facebook's Instagram product to post Jane Doe for sale to johns looking to exploit minor children. Through the use of Instagram, "dates" (that is, the rape of Jane Done in exchange for money) were arranged through Instagram by her traffickers.

243. These human trafficking posts were hardly a secret. After all, Jane Doe's traffickers were publicly posting partially nude photographs of her as a 15-year-old minor.

244. As a result of being trafficked through Instagram, Jane Doe was raped numerous times while she was still a minor.

245. Even upon Jane Doe's rescue, traffickers continued to use Jane Doe's profile to attempt to entrap minors into human trafficking. This activity was reported to Facebook by Jane Doe's mother. Facebook never responded despite making claims to the public they protect their users through other user reports.

246. To date, Instagram has taken no reasonable steps to mitigate the use of Instagram by sex traffickers or exploiters using its platform and product.

247. Millions of minors like Jane Doe remain at risk every day when they simply log onto Instagram.

A. ALLEGATIONS REGARDING THE BACKPAGE DEFENDANTS

248. On April 6, 2018, the FBI seized the Backpage website and its affiliated websites, and arrested its founders and current owners:

249. The seizure came on the heels of President Trump's anticipated signature of the Stop Enabling Sex-Trafficking Act (SESTA). Congress and the Senate, in passing SESTA, both noted their abhorrence of Backpage's (and other websites, such as TER, RubMaps.com, ECCIC, and Craigslist's) misuse of the Communications Decency Act. This bill was passed in direct response to a United States First Circuit Court of Appeals decision that granted § 230 communication decency act immunity to the Backpage website under state and federal law. The subsequent Senate Permanent Subcommittee Investigation that found the Backpage website "knowingly concealed evidence of criminality by systematically editing its "adult ads" that the Backpage website actually knew facilitated prostitution and child sex trafficking." SESTA (2017). SESTA itself states:

> Unfortunately, classified sites like Backpage.com, Eros, Massage Troll, and city guide have also become one of the primary channels of sex trafficking…Some websites have gone beyond merely hosting advertisements, however, and have purposely created platforms designed to facilitate prostitution and sex trafficking….because of protections provided to "interactive computer services" by the CDA, it has been challenging to hold bad actor websites accountable criminally (at the state level) and civilly…. In sum, **Backpage had engaged in a ruse, holding itself out to be a mere conduit, but in fact actively engaged in content creation and purposely concealing illegality in order to profit off of advertisements.** There has been no criminal investigation up until the Senate investigation to uncover exactly what Backpage was doing, which is what this bill aims

to remedy.[25]

250. The bipartisan measure creates an exception to Section 230 of the Communications Decency Act, and unequivocally allows survivors of sex trafficking to sue websites that enable their abuse. *Id.*

251. Even the Internet Association, which includes tech giants such as Amazon, Google, Yelp, Facebook, and Lyft are mortified by the flourishing of human trafficking on internet and has placed their support behind SESTA.[26] As eloquently stated by CoStar CEO:

> As a technology company, we believe in, and have benefitted from, the growth of the Internet. We understand that an unregulated Internet provides fertile ground for the development of important new and innovative business models, and we will continue to strongly defend that openness. But when we see those driven by greed take advantage of that freedom by facilitating underage sex trafficking, we cannot be silent.

252. It is clear that American Public is done standing idly by while often the most vulnerable members of our community, including minors, are sold for sex online.

A.1. As a minor, Jane Doe was sexually exploited and trafficked through the Backpage website.

253. Jane Doe was sexually exploited through the use of the Backpage website at only 15 years old. Jane Doe was caused by any means, by her exploiter, to prostitute herself out and underwent the worst type of sexual exploitation and abuse to preform sexual acts on countless individuals who sought criminal sexual conduct from a minor in exchange for a fee. Through The Backpage Defendants' knowing use of advertisement sanitization techniques to masquerade advertisements looking to sexually exploit minors as legal advertisements for escorts, Jane Doe was caused by any

[25] *Id.* (emphasis added).

[26] UNICEF, *The Fight Against Online Child Sex Trafficking*, https://www.unicefusa.org/stories/fight-against-online-child-sex-trafficking/33815, Jan. 11, 2018.

means into human trafficking and the sexual exploitation while a minor and suffered, as well as continues to suffer, significant personal injuries and damages as a result.

A.2. Sex trafficking of minors has exploded due to the marketplace of sexual exploitation created by the Backpage website.

254. According to the United States Department of Homeland Security, in 2016, human trafficking and the sexual exploitation of minors generates billions of dollars each year in illegal proceeds, making it more profitable than any transnational crime except drug trafficking.

255. While precise data concerning the black-market trade is scarce, estimates are there were as many as 27 million survivors of human trafficking and the sexual exploitation of minors worldwide in 2013—including 4.5 million people trapped in sexual exploitation. Too often, the survivors of sex trafficking, including Jane Doe, are minors caused by any means into prostitution.

256. The United States Department of Justice has reported that more than half of the sex-trafficking survivors are 17 years old or younger. In 2014, the National Center for Missing and Exploited Children reported an 846% increase from 2010 to 2015 in reports of suspected child sex trafficking—an increase the organization found to be "directly correlated to the increased use of the internet to sell children for sex." With the help of online advertising, traffickers can maximize profits, evade law enforcement detection, and maintain control of survivors by transporting them quickly between locations.

257. Both Texas and Houston have not escaped this horrific trend. Recent media reports indicate that Texas has the second highest number of calls to the National Human Trafficking Resources Center in the Nation. Moreover, as recent as 2015, Houston was found to have the highest number of trafficking survivors in the nation.

258. Online advertising has transformed the commercial sex trade, and in the process has contributed to the explosion of domestic sex trafficking. Sex trafficking previously took place (and continues to through the aid of online advertising) on the streets, casinos, truck stops, and in other

physical locations. Now, most child sex trafficking, including the trafficking of Jane Doe, occurred online.

259. The Backpage website is the leading online marketplace for human trafficking and the sexual exploitation of minors and commercial sex, including human trafficking and the sexual exploitation of minors. According to the United States Senate Permanent Subcommittee on Homeland Security and Government Affairs, Backpage is involved in 73% of all child trafficking reports that the National Center for Missing and Exploited Children receives from the general public (excluding reports by Backpage itself). The National Association of Attorneys General has aptly described the Backpage website as a "hub" of "human trafficking, especially the trafficking of minors."

260. The Backpage Defendants do not deny their site is used for criminal activity, including the sale of children for sex. As found by the United States Subcommittee Report, internal company documents show that Backpage has long maintained a practice of altering ads before publication by deleting words, phrases, and images indicative of child sex trafficking, and other sex trafficking, as well as "educating" users how to make illegal ads for prostitution appear as legal ads for escorts.

261. For example, on July 28, 2011, Backpage co-founder Larkin cautioned Backpage CEO Ferrer against publicizing the Backpage Defendants' moderation practices, explaining that "we need to stay away from the very idea of editing the posts, as you know."

262. Backpage had good reason to conceal its editing practices: Those practices served to sanitize the content of innumerable advertisements for illegal transactions, including those prostituting out and trafficking Jane Doe—even as the Backpage Defendants represented to the public and the courts that it merely hosted content others had created.

A.3. The Backpage Defendants' ad sanitization process proves they knew of their involvement in sex trafficking.

263. This practice by the Backpage Defendants of systematically editing its adult ads to conceal child human trafficking and the sexual exploitation of minors has been in effect for almost a

decade. As early as 2008, the Backpage Defendants and their executives began instructing staff responsible for screening ads (known as moderators) to edit the text of adult ads to conceal the true nature of the underlying transaction.

264. By October 2010, the Backpage Defendants and their executives formalized a process of both manual and automated deletion of incriminating words and phrases, primarily through a feature called the "Strip Term from Ad Filter."

265. At the direction of CEO Ferrer, the company programmed this electronic filter to "strip"—that is, to delete—hundreds of words indicative of sex trafficking the sex trafficking of minors and prostitution from ads before their publication.

266. The terms that the Backpage Defendants have automatically deleted from ads before publication include "Lolita," "teenager," "rape," "young," "amber alert," "little girl," "teen," "fresh," "innocent," and "school girl."

267. When the user (such as Jane Doe's trafficker) submitted an adult ad containing one of these "stripped" words, the Backpage Defendants' Strip Term from Ad Filter would automatically delete the discrete word and the remainder of the ad would be published.

268. While the Strip Term from Ad Filter changed nothing about the true nature of the advertised transaction or the real age of the person being sold for sex (such as Jane Doe, who was 15 years old) the filter would scrub the ads so they looked (but were not) "cleaner than ever."

269. Manual editing entailed the deletion of language similar to the words and phrases that the Strip Term from Ad Filter automatically deleted—including terms indicative of the sexual exploitation and proposed sexual assault of minors, including Jane Doe. By The Backpage Defendants' themselves estimated that by late 2010, they were editing "70 to 80% of ads" in the adult section, whether manually or automatically.

270. Along with its automatic Strip Term Filter and Manual Editing, The Backpage Defendants also reprogrammed their electronic filters to coach human traffickers looking to exploit minors using Backpage on how to post "clean" ads selling minors and other survivors, including Jane Doe, to be sexually assaulted.

271. Initially, when a user attempted to post an ad with a forbidden word, the user would receive an error message identifying the problematic word choice to "help" the user, as Backpage CEO Ferrer puts it. For example, a user advertising sex with a "teen" would get the error message "sorry, teen is a banned term." By simply redrafting the ad, the user would be permitted to post a sanitized version.

272. Backpage employed a similarly helpful error message in its "age verification" process of adult ads. In October 2011, Ferrer directed his technology consultant to create an error message when a user supplied an age under 18 years. The message would appear informing the trafficker that "Oops! Sorry, the ad poster must be over 18 years of age." With a quick adjustment to the poster's age, the ad would post despite the fact that the advertisement was still that for the sexual exploitation and sexual assault of a minor.

273. In November 2010, Ferrer, along with the Backpage Defendants, concluded that the error message method of sanitizing minor and other sex trafficking advertisements on Backpage was inefficient when the customer themselves was responsible for redrafting the ad after the error message. Therefore, instead of having the human trafficker or exploiter posting an advertisement edit the ad after submission, Ferrer ordered Backpage to implement a system to "strip out a term after the customer submits the ad and before the ad appears in the moderation queue." This meant that upon the submission of an advertisement containing one of the banned words related to human trafficking or the sexual exploitation of minors, the banned word would be **automatically deleted** from the advertisement instantaneously **before** any moderator screening. After the term was automatically

deleted due to the Strip Term from Ad Filter, the moderator would then be sent the advertisement and given the ability to continue to fix any other signs indicative of the sexual of minors. The Strip Term from Ad Filter concealed the illegal nature of countless ads, including those used to traffic Jane Doe, and systematically deleted words indicative of child sex trafficking and the sexual exploitation of minors before the ads even reached moderators.

274. This sanitization process described above was purposeful on the part of the Backpage Defendants or was undertaken with the knowledge that its sanitization process was encouraging and assisting human traffickers and exploiters to exploit minors and other survivors, including Jane Doe.

275. The Senate Subcommittee Report found the Backpage Defendants and Backpage employees knew the adult section ads were for prostitution and that the moderators' job was to sanitize them. The Backpage Defendants also knew that advertisers used its site extensively for child sex trafficking. Despite this knowledge, the Backpage Defendants refused to act in a reasonable and responsible manner to these complaints—but instead used the sanitization process to avoid potential criminal investigations and enhance sex traffickers' ability to exploit minors while going undetected.

276. Moreover, the Backpage Defendants did not implement the sanitation process on an ad hoc basis, but in a systematic manner that demonstrated a clear company policy to help human traffickers avoid law enforcement detection and continue the sexual assault of minors, including Jane Doe, and other young women against their will.

277. In December 2009, The Backpage Defendants and their executives prepared a training session for their team of moderators on the sanitization process. The PowerPoint presentation prepared for the session instructed moderators to fully implement the Adult Moderation pre-posting review queue by January 1, 2010.

278. Most importantly, the presentation explained that "Terms and code words indicating illegal activities require removal of ad or **words**. Backpage executives kept their word and formalized

and fully implemented the company-wide sanitation process in early 2010. In April 2010, Ferrer emailed a note to himself with the subject line "Adult clean up tasks," Ferrer confirmed that as of April 2010, staff were "moderating ads on a 24/7 basis." In a section of the note, Ferrer noted that "Ads with bad images or bad test [sic—text] will have the image removed or the offending text removed." In a section titled "Additional Steps," Ferrer said "text" could be cleaned up more as users become more creative.

279. Ferrer and the Backpage Defendants did not just discuss ways to make the sanitization process of human trafficking and sexual exploitation of minor advertisements more effective, but actively engaged in updating the word bank of terms to make the adult section appear "cleaner than ever." For example, in a December 1, 2010, email addressed to Backpage moderators and Ferrer, Padilla stated:

> Between everyone's manual moderations, both in the queue and on the site, and the Strip Term from Ad Filters, things are cleaner than ever in the Adult section.
>
> …
>
> In an effort to strengthen the filters even more and avoid the repetitive task of manually removing the same phrases every day, every moderator starts making a list of phrases you manually remove on a regular basis?
>
> …
>
> Included in your lists should be popular misspellings of previously banned terms that are still slipping by.
>
> …
>
> To avoid unnecessary duplicates, I'm attaching a spreadsheet with the most current list of coded terms set to be stripped out.

280. The spreadsheet attached to Padilla's email indicates that the following words (among others) were automatically deleted from adult ads by the Strip Term from Ad Filter before ads were published:

- Lolita (and its misspelled variant, lollita)
- Teenage
- Rape
- Young

281. Moreover, multiple documents and communications from the Backpage Defendants demonstrate the inclusion of these and other terms in the Strip Term from Ad Filter. Over the course of the next several months, Backpage added additional words to the Strip Term from Ad Filter, including:

- Amber alert
- Little girl
- Teen
- Fresh
- Innocent
- School Girl

282. When a user submitted an adult ad containing one of the above forbidden words, the Backpage Defendants' Strip Term from Ad Filter would immediately delete the discrete word and the remainder of the ad would be published after moderator review. Of course, the Strip Term from Ad Filter changed nothing about the real age of the person being sold for sex or the real nature of the advertised transaction. Nor was Backpage Defendants' goal to fix these things.

283. By July 2010, The Backpage Defendants were praising moderation staff for their editing efforts. Ferrer circulated an agenda for a July 2010 meeting of The Backpage Defendants' Phoenix staff and applauded moderators for their work on "adult content" and encouraging Backpage staff to keep up the good work. Ferrer elaborated in an August 2010 email that Backpage currently had a staff of 20 moderators working 24/7 to remove any sex act pictures and other code words for sex for money.

A.4. The Backpage Defendants sanitized, instead of deleting, ads that sexually exploited minors.

284. For a brief period in 2010, the Backpage Defendants appeared to have second thoughts about facilitating and encouraging human trafficking and the sexual exploitation of minors through the sanitation of Adult Page advertisements. In September of 2010, in response to pressure from Village Voice executives to "get the site as clean as possible," Backpage "empower[ed]" Phoenix-based moderators "to start deleting ads when the violations are extreme and repeated offenses." On September 4, 2010, when Craigslist, the company's chief competitor, shut down its entire adult section, the Backpage Defendants recognized it was "an opportunity" and "[a]lso a time when we need to make sure our content is not illegal due to expected public scrutiny" (note: not moral obligation to sexually exploited minors such as Jane Doe). The Backpage Defendants initially responded by expanding the list of forbidden terms that could trigger the complete deletion of an entire ad—whether by operation of an automated filter or by moderators. Despite finally taking a step in the right direction, the Backpage Defendants soon began to recognize that the deletion of ads with illegal content was bad for business. Ferrer explained his rational that ads should be sanitized instead of deleted to the company's outside technology consultant, DesertNet:

> We are in the process of removing ads and pissing off a lot of users who will migrate elsewhere. I would like to go back to having our moderators remove bad content in a post and then locking the post from being edited.

285. This more "consumer friendly" approach chosen by Ferrer and the Backpage Defendants was done in order to ensure that posts were sanitized in a way that avoided law enforcement detection and was used to "teach" the human trafficker or exploiter what they did wrong. This methodical and calculated decision made by the Backpage Defendants to focus all of its efforts on sanitizing instead of removing advertisements of human trafficking and sexual exploitation of

minors was done solely for the Backpage Defendants' own financial gain and with complete disregard for the safety of survivors, including Jane Doe.

286. Backpage also programmed the Strip Term from Ad Filter to strip scores of words indicative of prostitution and the sexual exploitation of minors from ads before publication. For ads submitted to the section advertising escorts for hire, the filter deleted words describing every imaginable sex act as well as common terms of the trade such as "full service," "Pay 2 Play," and "no limits." In addition, the Backpage Defendants programmed the filter to edit obvious prostitution price lists by deleting any time increments less than an hour (e.g. $50 for 15 minutes) and to strip references to a website called "The Erotic Review" or "TER"—a prominent online review site for prostitution.

287. **The Backpage Defendants designed the Strip Term from Ad Filter to delete, without a trace, hundreds of words and phrases indicative of prostitution from ads before their publication—cloaking those advertisements with the appearance of legality while concealing their true intent.**

288. By February 2011, Ferrer was boasting that the strip out sanitization system "affects almost every adult ad" on Backpage. Ferrer continued to boast that it was "pretty cool" to see how aggressively Backpage was using the strip out function to conceal the advertisements true purpose—human trafficking and the sexual exploitation of minors. The Backpage Defendants and their executives continually praised the results of this extensive content-editing effort: "[T]he consensus is that we took a big step in the right direction" (by editing instead of deleting illegal advertisements), Ferrer told Backpage executive Padilla, and that the "content looks great" and The Backpage Defendants should keep their goal to "tame the content down even further while keeping good content and users."

289. The Backpage Defendants' internal company communications demonstrate the Backpage Defendants and their executives' actual knowledge that the purpose of Backpage's

systematic editing was to sanitize prostitution and sexual exploitation of minors advertisements to avoid State and Law Enforcement repercussions against Backpage for encouraging and promoting human trafficking as well as the sexual assault and sexual exploitation of minors. As explained in an October 10, 2010 Backpage internal email from Padilla to Backpage moderators regarding Backpage's sanitation of adult ads: "it's the language in the ads that is really killing us with the Attorneys General." Similarly, Ferrer explained the need for a special "Clean Up" of Backpage's adult section in advance of a day on which he expected the "Attorney General investigators to be browsing for escorts."

A.5. The Backpage Defendants approved Backpage's facilitation of the sex trafficking of minors, including Jane Doe.

290. Ferrer personally directed and approved the addition of new words to the Strip Term from Ad Filter related to the trafficking and prostitution of underage survivors. For example, Ferrer told Padilla in a November 17, 2011 email that the word "lolita" is code for under aged girl [sic]. A similar understanding led Ferrer to add the words "daddy" and "little girl" to the Strip Term from Ad Filter. In February 2011, CNN ran a story about a 13-year-old girl named Selena who was sold for sex on Backpage. The report noted that "suspect ads with taglines such as 'Daddy's Little Girl' are common" on the Backpage website. Ferrer's remedy instead of removing this content from Backpage was to email the CNN story to Padilla and instruct him to add "daddy" and "little girl" to the strip out filter.

291. Similarly, in a June 7, 2011 email, Ferrer told a Texas law enforcement official that a word found in one Backpage ad amber alert is "either a horrible marketing ploy or **some kind of bizarre new code word for an under aged person**." Ferrer told the Texas official that he would forbid the phrase (not remove the advertisements)—without explaining that, inside the Backpage Defendants' operations, this meant the word would be automatically deleted from advertisements to conceal their true nature. Ferrer forwarded this email chain to Padilla and instructed Backpage employees to add "amber alert" to the automatic strip out filter. A June 11, 2012, version of the filter

word list indicates that "amber alert" was indeed automatically deleted by the Strip Term from Ad Filter before the advertisement reached moderators. In short, Backpage and Ferrer added such terms to the Strip Term from Ad Filter with full awareness of their implications for child sexual exploitation.

292. These actions by Ferrer included personally ensuring that known sex traffickers' accounts were not blocked on Backpage and that sex traffickers could post on Backpage with impunity and without recourse from Backpage. For example, Backpage locked the account of "Urban Pimp" for posting numerous ads for sex. When his ads were temporarily blocked, Urban Pimp complained to the Backpage Defendants that his advertisements for sex were blocked and that he was trying to post advertisements for sex in 50 cities all across the United States. Rather than report Urban Pimp to law enforcement or ban Urban Pimp from Backpage, Ferrer advised Urban Pimp that he had unlocked his account and that if his account did not work "email me back direct."

293. As a matter of policy, the Backpage Defendants moreover chose to err against reporting potential child sexual exploitation in favor of retaining its customer base and avoiding law enforcement review of the Backpage Defendants' actions. For example, in June 2012, the Backpage Defendants instructed its outsourced third-party moderators only to delete suspected child-sex advertisements "**IF YOU REALLY VERY SURE THE PERSON IS UNDERAGE."** In a similar email, a Backpage supervisor instructed internal moderation staff: **"Young ads do not get deleted unless they are clearly a child."** Backpage supervisors not only encouraged non-deletion of ads involving the sexual exploitation of minors, but actively instructed moderators not to report advertisements exploiting children to the National Center for Missing and Exploited Children. For example, in an email exchange dated July 11, 2013, Vaught, a Backpage supervisor, instructed a moderator that she "probably would not have reported" the advertisement despite the fact that the woman in the ad looked drugged, underage, and had bruises. In chastising the moderator for her decision, Vaught noted that "these are the kind of reports the cops question us about" and that while

she finds ads "like this" (with clear signs of abuse and trafficking) she does not typically send them to the National Center for Missing and Exploited Children.

A.6. The Backpage Defendants ordered employees not to delete ads that clearly exploited minor survivors of human trafficking.

294. After an advertisement had already been through the Strip Term from Ad Filter and passed to moderators, the Backpage Defendants implicitly and explicitly prevented moderators to reject entire ads due to indications of prostitution, child prostitution, and human trafficking. Documents from the Backpage Defendants indicate that the company permitted moderators to delete only a *de minimis* share of adult ads in their entirety. In January 2011, Ferrer estimated that about five adult sex for money postings are removed out of every 1,000—which equates to only five percent of advertisements that promote prostitution as well as human trafficking and the sexual exploitation of minors being removed from Backpage by The Backpage Defendants. This low removal rate of advertisements promoting human trafficking and the sexual exploitation of minors was by design. For example, on October 24, 2010, Padilla emailed the supervisor of Backpage's contract moderators to inform her of the edit over delete policy. The email subject line read "your crew can edit" and went:

> [Your team] should stop Failing ads and begin editing … as long as your crew is editing and not removing the ad entirely, we shouldn't' upset too many users. Your crew has permission to edit out text violations and images and then approve the ad.

295. In editing advertisements that clearly advertised the sexual exploitation of minors and human trafficking, moderators were instructed by the Backpage Defendants to systematically remove words indicative of criminality before publishing an ad (assuming that the ad still appeared criminal after making it through the Strip Word Filter). As stated by Backpage Employee A in the Senate Subcommittee Report who worked as a Backpage moderator from 2009 through 2015, the moderator's goal was to remove key phrases that made the ad sound like a prostitute ad rather than an escort ad, dancing around the legality of the ad. **Backpage Employee A explained the Backpage**

Defendants wanted everyone to use the term "escort," even though the individuals placing the ads were clearly prostitutes. Therefore, the Backpage Defendants were systematically through both explicit and convert means helping its users turn an intended illegal advertisement for human trafficking or the sexual exploitation of a minor into a seemingly legal escort advertisement—all while concealing the users' true intent.

296. Testimony under oath by former Backpage moderator Adam Padilla, brother of Backpage executive Andrew Padilla, tracks Backpage Employee A's account. In an August 2, 2016 deposition, Adam Padilla testified that deleting ads for illegal conduct, rather than editing out the indicia of illegality to provide a façade of legality, would have cut into company profits:

> A: [M]y responsibility was to make the ads okay to run live on the site, because having to get rid of the ad altogether was bad for business. And so you would want to, you know, make it — take out any of the bad stuff in the ad so that it could still run....
>
> Q: When you say that you viewed your job responsibility to be to take out the bad stuff in ads, you're referring to what we discussed earlier with regard to images that suggested that the ad was advertising money for sex or content that suggested the ad was for an advertisement for money for sex, correct?
>
> A: That is exactly correct.[203]

297. Padilla further testified that moderators even edited live ads that were reported for "Inappropriate Content" by users. According to Padilla, if moderators saw an ad that had inappropriate content that suggested sex for money or images that suggested sex for money, they would remove the offending language and repost the ad. This was ordered by the Backpage Defendants despite it being "common knowledge" that removing sex for money language before posting does not change the illegal nature of the advertised transaction.

> A: [I]t would be pretty much common knowledge that it's still going to run. So a person is still going to ... do what they wanted to do, regardless.
>
> Q: And do you agree with me if you removed language from an ad that blatantly sells—or says that "I'm willing to have sex with you for money," and then you post the remainder, you know as the person who edited the ad, that the ad is someone who is trying to sell sex for money, correct?
>
> A: Yes.[205]

298. Not only did the Backpage Defendants prevent moderators from deleting advertisements, but the Backpage Defendants moderators themselves used Backpage for prostitution services. For example, Backpage Employee C explained that at least one of her coworkers contacted and visited prostitutes using Backpage ads and told his colleagues about the encounters. Similarly, Backpage Employee A related that some Backpage moderators visited massage parlors that advertised on Backpage. Given the clear company policy and corporate culture of Backpage, those employees who felt that the corporate policy to encourage and assist users to disguise their human trafficking and sexual exploitation of minor ads were wrong did not voice their concerns out of fear for retaliation.

299. Although the Backpage Defendants' role in facilitating human trafficking as well as the sexual exploitation of minors was apparent to its employees, company management reprimanded employees who memorialized this in writing. On October 8, 2010, Padilla and a Backpage moderator made that point clear by ordering moderators not to leave notes in user accounts, even those who are long time term-of-use violators. Specifically, Padilla states in the October 8, 2010 email:

> Backpage and you in particular, cannot determine if any user on the site in [sic] involved with prostitution. Leaving notes on our site that imply that we're aware of prostitution, or in any position to define it, is enough to lose your job over. There was not one mention of prostitution in the power point presentation. That was a presentation designed to create a standard for what images are allowed and not

> allowed on the site. If you need a definition of "prostitution" get a dictionary. Backpage and you are in no position to re-define it.
>
> This isn't open for discussion. If you don't' agree with what I'm saying completely, you need to find another job.

300. In January 2013, a moderator copied similar notes into an email to a supervisor: "Could not delete ad. An escort ad suggested that they don't want a non GFE so I am assuming they are promote [sic] prostitution".

301. After an apparent telephone conversation, the moderator wrote the supervisor to "apologize" saying that she had to remove the offending picture and "didn't want to lose the notes." The supervisor suggested that the moderator communicate in Gchat while another supervisor stressed via email that the moderator follow the protocol and not go into detailed explanation. These practices have continued as recently as August 2016, when Backpage moderation supervisor Vaught requested that contract moderators not use the phrase promoting sex, but should instead say "adult ad."

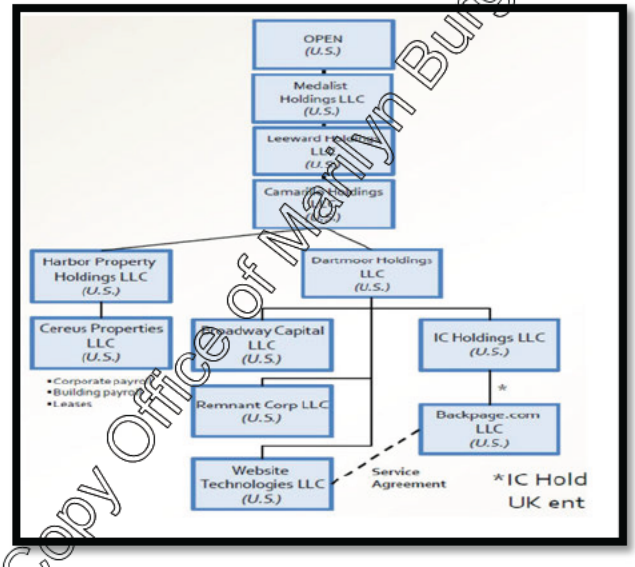
302. Despite these admonitions to moderators by the Backpage Defendants, as well as their executives and supervisors, the language of adult ads (both edited and unedited) leave little doubt that the underlying transactions involve human trafficking as well as the sexual assault and sexual exploitation of minors. For example, in a March 2016 internal email, Backpage moderator supervisors were reminded that the following terms were being wrongfully removed from ads, including: PSE (Porn Star Experience), Porn Star, Full Pleasure, Full Satisfaction, Full Hour, Quickie (even with a price accompanying the term) and GFE—which stands for girlfriend experience—a code word for prostitution.

A.7. The Backpage Defendants' ownership structure is designed to hide the Backpage website's true ownership through the use of shell companies.

303. By 2012, Village Voice Media Holdings changed to Medalist Holdings, LLC, a privately held Delaware entity owned by Lacey, Larkin, Scott Spear, Brunst, and two of Larkin's children. A February 2015 Agreement and Plan of Recapitalization for Medalist stated that Larkin served as CEO

of the company, and Larkin and Lacey retained 42.76% and 45.12% of Medalist shares, respectively. Brunst, who served as CFO, owned 5.67% of the company and Spears owned 4.09%.

304. At the time, Medalist was Back page's ultimate corporate parent—five shell companies removed. Medalist owned Leeward Holdings, which owned Dartmoor Holdings, LLC, which owned IC Holdings, LLC, which owned Backpage. According to Back page's tax accountant, Medalist and all its subsidiaries filed a single corporate tax return. In addition, Backpage had a service agreement with another of Medalist's ultimate subsidiaries, Website Technologies, LLC, under which Website Technologies preformed most of Back page's outward-facing operations. Prior to its sale in 2014, below is a chart of Back page's corporate structure.



305. On December 29, 2014, Medalist entered into a Letter of Intent for the sale of Backpage for $600 million to a Dutch corporation. The Backpage Defendants have long sought to obscure the identity of the purchaser. According to a contemporaneous report in the *Dallas Business Journal*, the "purchasing company's name was not disclosed, pending regulatory filings in the European Union." When questioned about the sale in a June 19, 2015 interview, The Backpage Defendants' General Counsel, Elizabeth McDougall, claimed she had no information about the transaction except

that Backpage had been sold to a Dutch entity. McDougall added that she did not even know the name of the new holding company.

306. In fact, the purchaser was McDougall's boss, CEO Ferrer. The December 2014 Letter of Intent listed the buyer as UGC Tech Group, a Dutch partnership headed by Ferrer. The seller was defendant Camarillo Holdings. The transaction was styled as a sale of the membership interest in Defendant Dartmoor Holdings, another shell limited liability corporation that owned Backpage, along with Website Technologies, LLC. The signatories on the Letter of Intent were Brunst, named as "CFO" of Camarillo Holdings, and Ferrer, acting as "Director" of UGC Tech Group The sale was to be financed with a five-year loan at 7% interest from Camarillo Holdings to UGC Tech Group for the full amount of the $600 million purchase price. A consulting firm engaged by Medalist concluded, however, that the sale was not an arms-length transaction and instead was infected by self-dealing. Rather than an arms-length sale, Lacey and Larkin loaned Ferrer, as Backpage CEO, hundreds of millions of dollars in an entirely seller-financed employee buyout. Under the Letter of Intent, moreover, Lacey and Larkin retained significant financial and operational control over Backpage. The pair, for example, are entitled to amortized loan repayments, earn-outs on future profits, and a 30% participation in any future sale of the company in excess of the purchase price. Moreover, Larkin and Lacey retained a security interest over all Backpage assets, all membership and stock interest in Backpage, and all Backpage bank accounts.

307. Furthermore, the Letter of Intent subjects Ferrer to significant restrictions on his management of the company until the loan is repaid. Ferrer cannot sell Backpage, assign the loan to another borrower, or even change accountants or outside counsel without approval from Lacey and Larkin. The sale was conditional on Ferrer providing a "five-year business plan satisfactory to the Seller in its sole and absolute discretion." Ferrer, moreover, also committed to submit to Lacey and Larkin for approval an annual budget, monthly and quarterly balance sheets, and annual audited

financial statements. Ferrer also made covenants to give Lacey and Larkin electronic access to The Backpage Defendant's bank accounts and full access to The Backpage Defendant's books and records. In addition, Ferrer could not, without approval, change the company's organizational structure, salaries, banking relationships, or place of domicile. Moreover, according to a loan agreement later executed in connection with the sale, Ferrer could not engage in any line of business other than the business engaged in on the date of the sale.

308. Recent reports confirm the significant level of operations control—as well as financial interest—Lacey and Larkin retain over Backpage. The declaration supporting the September 2016 California arrest warrants for Lacey, Larking, and Ferrer, for example, state that "while Ferrer currently runs the day to day operations for Backpage, he and other high-level personnel in Back page's structure report regularly to Larkin and Lacey. According to the declaration, moreover, Lacey and Larking also "regularly receive bonuses from Backpage bank accounts. For instance, in September of 2014, Lacey and Larkin each received a $10 million bonus." Therefore, it is undeniable that Lacey and Larkin from 2014-2015 played a significant role in The Backpage Defendants actions and continue to have a significant stake in Back page's operations.

A.8. Backpage is an alter ego of Ferrer, Lacey, and Larkin.

309. The sale contemplated in the December 29, 2014 Letter of Intent was executed in a series of transactions on April 22, 2015 for a total purchase price of $603 million. With the help of a consultant called the Corpag Group, a fiduciary and trust company based in Curacoa, Ferrer actually created two entities to serve as the direct buyers of Backpage domestic and foreign operations, respectively. Atlantische Bedrijven (a partnership that purchased Back page's U.S. Operations) and UGC Tech Group (a partnership that purchased Back page's foreign operations). Both of these companies are owned, operated, controlled, and managed by Ferrer, through five Delaware-based

limited liability companies—Defendants Amstel River Holdings, Lupine Holdings, Kickapoo River Investments, CF Holdings GP, and CF Acquisitions.

310. Atlantisch Bedrijven bought Back page's domestic operations for $526 million by purchasing the assets of Dartmoor Holdings (one of Back page's shell limited liability corporation parents) from Defendant Vermillion Holdings, LLC, which also loaned money to Atlantische Bedrijven for the purchase. As a consequence, Atlantische Bedrijven as of today owns Backpage and Website Technologies, among other entities. For the sale of Back page's foreign operations, the parties executed a similar series of transactions, involving slightly different corporate entities on the buyer's side, for a purchase price of approximately $77 million. For the purposes of these transactions, the buyer and borrower was UGC Tech Group, whose sole general partner was CF Holdings, GP a Delaware-based limited liability corporation owned and operated by Ferrer, the managing member.

311. According to a tax partner at a consulting firm engaged on Backpage-related matters, this unusual structure—involving multiple layers of holding companies, both domestic and foreign—provide no tax benefit to The Backpage Defendants. In fact, all profits within the corporate structure flow up to the U.S. based Amstel River holdings (of which Ferrer is the only member) for tax purposes and all Dutch entities are ignored. Brunst confirmed in an email to the consulting firm, obtained by the United States Subcommittee investigating The Backpage Defendants' long history of human trafficking, that Atlantisch Bedrijven is subject to United State tax on its earnings and serves as nothing more than a "pass through" entity owned by Ferrer, a United States citizen.

B. ALLEGATIONS REGARDING SIESTA INN

B.1. Human trafficking and the sexual exploitation of minors is a rampant, well-known problem in the hotel industry.

312. According to the Polaris Project, one of the most commonly reported venues for sex trafficking to the National Human Trafficking Hotline is hotels and motels. It has long been recognized that exploiters and traffickers use hotel and motel rooms when setting up "dates" between

survivors of sex trafficking and those individuals purchasing sex. Traffickers have long capitalized on the hotel industry's refusal to adopt companywide anti-trafficking policies, train staff on what to look for and how to respond, establish a safe and secure reporting mechanism, as well as the seclusion and privacy of hotel rooms. As aptly stated in a publication by Cornell University on the issue, "the hospitality industry is undoubtedly involved in the sex trafficking industry...and therefore have an inherent responsibility to deter the crime and can be liable for failing to do so." According to a 2012 BEST study, 63% of trafficking incidents happen in hotels, ranging from luxury to economy, with the majority of survivors being children. The ease of access and anonymity of hotels coupled with the internet websites like Backpage has led to an explosion in child sexual exploitation nationwide and particularly in Houston.

313. In response to this horrific trend in the hotel industry, several industry leaders and municipalities, including the Baltimore and Connecticut, now require mandatory training on how to recognize and respond to the signs of human trafficking and the sexual exploitation of minors. In spotting signs of human trafficking and the sexual exploitation of minors, such as paying for a room with cash or a pre-paid credit card, another guest lingering outside the room for long periods of time, several guests coming and going from the hotel without checking into a room, and minor children paying for rooms, a responsible hotel is able to train staff that can mitigate and prevent human trafficking and the sexual exploitation of minors from occurring on their premise.

314. This sentiment is reaffirmed by the United States Department of Homeland Security's Blue Campaign to end human trafficking. In a recent Blue Campaign bulletin, the Department of Homeland Security outlines that traffickers have long used the hotel industry as a hotbed for human trafficking and has recommended policies and procedures that the industry can take to help prevent human trafficking and the sexual exploitation of minors.

B.2. Jane Doe was repeatedly exploited at the Siesta Inn.

315. During 2018, Jane Doe was repeatedly exploited at the Siesta Inn by her trafficker.

316. Jane Doe would be instructed by her trafficker to meet child molesters at their hotel.

317. Siesta Inn refused to take any steps to alert the authorities, properly intervene in the situation, or take reasonable security steps to improve awareness of sex trafficking and/or prevent the sexual exploitation of minors at their property.

318. And yet, trafficking signs are clearly, and publicly flaunted on Siesta Inn's Facebook page:

319. Neither Siesta Inn nor Facebook took any steps to stop trafficking that was being publicly advertised on Facebook's product at the Siesta Inn. This directly resulted in Jane Doe's continued sexual exploitation and sexual assault.

320. Upon information and belief, this was done to maximize profits by:

a. Reducing the cost of training employees and managers of how to spot the signs of human trafficking and the sexual exploitation of minors and what steps to take;

b. Not refusing room rentals in order to fill vacant rooms, even if those rentals were to minors who were being exploited by human traffickers, including Jane Doe;

c. Lowering security costs by not having proper security measures, including a CLEET certified security guard to help prevent human trafficking at the hotel location; and

d. Cutting down on the cost of employing lawyers to properly respond to law enforcement subpoenas requesting security footage and other information to assist in the prosecution of human traffickers.

CAUSES OF ACTION AGAINST FACEBOOK

A. FIRST CAUSE OF ACTION—VIOLATION OF CPRC § 98.002

321. Jane Doe incorporates each foregoing allegation.

322. Each of Facebook's negligent acts and omissions, singularly or collectively, constituted negligence and proximately violate Texas Civil Practice and Remedies Code § 98.002.

323. Facebook had a duty not to knowingly benefit from trafficking of persons, including Jane Doe.

324. Facebook breached this duty by knowingly facilitating the sex trafficking of Jane Doe, including by:

a. Increasing profits by not using advertising space for public service announcements regarding the dangers of entrapment, grooming, and recruiting methods used by sex traffickers on Instagram;

b. Increasing profit margins due to lower operations cost of not implementing mandatory public service announcements for those who sign up for Instagram regarding the dangers of entrapment and grooming used by sex traffickers on Instagram;

c. Increasing profit margins due to lower operations cost by not having to hire human trafficking experts to coordinate Instagram's awareness campaign

regarding the dangers of entrapment and grooming used by sex traffickers on Instagram;

d. Raising advertising fees by extending its "user base" to include sex traffickers by not engaging in a public service awareness campaign regarding the dangers of entrapment and grooming used by sex traffickers on Instagram;

e. Increasing profit margins due to lower operation cost by not implementing safeguards requiring verification of the identity of all user's on Instagram;

f. Increasing profit margins as a result of continued customer loyalty and therefore increased "user" numbers used to extract higher advertiser fees by creating a breeding ground for sex traffickers to stalk and entrap survivors.

325. Facebook has received financial benefits as a result of these acts and omissions by continuing to turn a blind eye to human trafficking and the sexual exploitation of minors as demonstrated by Facebook's callous disregard to Jane Doe mother's reporting of Jane Doe's exploitation through Instagram—and Facebook's refusal to take action.

326. Each of Facebook's negligent acts and omissions, singularly or collectively, constituted violations of Texas Civil Practice and Remedies Code § 98.002.

B. SECOND CAUSE OF ACTION—NEGLIGENCE

327. Jane Doe incorporates each foregoing allegation.

328. As a user on its website, Facebook owed a duty to Jane Doe to warn her of the known dangers of grooming and recruitment on Facebook by sex traffickers.

329. The danger sex traffickers posed to users such as Jane Doe was known to Facebook.

330. Facebook failed to exercise this duty and was negligent in one or more of the following, non-exclusive particulars:

a. Failure to warn of the dangers of grooming;

b. Failure to warn of the dangers of recruitment;

c. Failure to implement awareness campaigns or safeguards to ensure that users, including minors, were aware of sex traffickers using its website;

d. Failure to implement any other meaningful procedure to ensure its users were adequately warned of the dangers posed by sex traffickers;

e. Failure to verify the identity and/or age of users';

f. Failure to implement any safeguards to prevent adults from contacting minors on Facebook;

g. Failure to report suspicious messages between a minor and an adult user;

h. Failure to require accounts for minors to be linked to those of adults;

i. Failing to deprive known criminals from having accounts on Facebook;

j. Failure to exercise ordinary care as a reasonably prudent person would have done under the same or similar circumstances.

331. Facebook's failure to publish self-produced warnings about the occurrence of sex trafficking by its users directly harms people it has a duty to protect.

332. Facebook's failure to publish self-produced warnings about the signs, indicia, flags, or key phrases used in its users' sex trafficking trade directly harms children it has a duty to protect.

333. Facebook's duty could have been satisfied 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.

334. Each of Facebook's negligent acts and omissions, singularly or collectively, constituted negligence and proximately caused legal injuries to Jane Doe.

C. THIRD CAUSE OF ACTION—NEGLIGENT UNDERTAKING

335. Jane Doe incorporates each foregoing allegation.

336. Facebook undertook to warn users about and to screen for illegal conduct on its platforms because it knew or should have known such actions were necessary to protect Jane Doe and other vulnerable users.

337. Among other acts, Facebook failed to exercise reasonable care in warning Jane Doe about sex trafficking recruitment on its platforms, in screening and identifying sex traffickers on its Platforms, and in identifying and reporting Jane Doe's Instagram friend.

338. Jane Doe relied on Facebook to warn her about sex trafficking and to identify and report sex traffickers.

339. Facebook's negligent performance in warning Jane Doe and identifying sex traffickers increased Jane Doe's risk of harm.

340. Facebook's negligent undertaking proximately caused Jane Does harm.

D. FOURTH CAUSE OF ACTION—STRICT PRODUCTS LIABILITY WARNING/MARKETING DEFECTS

341. Jane Doe incorporates each foregoing allegation.

342. Facebook identifies Instagram as a product in its 10-K filings.

343. Facebook founder and CEO Mark Zuckerburg refers to Facebook as a product in congressional testimony.

344. As the design, formulator, constructor, rebuilder, and producer of Instagram, Facebook is a manufacturer of the Instagram product as defined in Texas Civil Practice and Remedies Code 82.003(4). As a manufacturer, Facebook is responsible for the defective and unreasonably characteristics in its Instagram product.

345. Instagram was marketed in a manner that renders Instagram unreasonably dangerous. Specifically, Instagram was marketed to children under the age of 18, without providing adequate warnings and/or instructions regarding the dangers of "grooming" and human trafficking on Instagram. These dangerous warning and marketing defects were both the direct and producing cause of Jane Doe's trafficking, her sexual exploitation, and Jane Doe's injuries and damages.

346. These defects existed at the time Jane Doe used Facebook's Instagram product and were not the result of any alteration by Jane Doe.

347. Facebook originally designed, manufactured, and placed into the stream of commerce its Instagram product. At the time Jane Doe used the Instagram product, Facebook was in the business of designing, manufacturing, and placing into the stream of commerce social media products, such as Instagram.

E. FIFTH CAUSE OF ACTION—GROSS NEGLIGENCE

348. Jane Doe incorporates each foregoing allegation.

349. Facebook's acts and omissions constitute gross negligence.

350. Viewed objectively from the standpoint of Facebook at the time of the incident, Facebook's acts and omissions involved an extreme degree of risk, considering the probability and magnitude of the potential harm to Jane Doe.

351. As a result of Facebook's gross neglect, Jane Doe was exposed to and did sustain serious injury.

352. Facebook's gross negligence directly and proximately caused Jane Doe's injuries.

353. Exemplary damages are warranted for Facebook's gross negligence.

CAUSES OF ACTION AGAINST THE BACKPAGE DEFENDANTS

A. FIRST CAUSE OF ACTION—TCPRC 98

354. Jane Doe incorporates each foregoing allegation.

355. The Backpage Defendants' acts, omissions, and commissions, taken separately and/or together outlined above constitute a violation of Texas Civil Practice and Remedies Code § 98.002. Specifically, The Backpage Defendants had a duty not to knowingly benefit from trafficking of persons, including Jane Doe.

356. At all relevant times, The Backpage Defendants breached this duty by knowingly participating in the facilitation of trafficking minors, including Jane Doe, by acts and omissions including, but not limited to:

a. Accepting advertising fees from the Backpage website from human traffickers, including Jane Doe's trafficker, despite actual and/or constructive knowledge that those advertisements were for illegal human trafficking, prostitution, and/or sexual exploitation of minors;

b. Designing and implementing the Strip Term from Ad Filter to automatically sanitize advertisements intended to promote human trafficking, prostitution, and/or the sexual exploitation of minors in an effort to maximize advertising revenue, customer satisfaction, and avoid law enforcement detection of illegal acts;

c. Designing and implementing, in order to maximize revenue, a manual moderation system intended to sanitize posted content advertising human trafficking, prostitution, and/or the sexual exploitation of minors to give those ads the appearance of promoting legal escort services as opposed to illegal services;

d. Implementing a corporate policy to maximize revenue of sanitizing advertisements promoting human trafficking, prostitution, and/or sexual exploitation of minors instead of removing those advertisements from the Backpage website or reporting those advertisements to the proper law enforcement officers;

e. Knowingly implementing a corporate policy in order to maximize profit from the adult section of the Backpage website that discouraged moderators and employees of Backpage from contacting the authorities and/or advocacy groups when advertisements on the Backpage website clearly promoted human trafficking, prostitution, and/or sexual exploitation of minors;

f. Knowingly refusing to pull down advertisements (after Backpage had internally sanitized the ad either manually or with the use of the Strip Term from Ad Filter) that clearly demonstrated minors were being exploited and trafficked for sex; and

g. Knowingly refusing to pull down advertisements after reports and/or complaints that the advertisement was being used to exploit a minor.

357. The Backpage Defendants received substantial financial benefits as a result of these acts and/or omissions. Moreover, the Backpage Defendants received a direct financial benefit of the advertising fee paid by Jane Doe's trafficker on the Backpage website, sexually exploiting Jane Doe while she was a minor. These acts, omissions, and/or commissions were the producing, but for, and proximate cause of Jane Doe's injuries and damages. Therefore, the Backpage Defendants are in violation of Texas Civil Practice and Remedies Code § 98.002.

B. SECOND CAUSE OF ACTION—NEGLIGENCE

358. Jane Doe incorporates each foregoing allegation.

359. The Backpage Defendants had a duty of care to operate the Backpage website in a manner that did not sexually exploit minor children, including Jane Doe. Moreover, the Backpage Defendants had a duty of care to take reasonable steps to protect the foreseeable survivors of the danger created by their acts and omissions, including the danger created by their online marketplace for sex trafficking and their actions in perpetuating that marketplace by helping sex traffickers sanitize ads to avoid law enforcement detection and post their ads.

360. The Backpage Defendants breached the foregoing duties because they knew, or should have known, that adults working as sex traffickers were using their website to post advertisements of minor children for sex, including such advertisements of Jane Doe. Despite this knowledge, the Backpage Defendants took no steps to protect those children, including Jane Doe.

361. As a direct and proximate result of the Backpage Defendants' wrongful acts and omissions, Jane Doe suffered, and continues to suffer, severe injuries and damages including, but not limited to:

a. Past and future conscious physical pain and mental anguish;

b. Past and future medical expenses, including the expenses that in reasonable probability will be incurred in the future; and

c. Past and future pain and suffering.

C. THIRD CAUSE OF ACTION—GROSS NEGLIGENCE

362. Jane Doe incorporates each foregoing allegation.

363. Jane Doe will show that the acts and/or omissions of the Backpage Defendants constitute gross negligence. The Backpage Defendants acted with willful, wanton disregard, both before and at the time of the incidents in question, given the extreme degree of risk of potential harm to Jane Doe and others, of which the Backpage Defendants were aware. Despite this knowledge, the

Backpage Defendants proceeded with the acts and omissions described above with conscious indifference to the rights, safety, or welfare of others, including Jane Doe. Accordingly, Jane Doe seeks an award of exemplary damages against the Backpage Defendants.

D. FOURTH CAUSE OF ACTION—AIDING AND ABETTING

364. Jane Doe incorporates each foregoing allegation.

365. By the course of conduct, acts, and omissions alleged herein, the Backpage Defendants intentionally aided and abetted, by assisting and participating with, and by assisting or encouraging each other, as well as the other Defendants, to commit the tortious result—including, but not limited to, violation of Texas Civil Practice & Remedies Code § 98.002, negligence, outrage, and gross negligence.

366. By the course of conduct, acts, and omissions alleged herein, the Backpage Defendants also intentionally aided and abetted, by assisting and participating with and by assisting or encouraging each other, as well as Jane Doe's trafficker, in the commitment of the tortious acts between themselves and along with each other Defendant.

367. With respect to assisting or encouraging, the Backpage Defendants' tortious acts, when viewed individually and separate apart from each other and the other Defendants and Jane Doe's trafficker, were a breach of duty to Jane Doe and a substantial factor in causing the tortious activity alleged herein.

368. Moreover, each of the Backpage Defendants (a) had knowledge that each member of the Backpage Defendants and Jane Doe's trafficker's conduct constituted a tort; (b) had the intent to assist the other Backpage Defendants and Jane Doe's trafficker in committing a tort; (c) gave the other Backpage Defendants and Jane Doe's trafficker assistance or encouragement; and (d) assistance by the Backpage Defendants and Jane Doe trafficker's torts were substantial factors in causing the tort.

369. With respect to assisting and participating, Jane Doe's trafficker's tortious result (a) the Backpage Defendants provided substantial assistance to Jane Doe's trafficker and the other Defendants in accomplishing the tortious result; (b) the Backpage Defendants' own conduct, separate from Jane Doe's trafficker and the other Defendants' conduct, was a breach of duty to Jane Doe; and (c) the Backpage Defendants' participation was a substantial factor in causing the tortious result.

370. Jane Doe, therefore, seeks damages and remedies against each of the Backpage Defendants individually for the aiding and abetting alleged herein. As aiders-and-abettors, all of the Backpage Defendants are jointly and severally responsible with one another for the injuries and damages suffered by Jane Doe.

E. FIFTH CAUSE OF ACTION—CIVIL CONSPIRACY

371. Jane Doe incorporates each foregoing allegation.

372. Each of the Backpage Defendants entered into a civil conspiracy with the other Defendants herein. The acts of this conspiracy clearly demonstrate that the result was to accomplish an unlawful purpose by unlawful means, including, but not limited to, promoting and assisting human traffickers in promoting sexual exploitation of minors, including Jane Doe. The Backpage Defendants had a meeting of the minds on the object of the conspiracy and its course of action, and at least one or more of the Backpage Defendants, as alleged herein, committed at least one or more unlawful, over acts to further the object or course of action of the conspiracy.

373. Jane Doe suffered injury and damages as a direct and proximate result of the wrongful act. The civil conspiracy alleged herein, and the individual predicate misconduct, wrongful acts, and omissions alleged, were a direct, producing, and proximate cause of the injuries and damages to Jane Doe. The civil conspiracy alleged herein, and the individual predicate misconduct, wrongful acts, and omissions alleged, were moreover a substantial factor in bringing about the injury and damages to Jane Doe. Without such civil conspiracy alleged herein, and the individual predicate misconduct, wrongful

acts, and omissions alleged, the injury and damages would not have occurred. Moreover, a person of ordinary intelligence in the Backpage Defendants' position would have foreseen that the damages alleged herein might result from the civil conspiracy alleged herein, and the individual predicate misconduct, wrongful acts, and omissions alleged.

374. The damages and remedies sought by Jane Doe for the civil conspiracy alleged herein, and the individual predicate misconduct, wrongful acts, and omissions alleged, include the following:

a. actual damages;

b. direct damages;

c. consequential damages;

d. exemplary damages;

e. that a constructive trust be placed upon proceeds, funds, property, or anything else of value obtained by, or as a result of, the civil conspiracy;

f. equitable remedy of disgorgement—that all profits of the Defendants from the misconduct be disgorged in favor of the Plaintiff;

g. that the Court grant a receivership and appoint a receiver to inventory all proceeds, funds, property, or anything else of value obtained by or as a result of the conspiracy, trace any funds, and administer a trust (constructive or otherwise) for the benefit of the Plaintiff;

h. reasonable and equitable attorneys' fees;

i. prejudgment and post-judgment interest;

j. court costs; and

k. that the Plaintiff be awarded and granted all other and further relief to which she may be justly entitled.

375. As co-conspirators, the Backpage Defendants are jointly and severally with one another responsible for the injuries and damages suffered by Jane Doe.

F. FIFTH CAUSE OF ACTION—FRAUD

376. Jane Doe incorporates each foregoing allegation.

377. The Backpage Defendants intentionally misrepresented to Texans, including Jane Doe, the general public, United States Senate, and law enforcement in Houston (1) its intent to work law enforcement in connection with the trafficking and sexual exploitation of minors, including Jane Doe, (2) the validity of the advertisements sanitized and then posted on the Backpage website as advertisements for escorts—when the advertisements were really those exploiting minors, (3) its intent and promise to the public, law enforcement, and organizations designed to combat the sexual exploitation and sexual assault of minors, including Jane Doe, to act as the "sheriff" of the internet and, (4) its intent to act only as a "poster" of content, instead of an active participant in manipulating ads through the Strip Term from Ad Filter and being a moderator to give advertisements exploiting minors the façade of lawfulness.

378. The Backpage Defendants were aware that the statements made to law enforcement in Houston, Texans, human trafficking organizations, and the United States Senate were false and/or intentionally omitted to disclose the fact that the Backpage Defendants were actively engaging in conduct to façade advertisements exploiting minors, including Jane Doe, as advertisements for escorts. These representations include, but are not limited to, (a) the Backpage Defendants are merely "host" of third party content—not active participants in concealing the sexual exploitation of minors, including Jane Doe, (b) the Backpage Defendants intended to work with law enforcement, including the Houston police department and Harris County Sheriff's Office, to stop the sexual exploitation of minors, and (c) the Backpage Defendants did not intend to use the Backpage website as a marketplace to profit from the sexual exploitation and sexual assault of minors, including Jane Doe. Further and in the alternative, the Backpage Defendants made the misrepresentations and omissions recklessly, without any knowledge of the truth.

379. Law Enforcement in Harris County and Houston reasonably relied upon the Backpage Defendants' representations to their detriment and therefore were prevented from identifying Jane

Doe, and other minors, on the Backpage website as a minor being exploited for sex by her trafficker. Jane Doe has suffered severe damages and injuries as a result of the Backpage Defendants' fraud upon the public and law enforcement.

380. The Backpage Defendants' actions alleged herein, by and through the course of action, conduct, acts, and omissions alleged, were a direct, producing, and proximate cause of injury and damages to Jane Doe. Such breach was a substantial factor in bringing about injury and damages that would not have occurred. Moreover, a person of ordinary intelligence would have foreseen that the injury and damages alleged herein might result from the tortious interference alleged herein. Damages and remedies sought by Plaintiff for fraud committed by the trust include the following:

a. actual damages;

b. direct damages;

c. incidental and consequential damages;

d. unjust enrichment damages;

e. that a constructive trust be imposed on the Backpage Defendants and that the Court sequester hold any benefits or money wrongfully received by the Defendant for the benefit of the Plaintiff. Moreover, Plaintiff prays that any and all money the Backpage Defendants received in furtherance of this fraud be traced, and that all ill-gotten gains by the Backpage Defendants be placed in a constructive trust;

f. mental anguish and emotional distress damages;

g. reasonable and necessary attorneys' fees that are equitable and just;

h. prejudgment and post-judgment interest;

i. court costs; and

j. that Plaintiff be awarded and granted all other and further relief to which she may be justly entitled.

CAUSES OF ACTION AGAINST SIESTA INN

A. FIRST CAUSE OF ACTION—TCPRC § 98.002

381. Jane Doe incorporates each foregoing allegation.

382. Siesta Inn's acts, omissions, and commissions, taken separately and/or together, outlined above constitute a violation of Texas Civil Practice and Remedies Code § 98.002. Specifically, Siesta Inn had a duty not to knowingly benefit from trafficking of persons, including Jane Doe. At all relevant times, Siesta Inn breached this duty by knowingly participating in the facilitation of trafficking minors, including Jane Doe, by acts and omissions, including, but not limited to:

a. Profit from renting rooms to those looking to sexually exploit Jane Doe and other minors;

b. Increased profit margins due to lower operation costs by refusing to implement proper training of Siesta Inn employees and managers regarding the signs of human trafficking and the sexual exploitation of minors;

c. Increased profit margins due to lower operation costs by refusing to install proper security devices in the Siesta Inn's lobby, hallways, and parking lots that would help (a) deter human trafficking and the sexual exploitation of minors and (b) be used to identify potential human trafficking and the sexual exploitation of minors and alert the proper authorities and/or intervene in an appropriate way;

d. Increased profit margins due to lower operation costs by refusing to install adequate lighting and security cameras to monitor ingress and egress of human traffickers and suspicious males looking to sexually exploit minors on the Siesta Inn's property;

e. Increased profit margins due to lower operation costs by refusing to hire qualified security officers who would actively combat human trafficking and the sexual exploitation of minors;

f. Increased profit margins due to lower operation costs by refusing to implement proper security measures to prevent the sexual exploitation of minors at the Siesta Inn properties;

g. Increased profit margins as a result of continued customer loyalty by child molesters and johns who sought to sexually exploit minors, including Jane Doe, due to Siesta Inn's lack of measures against the sexual exploitation of minors and human trafficking. This customer loyalty lead to continued alcohol, food, and room sales;

h. Benefit of avoiding law enforcement officials and spending the time to address and properly solve human trafficking and the sexual exploitation of minors on Siesta Inn's premises. This prevented Siesta Inn from having to spend time and money filling out all proper and necessary law enforcement reports and information, as well as responding to proper and necessary subpoena requests;

i. Benefit by avoiding criminal liability by corporations and/or employees who failed to report child abuse—which is a violation of the Texas Penal Code;

j. Increased profit margins as a result of presenting a more "marketable brand" to child molesters and johns looking to exploit minors by being known as hotels with "underage girls"—which in turn leads to higher alcohol, food, and room sales when these child molesters and johns visit Siesta Inn properties; and

k. Increased profit margins by knowingly catering to the needs of a criminal sub-culture that is looking for locations that will not actively enforce laws against human trafficking and the sexual exploitation of minors or take active security measures to prevent human trafficking and the sexual exploitation of minors on their property.

383. Siesta Inn has received financial benefits as a result of these acts and/or omissions by continuing to turn a blind eye to human trafficking and the sexual exploitation of minors to keep security and operating costs low while maintaining the loyalty to the segment of their customer base that seek to exploit minors, including Jane Doe. Moreover, Siesta Inn directly benefited from the sexual exploitation and trafficking of Jane Doe on numerous occasions by receiving payment for rooms Jane Doe was caused by any means to rent at Siesta Inn's property. These acts, omissions, and/or commissions alleged in this pleading were the producing, but for, and proximate cause of Jane Doe's injuries and damages. Therefore, Siesta Inn is in violation of Texas Civil Practice and Remedies Code § 98.002.

B. SECOND CAUSE OF ACTION—NEGLIGENCE

384. Jane Doe incorporates each foregoing allegation.

385. Siesta Inn had a duty of care to operate each of their hotels in a manner that did not endanger minor children, including Jane Doe. Moreover, Siesta Inn had a duty of care to take reasonable steps to protect the foreseeable survivors of the danger created by their acts and omissions, including the danger created by Siesta Inn of human trafficking and sexual exploitation of minors due to Siesta Inn's fostering an environment that encouraged this behavior.

386. Siesta Inn breached the foregoing duties because they knew, or should have known, that adults working as sex traffickers were causing by any means minors, including Jane Doe, to be sexually exploited and trafficked at Siesta Inn's property on a repeated basis. Despite this knowledge, Siesta Inn accepted the unspoken financial benefit mentioned above by allowing human trafficking and the sexual exploitation of minors to occur at their hotels and failed to take reasonable steps to protect children being trafficked or exploited, including Jane Doe.

387. As a direct and proximate result of Siesta Inn's wrongful acts and omissions, Jane Doe suffered, and continues to suffer, severe injuries and damages, including, but not limited to:

a. Past and future conscious physical pain and mental anguish;

b. Past and future medical expenses, including the expenses that in reasonable probability will be incurred in the future; and

c. Past and future pain and suffering.

C. THIRD CAUSE OF ACTION—COMMON LAW AIDING AND ABETTING

388. Jane Doe incorporates each foregoing allegation.

389. By the course of conduct, acts, and omissions alleged herein, Siesta Inn intentionally aided and abetted, by assisting and participating with, and by assisting or encouraging each other, as well as the other Defendants, to commit the tortious result—including, but not limited to, violation of Texas Civil Practice & Remedies Code § 98.002, negligence, outrage, and gross negligence.

390. By the course of conduct, acts, and omissions alleged herein, Siesta Inn also intentionally aided and abetted by assisting and participating with and by assisting or encouraging each other, as well as Jane Doe's trafficker, in the commitment of the tortious acts between themselves and each other Defendant.

391. With respect to assisting or encouraging, the tortious acts of Siesta Inn, when viewed individually and separate apart from each other and the other Defendants, and Jane Doe's trafficker

were a breach of duty to Jane Doe and a substantial factor in causing the tortious activity alleged herein.

392. Moreover, Siesta Inn (a) had knowledge that the actions of Jane Doe's trafficker and the johns who sexually assaulted Jane Doe at Siesta Inn's properties constituted a crime and a tort, (b) had the intent to assist the other Defendants and Jane Doe's trafficker in committing a tort by allowing such conduct to go unchecked at Siesta Inn's properties and intentionally creating an atmosphere conducive to sexual assault and sexual exploitation of Jane Doe and other minors, (c) gave the other Defendants and Jane Doe's trafficker assistance or encouragement, and (d) the assistance by Siesta Inn of Jane Doe trafficker's torts, as well as the other Defendants, was a substantial factor in causing the tort.

393. With respect to assisting and participating, Jane Doe's trafficker's, as well as the other Defendants', tortious result (a) Siesta Inn provided substantial assistance to Jane Doe's trafficker and the other Defendants in accomplishing the tortious result, (b) Siesta Inn's own conduct, separate from Jane Doe's trafficker and the other Defendants' conduct, was a breach of duty to Jane Doe, and (c) Siesta Inn's participation was a substantial factor in causing the tortious result.

394. Jane Doe, therefore, seeks damages and remedies against Siesta Inn for the aiding and abetting alleged herein. As aiders-and-abettors, Siesta Inn is jointly and severally responsible with all other Defendants for the injuries and damages suffered by Jane Doe.

JOINT & SEVERAL LIABILITY

395. Each Defendant's conduct violated Texas Civil Practice & Remedies Code § 98.005. Therefore, each Defendant is jointly and severally liable for the entire amount of damages awarded by a jury in this case against any other Defendant under Texas Civil Practice & Remedies Code § 98.005.

STATEMENT OF DAMAGES

396. Jane Doe trusts the Court to evaluate the evidence and to properly assess the damages sustained.

397. Texas Rule of Civil Procedure 47(c) requires Jane Doe to set forth the level of damages sought. In compliance with this Rule, and only in compliance with this Rule, Jane Doe states she expects to seek monetary relief of $1,000,000 or more for the damages asserted.

398. Jane Doe reserves the right to increase or decrease the amount she seeks based on additional discovery, evidence presented at trial, and/or the verdict of the Court.

JURY DEMAND

399. Jane Doe demands a trial by jury.

PRAYER

Wherefore, Jane Doe respectfully requests judgment against Defendants for actual damages in excess of the minimum jurisdictional limits of this Court, pre- and post-judgment interest as allowed by law, costs of suit, attorney fees, and all other relief, at law or in equity, to which she may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 26th of April, 2019, a true and correct copy of the foregoing instrument was served on opposing parties who have appeared herein.

/s/ David E. Harris
DAVID E. HARRIS

P

3/27/2019 6:17 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 32300144
By: Anais Aguirre
Filed: 3/27/2019 6:17 PM

CAUSE NO. 2018-82214

JANE DOE,	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
vs.	§	**HARRIS COUNTY, TEXAS**
FACEBOOK, INC. d/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

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

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

INTRODUCTION

Plaintiff Jane Doe alleges that, when she was a minor, she was a victim of rape and child trafficking at the hands of assailants who allegedly posted and advertised her on Instagram and on the website backpage.com, an online service that has been seized by the federal government in connection with its widely reported use for child sex trafficking. Backpage.com LLC, along with several of its senior officers, are defendants in this lawsuit. Plaintiff also has sued Facebook, alleging that she was "trafficked through Instagram," a social media platform that Facebook owns and operates. Plaintiff alleges that her traffickers "used Instagram to post [her] for sale to johns" and that "dates" were "arranged through Instagram by her traffickers."[2]

The Petition does not allege any involvement by Facebook in the acts of violence that Plaintiff allegedly suffered at the hands of these unnamed traffickers and rapists. Plaintiff's claim against Facebook turns entirely on the allegation that Plaintiff's traffickers "had access to her and sold her" in part "through" posts to Facebook's Instagram platform, which allows Instagram users to post photos and exchange messages on their phones or other internet-connected devices. Essentially, Plaintiff's claim is that Facebook failed to monitor, block, remove, or warn about the traffickers' posts, "through" which they allegedly exploited her and exposed her to sexual abuse.

There can be no doubt that human trafficking is an abhorrent practice, as is the use of online

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

2 The Amended Petition incorrectly alleges that Facebook does business as Instagram. Instagram is part of the Facebook family of apps and operates out of Facebook's product division.

services to advertise children for sexual exploitation. Facebook employs and enforces community standards policies, and also uses sophisticated technology, to prevent its broadly available platform and messaging service from being used for this and other types of human harm.

But just as with other communications services such as email or texting apps, there is no legal basis for holding a carrier or platform liable on grounds that the service was used by a third party to communicate harmful content generated by that third party—here, communications geared toward "provid[ing] . . . false promises" to Plaintiff and "advertising" Plaintiff to would-be criminals. Among multiple other reasons (including a lack of causation or a legal duty), such claims are legally barred by Section 230 of the federal Communications Decency Act ("CDA"), 47 U.S.C. § 230, which broadly protects online platforms such as Facebook and Instagram from liability for third party content or communications on the platform. As courts repeatedly have held, Section 230 bars claims, such as those alleged here, that on-line communications via a defendant's platform or messaging service led to some form of off-line harm. *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 759 (Tex. App.—Beaumont 2014, pet. denied) (reversing trial court's denial of defendant's motion to dismiss under Rule 91a and holding that Section 230 barred plaintiffs' claims); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (affirming the trial court's grant of dismissal on the pleadings). Because Plaintiffs' claim against Facebook has no basis in law, the Court should dismiss it under Rule 91a.

BACKGROUND

Plaintiff Jane Doe has asserted claims against Backpage, four senior Backpage executives, the hotels at which she allegedly was victimized, and Facebook. Her First Amended Petition (the "Amended Petition" or "FAP") alleges only one claim against Facebook: a statutory claim under section 98.002 of the Civil Practice and Remedies Code. FAP at ¶¶ 295–300. This motion addresses only the claim against Facebook.

Plaintiff alleges that in 2017, when she was 14 years old (FAP ¶ 105), she was "coerced and forced into a life of trafficking through traffickers who had access to her and sold her through social

media." *Id.* at ¶¶ 211–212. She alleges that an adult "Instagram friend" "coerced" her and "provided [her] false promises of love and a better future."[3] *Id.* at ¶¶ 213–14. She alleges that her traffickers "used Instagram to post [her] for sale" and to "arrange" "dates" with "johns looking to exploit minor children." *Id.* at ¶ 216. She further alleges that she "was raped numerous times while she was still a minor" "as a result of allegedly being trafficked through Instagram." *Id.* at ¶ 218. Finally, she alleges that at some point after she was rescued, her mother reported her trafficking to Facebook by posting a message on the "Messenger" app for Instagram's official Facebook page. *Id.* at ¶ 219.

Plaintiff's claim against Facebook centers upon the traffickers' alleged use of Instagram to advertise and arrange the illicit "dates" at which she was assaulted and Facebook's alleged failures to prevent or "warn[] against" such use. She alleges that Facebook failed to implement certain "safeguard" measures, such as taking various steps to warn Instagram users about the dangers of human trafficking or "requiring verification" of users' identities, and that by allegedly failing to implement such measures, Facebook knowingly facilitated and benefitted from her trafficking. *Id.* at ¶ 298. Subject to its Special Appearance, Facebook has generally denied these allegations.

Plaintiff does not allege that Facebook had any advance knowledge that the traffickers presented a risk to Plaintiff or any other person. Nor does she allege that Facebook had any involvement in the off-line harm that she claims to have suffered.

STANDARD FOR DISMISSAL UNDER RULE 91A

Under Rule 91a of the Texas Rules of Civil Procedure, "a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact." Tex. R. Civ. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* Texas courts "accept as true the factual

[3] While these new allegations in the Amended Petition seem to imply that the Instagram friend sent these messages via the Instagram platform, the Petition nowhere expressly makes such an allegation. However, this uncertainty in the pleadings is not material because CDA 230 would bar Plaintiff's claim in any case.

allegations in the pleadings to determine whether the cause of action has a basis in law or fact." *Guzder v. Haynes & Boone, LLP*, 01-13-00985-CV, 2015 WL 3423731, at *3 (Tex. App.—Houston [1st Dist.] May 28, 2015, no pet.). A "cause of action has no basis in law under Rule 91a" where "the petition alleges … facts that, if true, bar recovery." *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App—-Houston [1st Dist.] 2015, pet. denied). Dismissal under rule 91a is especially appropriate "when the plaintiff's own allegations, taken as true, trigger a clear legal bar to the plaintiff's claim." *Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 608 (Tex. App.—Corpus Christi 2017, no pet.).

ARGUMENT AND AUTHORITIES

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

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

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

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," and "[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(c)(1), (e)(3). Section 230 applies "without regard to the nature of the content at issue," *GoDaddy.com*, 429 S.W.3d at 759, and extends "broad immunity … to Web-based service providers for *all* claims stemming from their publication of information created by third parties." *MySpace*, 528 F.3d at 418 (emphasis added).

In particular, Section 230 immunizes internet social media platforms such as the one involved here from liability for allegedly harmful third-party communications conveyed via those services. *Id.* at 417 (Section 230 barred claims against MySpace); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 995 (S.D. Tex. 2017) (Section 230 barred claims against Facebook); *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 975 (N.D. Cal. 2016) (Section 230 barred claims against Twitter). Among other reasons, courts have recognized that imposing a duty to monitor customer posts and communications would have a crippling effect on internet platforms. *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997).[4]

Here, the sole factual connection between Plaintiff's alleged injuries and Facebook is that the traffickers allegedly advertised Plaintiff and arranged "dates" through posts that they created on the Instagram platform. FAP ¶¶ 213–19. It is settled law that "[a]llowing [Plaintiff] to assert *any* cause of action against [Facebook] for publishing content created by a third party, or for refusing to remove content created by a third party would be squarely inconsistent with [S]ection 230." *GoDaddy.com*, 429 S.W.3d at 758 (emphasis added). In short, where the plaintiff's claim depends on the assertion that the online service was used as an "intermediar[y]" for "other parties' potentially injurious messages," Section 230 bars the claim. *Zeran*, 129 F.3d at 330–31.

B. Plaintiff's claim meets all of the elements for Section 230 immunity

Plaintiff's claim meets all the elements of Section 230 and accordingly is barred. Dismissal under Section 230 is warranted when (1) the defendant is a "provider … of an interactive computer

[4] The statute currently contains a limited exception, not applicable here, for certain sex-trafficking claims brought under specific federal statutes. On April 11, 2018, the President signed into law the Allow States And Victims To Fight Online Sex Trafficking Act Of 2017 ("FOSTA"), Pub. L. 115-164, Apr. 11, 2018, 132 Stat. 1254. Among other reforms, FOSTA (1) created a new federal civil cause of action against operators of interactive computer services who intentionally "promote or facilitate the prostitution of another person", *id.* at § 6 (codified at 18 U.S.C. § 2421A), and (2) amended Section 230 to create a discrete exception for federal civil claims brought under 47 U.S.C. § 1591 and § 1595 (which together provide a federal civil cause of action against knowing and reckless participants in sex trafficking), *id.* at § 4 (codified at 47 U.S.C. § 230(e)(5)). In this case, Plaintiff has chosen not to plead a claim under 18 U.S.C. § 2421(A), or 18 U.S.C. § 1595, or any other federal statute, presumably to avoid removal. FAP ¶¶ 295–300. Accordingly, the FOSTA amendments do not apply, and the normal Section 230 analysis applies to Plaintiff's claim against Facebook.

service"; (2) the allegedly harmful content at issue was "provided by another information content provider"; and (3) the claim seeks to hold the defendant liable as a "publisher or speaker" of that content under a state-law cause of action. *Davis v. Motiva Enterprises, L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *2 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009)). Each element is met here.

First, Facebook is a "provider … of an interactive computer service." An "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." 47 U.S.C. § 230(f)(2). Instagram meets this definition because its users access its servers to share information on its platform. *La'Tiejira*, 272 F. Supp. 3d at 993; *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156 n.10 (E.D.N.Y. 2017); *see also MySpace*, 528 F.3d at 420–22 ("social networking" site was an "interactive computer service[e]" under Section 230). Section 230 also fully applies to internet services, such as email messaging services, where the interactive computer service serves as an intermediary for third party communications. *See generally Zeran*, 129 F.3d at 331 (immunity covers "any cause of action that would make service providers liable for information originating with a third-party user of the service"); *MySpace*, 528 F.3d at 420–22 ("interactive computer service" includes social networking site on which "any … user can contact any other … user through internal email and/or instant messaging"); *Fields*, 200 F. Supp. 3d at 975 ("private nature" of messaging app does not remove claim from Section 230(c)(1) immunity); *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536 (D. Md. 2006) (Section 230 barred claims based on web company's transmission of "allegedly offensive e-mails"). Plaintiff does not allege that she had any contact with Facebook other than through Instagram's interactive computer service.

Second, the allegedly harmful content—consisting entirely of content allegedly posted on Instagram by the traffickers—was "provided by another information content provider." An "information content provider" is a person or entity "that is responsible, in whole or in part, for the

creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). The term "development" "refer[s] not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008).

Accepting Plaintiff's allegations as true, the allegedly harmful content at issue here consisted of posts that the traffickers created and posted via Instagram's online platform. FAP ¶¶ 214–19. Plaintiff does not (and could not) allege that Facebook created or developed any of the traffickers' posts or altered or contributed to those posts in any way, let alone in a way that "materially contribut[ed] to [their] alleged unlawfulness." *See Roommates.com*, 521 F.3d 1127–68.

The fact that Facebook is a "for-profit" social media platform does not change the applicability of Section 230 because there is no "for-profit exception to § 230's broad grant of immunity." *M.A. ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1050 (E.D. Mo. 2011); *accord Roommates.com*, 521 F.3d at 1161, 1174–75 (website's receipt of revenue from "advertisers and subscribers" did not affect immunity).[5]

Nor does the use of "neutral tools"—such as those that filter or arrange third-party content—equate with "creat[ing]" or "develop[ing]" information posted by third parties. *Roommates.com*, 521 F.3d at 1171–72; *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003). In this regard, the allegations about Facebook starkly contrast with the allegations against the Backpage defendants, who are alleged to have actively curated, "manipulat[ed]," and "systematically edit[ed]" advertisements for child prostitutes posted on the Backpage.com site "to sanitize the content of innumerable

[5] The petition points to Facebook's advertising practices and profit motive, ostensibly to suggest that Facebook was somehow complicit in "developing" the content that appears on its platform. *See, e.g.*, FAP ¶¶ 1, 188–89, 298–299. Not only is this allegation far-fetched and unsupported—it is difficult to see how Facebook, a free service that makes money through advertising, would benefit from allowing its site to be used as a vehicle for child trafficking—but it does not support the conclusion that Facebook created or developed any of the harmful communications at issue here.

advertisements for illegal transactions." *See* FAP ¶¶ 237–276, 324–25. *See generally Roommates.com,* 521 F.3d at 1167–68 (defendant website "developed" illegal content and thus was not immune under Section 230 where the defendant "materially contribut[ed] to [the content's] alleged unlawfulness"). In addition, in contrast to the allegations that the backpage.com site was designed to facilitate criminal activity, Plaintiff does not dispute that Instagram is broadly available for public posting and user-to-user communications by Instagram users, or that the overwhelming majority of content on Instagram is uncontroversial.

Third, Plaintiff's claim seeks to hold Facebook liable as a "publisher or speaker" of third-party content. Although the Amended Petition alleges hundreds of new "jurisdictional facts" about Facebook, the factual allegations about Facebook's alleged connection to this case are essentially unchanged. Facebook's only alleged connection to Plaintiff's injuries is the allegation that the traffickers used Instagram to advertise and arrange "dates" with johns.[6] FAP ¶¶ 213–18. These facts that Plaintiff asserts led to harm against her all involve communications by the traffickers, not messages or content created by Facebook. Essentially, Plaintiff's claim seeks to hold Facebook liable for its alleged failure to monitor, block, or remove the posts "through" which her traffickers exploited her and exposed her to sexual abuse.

Under Section 230, Facebook cannot be liable on that basis, no matter under what legal theory the claims are pled. Because all of Plaintiff's claims against Facebook "stem from [Facebook's] publication of the contested content" and "its failure to remove the content," allowing Plaintiff "to assert any cause of action" against Facebook "would be squarely inconsistent with section 230." *See GoDaddy.com*, 429 S.W.3d at 758; *see also MySpace*, 528 F.3d at 420 ("Section 230 specifically proscribes

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[6] The Amended Petition adds new allegations that "[t]he Instagram friend who coerced Jane Doe" "provided [her] false promises of love and a better future," but it does not state whether "the Instagram friend" sent these messages to Plaintiff via Instagram, or if/how these "false promises" are related to her injuries. FAP ¶¶ 213–14 However, this ambiguity in the pleadings is immaterial because, as explained in this motion, Section 230 applies with equal force to such messages, *See MySpace*, 528 F.3d at 417–18; *Zeran*, 129 F.3d at 330–33.

liability in such circumstances" where a plaintiff "attempts to hold [a provider of an interactive computer service] liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role." (citations omitted)); *Roca Labs, Inc. v. Consumer Opinion Corp.*, 140 F. Supp. 3d 1311, 1324 (M.D. Fla. 2015) (liability based on "the effect of third parties' posts would run afoul of Section 230 of the CDA"). There is not, nor could there be, any allegation that Facebook had any advance knowledge of, or any involvement in, the alleged off-line physical violence against Plaintiff. Indeed, *all* of the alleged acts upon which Plaintiff's claim against Facebook might be premised are the acts of third parties who published content of their own creation to a neutral social media platform. Because Plaintiffs' theory of causation necessarily depends on Instagram's alleged role as the forum where the traffickers published their content or Facebook's failure to monitor or remove content posted by such third parties, CDA 230 precludes Plaintiff's claim. *See, e.g., Igbonwa v. Facebook, Inc.*, 3:18-cv-2027, 2018 WL 4907632, at *6 (N.D. Cal. Oct. 9, 2018) (CDA 230 "covers not only claims that are based on conduct that is directly related to the publication or removal or content but also claims where causation depends on the content itself."); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1165 (N.D. Cal. 2017) (where "Plaintiffs 'rely on content to establish causation,'" CDA 230 bars their claims (quoting *Cohen*, 252 F. Supp. 3d at 157)).

In particular, Plaintiff cannot plead around Section 230 by recasting her claim in "failure to warn" or "failure to safeguard" terminology. FAP ¶¶ 189–90. Courts have consistently unmasked and rejected such attempts to evade Section 230. "What matters" for Section 230 is not the "label[]" placed on the claim but "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1101–03. If "the duty" allegedly violated "derives from the defendant's status or conduct as a 'publisher or speaker,'" that ends the analysis, and Section 230 "precludes liability." *Id.* at 1102; *see also GoDaddy.com*, 429 S.W.3d at 759 (plaintiffs may not "circumvent [Section 230] by couching their claims as state law

intentional torts"); *MySpace*, 528 F.3d at 419–20 (liability for failing to screen potential users was no different from liability for publishing users' content). Here, Plaintiff asserts, at most, a failure to police content and/or users on its site—but that precise claim has consistently been held as attempting to hold the defendant liable as the "publisher" for purposes of the CDA. *See id.* at 420-21; *Fields*, 200 F. Supp. 3d at 975.

For example, in *MySpace* the Fifth Circuit held that Section 230 bars "failure to safeguard" and "failure to warn" claims. The plaintiff alleged that MySpace "failed to implement basic safety measures to prevent sexual predators from communicating with minors on its Web site," but the Court held these allegations were "merely another way of claiming that MySpace was liable for publishing the communications," and that these allegations "sp[oke] to MySpace's role as a publisher of online third-party-generated content." 528 F.3d at 416–17, 420–21. The plaintiffs' claims were therefore "barred by the CDA, notwithstanding [the plaintiffs'] assertion that they only s[ought] to hold MySpace liable for its failure to implement measures that would have prevented Julie Doe from communicating with [the sexual predator]." *Id.* at 420; *see also Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 591–92 (S.D.N.Y. 2018); *McDonald v. LG Electronics USA, Inc.*, 219 F. Supp. 3d 533, 539–40 (D. Md. 2016).

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

grounds, 881 F.3d 739 (9th Cir. 2018); *Fields*, 200 F. Supp. 3d at 975.

Section 230 bars the claim here for the same reason: Plaintiff's claim seeks to hold Facebook liable based on its alleged failure "to take reasonable steps to mitigate the use of Facebook by human traffickers," FAP ¶ 203; its alleged failure to "warn[] against" certain third-party messages due to their content, *id.* ¶ 215; and its alleged failure to warn Plaintiff about certain users or content generated by certain users, *id.* ¶ 298. But section 230 protects Facebook from being held "liable for its [alleged] failure to implement measures that would have prevented [Jane] Doe from communicating with" her traffickers. *See MySpace*, 528 F.3d at 420. Because that is precisely what Plaintiff's claim seeks to do, the claim has no basis in law, and it is subject to dismissal under Rule 91a. *See GoDaddy.com*, 429 S.W.3d at 762.[7]

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

The nature of Section 230 immunity means defendants should not be subject to multiple rounds of litigation where it is clear that immunity would cover any new or alternative iteration of the underlying legal theories. This case presents the very danger that Congress sought to prevent in enacting Section 230: that platforms hosting immeasurable amounts of third-party content would face endless litigation based on that content—the "death by ten thousand duck-bites" about which the Ninth Circuit warned in *Roommates.com*, 521 F.3d at 1174. The Court should dismiss Plaintiff's claim against Facebook with prejudice. *See GoDaddy.com*, 429 S.W.3d at 753, 761 (reversing denial of Rule

7 To the extent Plaintiff seeks to impose liability on the theory that Facebook should have prohibited teenagers from communicating with adults in the absence of parental consent, any such theory is also foreclosed by the First Amendment of the U.S. Constitution. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 795 n.3 (2011) (striking down state law prohibiting the sale or rental of violent video games to minors without parental consent). So long as the regulated speech is otherwise protected, minors enjoy full First Amendment rights. *Id.* at 794–95 & n.3. Accordingly, laws that would prohibit minors from engaging in or being exposed to protected speech without their parents' prior consent are "obviously an infringement" on the free speech rights of young people and, absent some justification satisfying strict scrutiny, "must be unconstitutional." *Id.* at 795 n.3. Plaintiff may not recover on a claim that would require this Court to "appl[y] a state rule of law" that would "impose invalid restrictions on [a litigant's] constitutional freedoms of speech and press. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

91a motion on interlocutory appeal and finding that futile amendment of petition "would be contrary to the policies set forth in the CDA").

CONCLUSION

Subject to its Special Appearance, Facebook asks the Court to dismiss Plaintiff's claim against Facebook under Rule 91a.

Dated: March 27, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2019, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

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Q

No. 2018-82214

JANE DOE	§	In the District Court of
	§	
v.	§	
	§	
FACEBOOK, INC. D/B/A INSTAGRAM, INC.; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AND BABASAI, INC. D/B/A SIESTA INN	§	334th Judicial District
	§	
	§	
	§	Harris County, Texas

PLAINTIFF'S RESPONSE TO RULE 91A MOTION TO DISMISS

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City of Chicago, Ill. v. StubHub!, Inc.,
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Davis v. Motiva Enterprises, L.L.C.,
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Doe v. America Online, Inc.,
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Doe v. GTE Corp.,
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163 Cong. Record S3977 (daily ed. July 13, 2017) (statement of Sen. Portman) 25

Act to Encourage and Protect Private Sector Initiatives that Improve User Control Over Computer Information Services, H.R. 1978, 104th Cong. (1995) 5

Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, sec. 4, § 230(e)(5), 132 Stat. 1253, 1254 (2018) 23, 25, 29

H.R. Rep. No. 104-458 (1996) 6

S. Rep. No. 104-23 (1995) 6

Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. On Commerce, Sci. & Transp., 115th Cong. (2017) 18, 22

Secondary Authorities

Brief of Members of U.S. Congress as Amici Curiae Supporting Respondents, *Daniel v. Armslist, LLC*, No. 2017AP344 (Wis. Jan. 28, 2019), 2019 WL 654471 17

Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans §230 Immunity*, 86 Fordham L. Rev. 401 (2017) 13

Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 Geo. L. Tech. Rev. 453 (2018) 10

Internet Usage Statistics—March 2019, https://www.internetworldstats.com/stats.htm 19

Martin Hilbert, *Technological Information Inequality As an Incessantly*

Moving Target: The Redistribution of Information & Communication Capacities Between 1986 & 2010, 65 J. of Ass'n for Info. Sci. & Tech. 821 (2014) 19

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Introduction: Three Take-Aways

Facebook relies upon Section 230 of the federal Communications Decency Act of 1996 as the sole basis for its motion to dismiss Jane Doe's claims.[1] That motion should be denied for three overriding independent reasons:

The federal courts got this wrong. The majority of the federal courts, and subsequently the state courts, have ignored the plain meaning of Section 230's language, mistakenly interpreted Congress's intent when enacting the statute, and disregarded any plausible common-sense understanding of the objectives Congress sought to achieve. This Court is not required to follow these decisions, and it should not.

The 2018 amendments demonstrate that Congress does not want Section 230 to immunize internet service providers from claims such as those brought by Jane Doe. Section 230 was enacted in 1996, when the internet was in an embryonic state. Because the courts had misinterpreted Section 230, Congress was forced to pass an amendment to the section in 2018 to make it clear that the section did not apply to human trafficking claims. If there was any real doubt that the courts had gotten the

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[1] A nearly identical copy of this response is being filed in a companion case, No. 2018-69816.

interpretation of Section 230 wrong in connection with human trafficking claims, the amendment has made Congress's intent unmistakable.

Without regard to the first two points, this Court is not obligated to follow the prior decisions broadly construing Section 230. The issue raised by Facebook's motion is, at its core, one of preemption. But Section 230 does not preempt Texas law with respect to human trafficking claims, so it does not require this Court to follow the decisions of the federal courts. There are only three Texas appellate opinions dealing with Section 230 in Texas—all three from the Beaumont court of appeals. Those decisions are not binding precedent on this court. There has been no guidance on the construction of Section 230 from any of this Court's superior courts. The Court will be writing on a blank slate.

The Court, however, would not be standing alone. Even before the 2018 amendments, a growing number of courts interpreted Section 230 based on the text, not outdated notions of Congress's policy goals for the internet. These courts have held that internet service providers were not immune from claims seeking to hold them liable for their own conduct, claims such as failure to warn and negligent undertaking. Jane Doe seeks to hold Facebook liable for its own conduct—for facilitating trafficking, failing to warn Jane

Doe about trafficking, and negligently undertaking to protect Jane Doe from harmful and abusive activity.

Standard of Review for 91a Motions

Rule 91a permits a party to "move to dismiss a cause of action on the grounds that it has no basis in law or fact." Tex. R. Civ. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* In ruling on a motion to dismiss under 91a, the Court should take all the plaintiff's allegations as true and consider whether her petition contains "enough facts to state a claim to relief that is plausible on its face." *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied).

Facebook has moved to dismiss Jane Doe's claims on pure legal grounds. The sole question before the Court is whether Section 230 of the federal Communications Decency Act of 1996—as recently amended in 2018—completely immunizes internet service providers[2] against state statutory and common-law claims based on the providers' roles in facilitating human trafficking of minors.

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[2] Facebook contends it is an internet service provider. For the purposes of this response, we will assume that to be the case.

Argument and Authorities

I. The Historical Context Explains Why Facebook's Motion Should Be Denied

Reviewing the history of litigation against internet service providers shows why Facebook's motion should be denied. That history starts in 1996, when Congress, appalled by pornographic content on the internet, enacted the Communications Decency Act, including Section 230.

Shortly thereafter, the Fourth Circuit issued its opinion in *Zeran v. America Online, Inc.* 129 F.3d 327 (4th Cir. 1997), which was a defamation case against a service provider. *Zeran* held that Section 230 grants broad immunity to internet service providers from virtually all claims based on harmful online content or conduct. For years, the vast majority of courts followed *Zeran*'s approach. Plaintiffs who sued internet service providers almost always lost.

As time went on, some cracks in the service providers' armor began to emerge. Some courts—even some federal circuit courts—began to doubt the soundness of previous decisions. Commentators argued that *Zeran*'s progeny inexplicably ignored the statutory language and totally disregarded the legislative intent of Congress.

And the internet changed. Dramatically. By the time people realized that harmful online conduct could have widespread and serious

consequences, the internet of the mid-90s had become a distant memory. But by then, the prevailing judicial interpretation of Section 230 was providing legal immunity for intentionally harmful, and frequently criminal, conduct.

In 2018, Congress amended Section 230, specifically exempting human trafficking cases from its purview. While claims against internet service providers premised on conduct other than human trafficking may still need to contend with the cases Facebook relies upon here, Congress has mandated that Jane Doe does not.

II. Congress Passed Section 230 to Shield Minors from Internet Pornography

A. The Congressional Intent Behind 230(c)(1)

In June 1995, two representatives introduced a bill that largely contained the language of what would become the Communications Decency Act: An Act to Encourage and Protect Private Sector Initiatives that Improve User Control Over Computer Information Services, H.R. 1978, 104th Cong. (1995). Discussing that bill, the Committee on Commerce, Science, and Technology noted that:

> The information superhighway should be safe for families and children. The Committee has been troubled by an increasing number of published reports of inappropriate uses of telecommunication technologies to transmit pornography, engage children in inappropriate adult contact, terrorize

> computer network users through "electronic stalking" and seize personal information.

S. Rep. No. 104-23, at 59 (1995).

Thus, Congress wanted to incentivize internet service providers to create lock-out mechanisms: it sought to "encourage telecommunications and information service providers to deploy new technologies and policies which would allow users to control access to prohibited communications." *Id*. As the bill wound its way through the legislative process, a House Conference Report noted: "This section provides 'Good Samaritan' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material." H.R. Rep. No. 104-458, at 194 (1996).

B. Congress Also Granted Internet Service Providers Immunity from Certain Defamation Claims

At the same time as Congress worried about pornography, it became concerned about defamation claims against internet service providers. Two courts in New York had reached opposite results in similar defamation cases. These two decisions set the stage for "publisher" protections ultimately adopted in the Communications Decency Act.

First, *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), held that CompuServe was a distributor, rather than a publisher, of

defamatory content posted by a customer in one of its forums. As a distributor, CompuServe could not be liable unless the plaintiff proved it had actual or constructive knowledge of the defamatory content. *Id.* at 139.

But a few years later, the court in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, (N.Y. Sup. Ct. May 24, 1995), held that Prodigy was a *publisher* of defamatory statements posted by an unknown user on its online bulletin board. The court distinguished this case from *Cubby* because Prodigy had exercised editorial control over content by creating guidelines, automatically screening posts, monitoring the bulletin boards, and occasionally censoring content. *Id.* at *4. Thus, the court concluded that Prodigy was subject to publisher liability for defamatory content. *Id.* at *3.

C. Section 230(c)(1) Was Intended to Protect Internet Service Providers from Defamation Claims

The statutory language that ultimately made it into law provided:

> (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 by another information content provider.

A House Conference report observed that "[o]ne of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any

other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because *they have restricted access to objectionable material."* H.R. Rep. 104-458, at 194 (1996) (emphasis added). The report continued that the "conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services." *Id.*

III. Ignoring Congressional Intent, the Courts Expanded Section 230(c)(1) Into a Broad Immunity for Internet Service Providers

A. Federal Courts Began Interpreting Section 230(c)(1) As Providing Broad Immunity

1. *Zeran* Expansively Interpreted Section 230(c)(1) in Order to Protect "the New and Burgeoning Internet Medium"

The Fourth Circuit, in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), was the first circuit court to address Section 230(c)(1). *See Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (describing *Zeran* as the seminal case). Zeran was the victim of a hoax that attributed offensive ads posted on an AOL bulletin board to him. *Zeran*, 129 F.3d at 329. Zeran filed suit and asserted defamation and negligence claims. *Id.* at 330. He argued that because Section 230 was drafted to respond to *Stratton-*

Oakmont, Section 230 only precluded publisher liability and not distributor liability. *Id.* at 331.

The court identified broad policy reasons for immunizing internet service providers. It argued Congress thought tort-based lawsuits were a threat to "the new and burgeoning Internet medium." *Id.* at 330. So the court concluded that "to maintain the robust nature of Internet communication" while encouraging the self-regulation of offensive material, Congress enacted Section 230. *Id.* The court rejected Zeran's argument because it believed that subjecting internet service providers to distributor liability would defeat the purpose of Section 230. *Id.* at 333.

But while Congress was concerned with promoting the development of the internet, that was not its primary motive for Section 230—its intent was to encourage "blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). As commentators have observed, the *Zeran* line of cases goes far beyond that: "Lawmakers thought they were devising a limited safe harbor from liability for online providers engaged in self-regulation." Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 Geo. L. Tech. Rev. 453, 455

(2018). But after *Zeran*, most courts were not guided by what Congress intended.

2. Most Federal Courts Followed *Zeran* and Relied on Its Broad Policy Arguments to Support Their Expansive Application of Section 230(c)(1)

Most circuit courts have followed the *Zeran* court's lead. These courts rely on *Zeran*'s policy goals related to protecting the "new and burgeoning" internet to justify extending immunity under Section 230(c)(1). *See, e.g., Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) ("In light of these policy concerns, we too find that Section 230 immunity should be broadly construed."); *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003) (rejecting plaintiff's interpretation of "information" in Section 230(c)(1) because it "would run afoul of the intention of section 230"). In doing so, the courts expanded internet service providers' immunity under Section 230(c)(1) in two key respects.

First, courts determined that whenever third-party content was a but-for cause of plaintiff's injury, Section 230(c)(1) applies regardless of the cause of action asserted. *See, e.g., Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19-20 (1st Cir. 2016) (plaintiffs' federal human trafficking claim treated defendant as a publisher because "there would be no harm to [plaintiffs] but for the content of the postings"); *Doe v. MySpace, Inc.*, 528 F.3d 413, 419-20

(5th Cir. 2008) (negligent failure to monitor claim treated defendant as a publisher because but-for plaintiff and third party communicating through internet service provider, plaintiff would not have been injured); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (because none of the offensive information originated from internet service provider, it was not a publisher).

Second, the courts held that an internet service provider would be liable only when the provider directly and materially contributed to offensive content on its platform. This high standard was *not* satisfied even when the internet service provider designed and operated its website to facilitate and profit from illegal third-party content and conduct. *See e.g.*, *Backpage.com*, 817 F.3d at 21 (rejecting the argument that internet service provider was a content provider because it facilitated and benefited from the illegal conduct); *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 413, 415-16 (6th Cir. 2014) (holding internet service provider that solicited, selected, and commented on defamatory statements was immune under Section 230).

Thus, under the *Zeran* line of cases, Section 230 barred plaintiffs' claims regardless of the type of cause of action asserted unless the internet

service provider participated directly and materially in creating the offensive content on its platform.

3. Many State Courts Have Blindly Followed the *Zeran* Line of Federal Decisions

Many state courts have also followed *Zeran*. Like their federal counterparts, these courts rely on broad policy statements to justify their expansive constructions of Section 230(c)(1). *See, e.g., Doe v. America Online, Inc.*, 718 So. 2d 385, 387-89 (Fla. 4th Dist. Ct. App. 1998), *approved*, 783 So. 2d 1010 (Fla. 2001) ("For the reasons expressed in *Zeran* as set forth in this opinion, we affirm the trial court's dismissal of Doe's complaint with prejudice.").

The three Texas state court opinions that address Section 230(c)(1) fall into this camp. In its first case, the court set the tenor for the cases that followed, citing *Zeran* for its conclusion that "[i]n section 230, Congress apparently made a choice 'not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries.'" *See Milo v. Martin*, 311 S.W.3d 210, 215 (Tex. App.—Beaumont 2010, no pet.) (quoting *Zeran*, 129 F.3d at 330).

The second case, *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied), has been cited by scholars as one of the most flagrantly expansive applications of Section 230(c)(1). Danielle Keats

Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans §230 Immunity*, 86 Fordham L. Rev. 401, 408 (2017) ("the 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."). The court argued that allowing liability related to any claim in which the plaintiffs' injury stems from third-party content would be contrary to Section 230 and "legislative intent." *GoDaddy.com*, 429 S.W.3d at 758, 758 n.3. The most recent Beaumont court opinion also concluded that Section 230 immunity applied because a cause of action would not otherwise have accrued but for the third-party content. *Davis v. Motiva Enterprises*, L.L.C., No. 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (plaintiff's negligent supervision and negligent entrustment claims treated defendant as a publisher because they related to harm caused by third-party content).

B. Some Courts Have Limited the Scope of Section 230(c)(1) Immunity

1. The Seventh Circuit Applies a Text-Based Analysis

The Seventh Circuit was the first circuit court to recognize the disconnect between *Zeran*'s application of Section 230 and the statutory language and history of Section 230. In *Doe v. GTE Corp.*, 347 F.3d 655, 660

(7th Cir. 2003), the court noted that Section 230 is titled "Protection for 'Good Samaritan' blocking and screening of offensive material" and asked: "Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?" *Id.*; *see also City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) ("subsection (c)(1) does not create an 'immunity' of any kind").

After analyzing the language of Section 230, the *GTE Corp.* court concluded Section 230 did not apply to the plaintiff's negligent entrustment claim because that claim did not seek to impose liability for a duty related to publisher or speaker conduct. *See GTE Corp.*, 347 F.3d at 660. Unlike the *Zeran* progeny, the Seventh Circuit evaluated whether the cause of action treated the internet service provider as a publisher or speaker. *Id.; see also Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-71 (7th Cir. 2008) (applying Section 230(c)(1) to statute that made publishing discriminatory advertisements illegal).

2. The Ninth Circuit Explicitly Limits Section 230(c)(1) to Claims Where the Duty Violated Involves Publication or Speech

Recognizing that the internet had "outgrown its swaddling clothes and no longer need[ed] to be so gently coddled," the Ninth Circuit followed the

Seventh Circuit's text-based analysis of Section 230. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164-65, 1175 n. 39 (9th Cir. 2008) (en banc). The court expressly limited its prior decisions that followed *Zeran*. *See id.* at 1170-71; *see also Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 n.11 (9th Cir. 2009) (also acknowledging that its earlier decisions following *Zeran* had read Section 230 too broadly).

Most significantly, it articulated the test that the Seventh Circuit had implicitly applied to determine whether a claim treated the internet service provider as a publisher or speaker. The Ninth Circuit instructed that "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, Section 230(c)(1) precludes liability." *Barnes*, 570 F.3d at 1102. Applying the test in *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852 (9th Cir. 2016), the Ninth Circuit held that Section 230(c)(1) did not apply to the plaintiff's failure to warn claim because the claim had "nothing to do with Internet Brands' efforts, or lack thereof, to edit, monitor, or remove user generated content."

The Ninth Circuit also expressly rejected the broad "but-for" test, which had been expressly and tacitly applied by courts that followed *Zeran*, because such a test would result in general immunity against all claims

derived from third-party content. *Id.* at 853. After all, "[p]ublishing activity is a but-for cause of just about everything" an internet service provider is involved in. *Id.*; *see also HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) ("*Internet Brands* 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").

3. Other Courts and Members of Congress Have Also Repudiated *Zeran*'s Broad Immunity

The Seventh and Ninth Circuit Courts are not alone. Other courts have also interpreted Section 230(c)(1) as only granting limited immunity to internet service providers. For example:

- A Georgia court of appeals held that the plaintiff sought to hold internet service provider liable for its conduct, not for publishing or speaking, because she claimed the provider failed to warn that its "speed filter" caused reckless driving. *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 79, 81 (Ga. Ct. App. 2018).

- Based on the statutory language of Section 230(c)(1) and the presumption against preemption, a Wisconsin court of appeals held "the Act does not protect a website operator from liability that arises from its own conduct in facilitating user activity." It concluded Section 230 did not apply to the plaintiffs' claim to hold the internet service provider liable for its own conduct in designing and operating the website, not for content published by a third party. *Daniel v. Armslist, LLC*, 913 N.W.2d 211, 214 (Wis. App. 2018) pet. granted, 918 N.W.2d 642 (Wis. 2018).

- One of the three Texas opinions applying Section 230 includes a concurrence arguing that *Zeran* "over-read Section 230(c)(1)" and applied publisher liability too broadly. *Milo v. Martin*, 311 S.W.3d

210, 220 n.1 (Tex. App.—Beaumont 2010, no pet.) (Gaultney, J. concurring).

The Seventh and Ninth Circuit's interpretation of Section 230 was also recently validated in an amicus brief from "current and past members of Congress" who participated "firsthand" in the development and enactment of Section 230 or the recent sex trafficking amendment. Brief of Members of U.S. Congress as Amici Curiae Supporting Respondents, *Daniel v. Armslist, LLC*, No. 2017AP344, 2019 WL 654471, at *1, 3-5 (Wis. Jan. 28, 2019). The legislators explained that Section 230 does not bar claims that seek to hold internet service providers liable for their own conduct, such as claims that the internet service provider "failed to warn of dangers of using its website or designed a website to facilitate wrongful conduct." *Id.* at *3-10. The *Zeran* line of cases that Facebook asks this Court to follow, therefore, "strayed from the text, upset the rule of law, and undermined the state courts' role as arbiters of private law." *Id.* at *8, 11.

C. The *Zeran* Line of Cases Immunized Bad Actors, Something that Cannot Have Been Intended by Congress

In a statement to Congress in 2017, Yiota Souras, Senior Vice President and General Counsel of the National Center for Missing and Exploited Children noted:

> The child sex trafficking victims who have been denied relief due to the [Communications Decency Act] include:

- A 14-year-old child who was trafficked online for two years and advertised with photos displaying her private body parts in sexually exploitive poses.

- A 15-year-old child who estimates she was raped over 1,000 times while trafficked on Backpage.com for a year and a half.

- A 15-year-old child who was trafficked for two years with ads posted on Backpage.com an average of six times a day with five to fifteen customers a day.

Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. On Commerce, Sci. & Transp., 115th Cong. (2017) (Statement of Yiota Souras at 2). She continued: "NCMEC has managed tens of thousands of cases where children have been bought and sold by the commercialization of child sex trafficking online." *Id.*

So, at this point in the history, the question emerges: Can it really be the case that Congress intended to immunize internet service providers from intentional bad conduct that facilitated the commission of rape, human trafficking of minors, and terrorism?

As the Court will see in Section V below, the answer is "no." We know that is the answer because Congress specifically told the nation so when it was considering the 2018 amendments to Section 230.

IV. Meanwhile, the Internet Changes

A. Today's Internet Service Providers Do Not Need Protection from Us, We Need Protection from Them

Although the point is debatable, it may be that the fledgling internet needed some of the protection that the *Zeran* decision and its progeny bestowed upon it. But the internet of 1996 has mutated into something far more pervasive and dominant in our society.

First, it is ubiquitous. Information and communications technologies are more widespread than electricity, reaching over four billion people. Martin Hilbert, *Technological Information Inequality As an Incessantly Moving Target: The Redistribution of Information & Communication Capacities Between 1986 & 2010*, 65 J. of Ass'n for Info. Sci. & Tech. 821, 832 (2014); *Internet Usage Statistics—March 2019*, https://www.internetworldstats.com/stats.htm.

Second, it no longer exists to primarily sell internet services. It is not confined to generating profits through online advertising. Rather, it produces what technology philosopher and Harvard Business School professor Shoshana Zuboff labels "prediction products," harvesting information about us from our phones, fitbits, "smart" appliances and home devices, and marketing that information to "insurance, retail, finance, and an ever-widening range of goods and services companies." Shoshana Zuboff,

The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power 10 (2019).

To the extent the *Zeran* line of cases had an underlying goal, it was to protect the internet service provider during the early days of the industry. The question is not now, and may never have been, whether internet service providers need to be protected from us; the question now is whether we can protect ourselves from them.

B. Today's Facebook Knows When It Is Being Used for Harmful Purposes

One of the concerns that runs through the *Zeran* line of cases was that the internet service provider could not monitor the material that was posted on its platform. When the Communications Decency Act was passed in 1996, that was almost certainly a valid concern. It no longer is.

Jane Doe has alleged and, at trial, will prove that Facebook can target users "based on a variety of factors including age, gender, location, interests, and behaviors." Secton Amended Petition, ¶ 199. To do so, Facebook classifies its users into over 1,300 categories, including categories such as "Away from Family." *Id*. It uses this information and its algorithms to sell ads to micro-target groups such as the roughly 1,300 forty-year-old female motorcyclists in Nashville, Tennessee. *Id*. at ¶ 200.

Today, Facebook monitors not just its users' postings but also their "interests and behaviors," because it generates "substantially all" of its revenue from selling ads. *Id.* at ¶ 224. If it knows when a user is "Away from Family," Facebook knows when traffickers are targeting and grooming victims.

C. Today's Facebook Can Warn and Otherwise Protect Its Users

Facebook itself tells its community in the Terms of Service it attaches to the Rule 91a motion that "[w]e help you find and connect with people . . . that matter to you," by using "the data we have to make suggestions for you and others." Terms of Service, § 1.

And it explicitly tells its users that it employs "dedicated teams around the world" and develops "advanced technical systems to detect misuse of our Products, harmful conduct towards others, and situation where we may be able to help support or protect our community." *Id.* It claims it develops "automated systems to improve our ability to detect and remove abusive and dangerous activity that may harm our community and the integrity of our Products." *Id.* Finally, Facebook claims that it will act when it learns of harmful conduct on the platform by "offering help, removing content, blocking access to certain features, disabling an account, or contacting law enforcement." *Id.*

D. Today's Internet Facilitates the Trafficking of Minors

In 2017, the Senate Committee on Commerce, Science and Transportation heard Souras testify:

> Technology has fundamentally changed how children are victimized through sex trafficking in ways that would have been unimaginable just a few years ago. An adult can now shop from the privacy of his home or hotel room, often on a cell phone, to buy a child for rape. Traffickers lure and recruit children online. Websites can be used to create virtual marketplaces on which predatory offenders can peruse a variety of sexual experiences being offered for sale, including with children, and complete their purchase online.

Stop Enabling Sex Traffickers Act of 2017: Hearing on S. 1693 Before the S. Comm. On Commerce, Science & Transportation, 115th Cong. (2017) (Statement of Yiota Souras at 2). She continued: "Traffickers have learned that by leveraging the power of the internet, they can more easily recruit, control and sell children for sex." *Id.*

V. The 2018 Amendment to Section 230

A. The Amendment

The 2018 amendment added this language to Section 230(e)(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 15, 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.

Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, sec. 4, § 230(e)(5), 132 Stat. 1253, 1254 (2018). As the Court will see in Section VI, below, when the amendment is considered in conjunction with Section 230(e)(3), which explains when Section 230 will preempt state law claims, it becomes clear that Section 230 does not apply to Jane Doe's state law claims.

But Congress' intent is even more clear when the legislative history of the amendment is examined.

B. In Passing the Amendment, Congress Recognized the Scope of the Human Trafficking Problem

Prior to passing the 2018 amendment, the Senate Subcommittee on Investigations of the Committee on Homeland Security conducted an extensive investigation of "how sex traffickers increasingly use the Internet to advance their trade and evade detection." *Human Trafficking Investigation*, 114th Cong. 39, at 1 (2015). During that hearing, Senator Portman observed "that technology has fundamentally changed the way

children can be victimized through sex trafficking." *Id.* at 11. The Subcommittee heard evidence documenting an 846% increase in the number reports of suspected child sex trafficking. That increase was "directly correlated to the increased use of the Internet to sell children for sex." *Id.* at 2. The Subcommittee also heard testimony that the Communications Decency Act was being used as a shield against lawsuits and threats of prosecution. *Id.* at 20-21.

On the floor of the Senate, it was recognized that an estimated 100,000 children are victims of human trafficking per year in the United States. 161 Cong. Rec. S1617 (daily ed. March 18, 2015) (statement of Sen. Cornyn). Senator Feinstein commented that "[r]egardless of how children are first trafficked, one thing is almost universal—victims will be advertised on the internet." *Id.* at S1621 (statement of Sen. Feinstein). She concluded that "the Internet has made this industry what it is, the second largest criminal industry in the world." *Id.* at S1622.

C. Congress Made It Clear that the *Zeran* Line of Cases Were Wrongly Decided

In April 2018, Congress passed the amendment to Section 230. The caption of the amendment indicates that it is intended "to clarify that section 230 of [the] Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and State criminal and civil

law relating to sexual exploitation of children or sex trafficking." Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018). Note that this statement of purpose makes no distinction between federal and state civil law claims.

Senator Portman, one of the sponsors of the amendment, made it clear that the motivation for the amendments was the court opinions that interpreted the Communications Decency Act as providing immunity to internet service providers: the Act "was never intended to protect those who knowingly facilitate the sex trafficking of vulnerable women and girls." 163 Cong. Record S3977 (daily ed. July 13, 2017) (statement of Sen. Portman). Congress stated the "sense of Congress" was that Section 230 "*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, sec. 2(1) 132 Stat. 1253 (emphasis added). Thus, the point of the amendment was "to ensure that such section does not provide such protection to such websites." *Id.* at sec. 2(3).

D. Facebook Does Not Acknowledge the Fatal Problem With Its Motion: The Cases It Relies Upon Do Not Apply to Human Trafficking Claims

Facebook's only comment concerning the 2018 amendments is that they "do not apply" because Jane Doe does not seek relief under Sections

2421(A) or 1595 of title 18. Motion, p. 5 n.4. But Facebook does not provide a basis for its position–there is no explanation why the amendments might only apply to those two statutes. As we will see in the preemption analysis below, neither the amendments nor the original statute actually prevented a Texas plaintiff from relying upon a state cause of action in a human trafficking case.

But more importantly, Facebook disregards what Congress stated in 2018 about its original intent in 1996 when it passed Section 230. *Congress has made clear that the courts have fundamentally misinterpreted that intent*. That, in turn, makes it clear that the array of cases Facebook relies upon to support its 91a motion should not be applied to human trafficking cases.

VI. Section 230 Does Not Preempt Jane Doe's State-Law Claims

A. The Standards for Finding Federal Preemption Are Narrow and Demanding

A federal law may expressly preempt state laws. *Moore v. Brunswick Bowling & Billiards Corp*., 889 S.W.2d 246, 247 (Tex. 1994); *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992). It may also impliedly preempt state laws if Congress has indicated its intent to exclusively occupy the entire field or if state law actually conflicts with the federal law. *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001); *Freightliner*

Corp. v. Myrick, 514 U.S. 280, 287 (1995). An actual conflict exists when (1) "it is impossible for a private party to comply with both state and federal requirements"; or (2) "state law obstructs accomplishing and executing Congress' full purposes and objectives." *Great Dane*, 52 S.W.3d at 743; *Freightliner*, 514 U.S. at 287.

As shown, Section 230 does not apply to Jane Doe's claims. Regardless, it cannot immunize Facebook from Jane Doe's state-law claims unless it was intended to preempt such claims. *See Kaufman v. Allied Pilots Ass'n*, 274 F.3d 197, 203 (5th Cir. 2001) (preemption doctrine immunizes defendants from claims under state law). There is always a presumption against preemption. *Great Dane*, 52 S.W.3d at 743; *Maryland v. Louisiana*, 451 U.S. 725, 728 (1981). That presumption is strongest when states exercise authority over matters involving public health and safety—matters over which states have historically exercised primary authority. *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 4 (Tex. 1998); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718-19 (1985). Accordingly, courts must assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Hyundai*, 974 S.W.2d at 5 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996)) (emphasis in original).

"The purpose of Congress is the ultimate touchstone in every preemption case." *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 482 (Tex. 2010); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). To determine that purpose, courts must examine the language, purpose, and history of the federal statute. *Moore*, 889 S.W.2d at 247; *Worthy v. Collagen Corp.*, 967 S.W.2d 360 (Tex. 1998); *Medtronic*, 518 U.S. at 486.,

B. Congress Has Clearly Stated that Section 230 Does *Not* Preempt Jane Doe's Claims

As always, the Court's analysis should begin with the language of the statute. Section 230(e)(3) contains an express preemption provision, while congressional intent is expressed throughout the remainder of the statute. Section 230(e)(3) begins by stating:

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

This sentence expresses Congress's clear intent to permit at least some state laws that would impose liability upon internet service providers. The provision continues:

> 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.

This sentence expresses Congress's intent to preempt only those state laws that actually conflict with the rest of Section 230.

As discussed above in Section II, the original purpose of Section 230, as expressed in subsections (b) and (c), was to promote the development of the internet by encouraging providers to restrict access to obscene materials and preventing the imposition of liability upon service providers for defamatory-type content.

The new amendments in subsection (e)(5) then clarify that Congress did not intend the protections afforded by Section 230 to have any effect on sex trafficking laws, whether state or federal, civil or criminal. Pub. L. No. 115-164, 132 Stat. 1253. Given Congress's stated intentions and the heightened presumption against preemption in matters concerning health and safety, Section 230 should not be interpreted as preempting state laws that provide civil remedies against online facilitators of human trafficking.

Texas's human trafficking statute—Chapter 98 of the Texas Civil Practice and Remedies Code—tracks the language of the federal human trafficking statutes—Sections 1591 and 1595 of Title 18—which are expressly exempted from Section 230 by the 2018 amendments. *See* 47 U.S.C. § 230(e)(5)(A). Chapter 98 imposes civil liability upon:

> A defendant who intentionally or knowingly benefits from participating in a venture that traffics another person.

Tex. Civ. Prac. & Rem. Code § 98.002(a) (West 2019) Similarly, the federal statute imposes civil liability upon:

> Whoever knowingly . . . benefits . . . from participation in a venture which has engaged in [human trafficking]. . . .

18 U.S.C. §§ 1591, 1595 (2018). Thus, both the Texas and federal statutes target those who knowingly benefit from human trafficking. Since Section 230 expressly excepts the federal human trafficking statutes, it cannot be inconsistent with the analogous Texas human trafficking statute.

The Texas Supreme Court has also repeatedly held that common-law actions based upon negligence involve the state's power to regulate health and safety matters and are therefore protected by the heightened presumption against federal preemption. *Great Dane*, 52 S.W.3d at 743; *Moore*, 889 S.W.2d at 249. It has further held that an express preemption clause that applies to state "law" generally must be narrowly construed so that it does not preempt state common-law claims. *See Moore*, 889 S.W.2d at 250. Jane Doe's negligence claims, therefore, is also not preempted by Section 230.

Finally, the significance of the state interest at issue permits federal preemption only where Congress has expressed that intent in "clear and certain terms." *Id.* at 251. Texas, like other states, has a "compelling interest in protecting children from sexual exploitation" and "in safeguarding the physical and psychological well-being of children." *Ex parte Ingram*, 533 S.W.3d 887, 904 (Tex. Crim. App. 2017); *Ex parte Fujisaka*, 472 S.W.3d 792,

801 (Tex. App.—Dallas 2015, pet. ref'd); *Fleming v. State*, 455 S.W.3d 577, 610 (Tex. Crim. App. 2014); *see also New York v. Ferber,* 458 U.S. 747, 757 (1982) (recognizing that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"). Far from expressing an intention to usurp the states' power to protect these interests, Congress has clearly stated in the amendments to Section 230 that it never intended to do so.

Prayer

Facebook's Rule 91a motion should be denied. Jane Doe requests the fees and expenses she is entitled to if the motion is denied.

Respectfully submitted,

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CAUSE NO. 2018-69816

JANE DOE,	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
vs.	§	**HARRIS COUNTY, TEXAS**
FACEBOOK, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHWEST FWY, HOUSTON, TX 77074; and TEXAS PEARL., INC.,	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

CAUSE NO. 2018-82214

JANE DOE,	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
vs.	§	**HARRIS COUNTY, TEXAS**
FACEBOOK, INC. d/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

REPLY MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT FACEBOOK, INC. TO DISMISS PURSUANT TO RULE 91A

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Other Authorities

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INTRODUCTION

Plaintiffs' opposition brief[1] and subsequently filed Executive Summary effectively concede that, under decades of consistent federal and Texas precedents, Plaintiffs' claims against Facebook are barred by Section 230 of the Communications Decency Act because they necessarily turn on third-party content that allegedly was transmitted via Facebook's platform. Plaintiffs' lead argument is that this Court should disregard all of these prior cases—including three Texas Court of Appeals decisions—on the theory that (1) this consistent line of federal and state cases interpreting Section 230 to bar claims that depend on third-party content were all in error, and (2) Congress silently and impliedly repealed Section 230 to the extent that it applies to human trafficking claims. Neither of these contentions has merit. Rather, they show that the parties actually agree on the central point of Facebook's motion: As Section 230 is has been consistently interpreted by the courts, all of Plaintiffs' claims are barred, including the two new claims added by the recent amendments to the petitions. And the principal case that Plaintiffs cited for a contrary proposition—*Daniel v. Armslist, LLC*, 913 N.W.2d 211, 214 (Wis. App. 2018)—i.e., that Section 230 "does not protect a website operator from liability that arises from its own conduct in facilitating user activity" (Resp. at p. 16)—was expressly reversed by the Wisconsin Supreme Court this week. *See Daniel v. Armslist, LLC*, --- N.W.2d ---, 2019 WI 47 (Wisc. April 30, 2019) (Section 230 bars claims, "no matter how artfully pled," that an internet service provider "provided an online forum for third-party content and failed to adequately monitor that content").

For all of these reasons, the claims against Facebook have no basis in law, and Facebook asks the Court to dismiss these cases with prejudice pursuant to Rule 91a. Facebook moves for dismissal

[1] Facebook's motions to dismiss in Causes Nos. 2018-82214 and 2018-69816 are both set for a consolidated hearing on May 3, 3019. Accordingly, and because the two actions present substantially identical legal issues for purposes of Facebook's motions to dismiss, Facebook files this consolidated Reply in support of its motion to dismiss in each action.

subject to and without waiving its previously filed Special Appearance to Contest Personal Jurisdiction, Objection to Improper Venue and Motion to Dismiss for Improper Forum, and Answer ("Special Appearance"). *See* Tex. R. Civ. P. 91a.8 (defendant does not waive special appearance by seeking and obtaining a ruling on a Rule 91a motion to dismiss).

ARGUMENT AND AUTHORITIES

I. Texas and federal courts have consistently interpreted CDA 230 to bar claims such as Plaintiff's

Plaintiffs admit that courts around the country—including in three decisions from the Beaumont Court of Appeals and a published decision from the U.S. Court of Appeals for the Fifth Circuit—have held that CDA 230 bars claims like theirs. The response concedes that federal and state courts have "barred plaintiffs' claims regardless of the type of cause of action asserted unless the internet service provider participated directly and materially in creating the offensive content on its platform," (Resp. at 10–13), and Plaintiffs do not contend that Facebook directly and materially participated in creating any of the content involved in their claims.

Plaintiffs' response is for all intents and purposes a request that this Court decline to follow any of these consistent precedents, including Texas Court of Appeals decisions, that bar the claims against Facebook. Nothing in the response provides this Court with a warrant to do so, and it should decline Plaintiffs' invitation. Of course, Section 230 is binding on this court, particularly given that its preemption provision expressly bars state law claims that fall within its scope. "[T]he Supremacy Clause of the Constitution requires that a state court follow the laws passed by Congress when the Congress has expressed its intent to preempt state law." *Milo v. Martin*, 311 S.W.3d 210, 215 (Tex. App.-Beaumont 2010, no pet.). Section 230 is "a federal statute that 'overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law.'" *Id.* And for good and sensible reasons, Texas courts generally will defer to federal decisions construing federal statutes. *See id.* (citing and following federal precedents regarding construction of Section 230).

The response contends that this long line of federal decisions is wrong, and that the Texas courts are wrong for following them, because, in Plaintiffs' view, Congress's sole intent in enacting Section 230 was "to encourage 'blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material'"—in other words, to encourage "Good Samaritan" engagement by platforms without penalizing them with liability for such efforts. Resp. at 9 (quoting 47 U.S.C. § 230(b)(4)). Even if Plaintiffs could show that was the only purpose of the statute—to protect "Good Samaritan" monitoring and blocking efforts—the law is clear that the meaning of a statute is not constrained by an underlying legislative purpose that is either narrower or broader than the enacted text. *See* Resp. at 10–13 (citing cases). Here, the actual text of Section 230 was written broadly, and reasonably so, as otherwise it could be too easily evaded. That is why, beginning with *Zeran* and continuing through the long line of federal and state (including Texas) cases that Plaintiff cites and challenges, Section 230 always has been read broadly. *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) ("By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 758 (Tex. App.—Beaumont 2014, pet. denied) ("the plain language of the statute contemplates application of immunity from civil suit under section 230 for interactive computer service providers").

For these reasons, Texas courts consistently and correctly have held that Section 230 preempts state causes of action that "stem" from a defendant's alleged "publication of … contested content, its failure to remove the content, or its alleged violation of the Texas Penal Code for the same conduct." *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 758 (Tex. App.—Beaumont 2014, pet. denied).

For the same reason, courts in Texas and across the country have uniformly held that where a critical part of the chain of causation in a plaintiff's theory of liability against a platform turns on third party content posted on the site, CDA 230 bars the claim. "Allowing plaintiffs to assert any

cause of action … for publishing content created by a third party, or for refusing to remove content created by a third party would be squarely *inconsistent* with section 230." *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 758 (Tex. App.—Beaumont 2014, pet. denied) (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009) and *Zeran v. America Online, Inc.* 129 F.3d 327 (4th Cir. 1997)); *Davis v. Motiva Enterprises, L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (Section 230 barred plaintiff's negligence claims because the "theory of liability" was "based on [the defendant] allowing [a third party] access to the Internet … to publish fake Craig's List posts and failing to prevent those posts from being published"); *see also Milo v. Martin*, 311 S.W.3d 210, 215 (Tex. App.—Beaumont 2010, no pet.) (following *Zeran* and other federal cases that "applied section 230 broadly"); *Jones v. Dirty World*, 755 F.3d 398 (6th Cir. 2014); *Johnson v. Arden*, 614 F.3d 785, 791–92 (8th Cir. 2010); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009));[2] *Doe v. MySpace, Inc.*, 528 F.3d 413, 419–20 (5th Cir. 2008); *Universal Commc'n Sys, Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *Green v. America Online*, 318 F.3d 465, 470–71 (3d Cir. 2003); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 591–92 (S.D.N.Y. 2018); *Force v. Facebook, Inc.*, 304 F. Supp. 3d 315, 319–25 (E.D.N.Y. 2018); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1165 (N.D. Cal. 2017); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 888–92 (N.D. Cal. 2017); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1128–29 (N.D.

[2] Later Ninth Circuit cases do not change that court's holdings that claims alleging that a platform should have monitored, removed, or warned about third-party content are barred. In *Doe v. Internet Brands, Inc.*, the plaintiff, an aspiring model, posted a profile on a website called modelmayhem.com. 824 F.3d 846 (9th Cir. 2016). Two predators found the profile and contacted her, lured her into a fake modeling audition, drugged her, and raped her. *Id.* at 848–49. The Ninth Circuit held that the CDA did not bar the plaintiff's failure to warn claim because no part of the alleged duty arose from third-party content on the site. *Id.* at 851. The only content posted on the site was that of the plaintiff herself—there were no postings by the third party predators that Internet Brands allegedly should have prevented through monitoring or other publishing activity. *Id.* at 851. Nor was there any "allegation that Model Mayhem transmitted any potentially harmful messages between Jane Doe and [the predators]" or that the predators "posted their own profiles on the website." *Id.* at 852. The court held that the claim "d[id] not arise from an alleged failure to adequately regulate access to user content or to monitor internal communications that might send up red flags about sexual predators." *Id.* at 853. *HomeAway.com, Inc. v. City of Santa Monica* confirmed and followed this reading of *Internet Brands.* 918 F.3d 676, 682 (9th Cir. 2019) ("[W]here the website provider was alleged to have known *independently* of the ongoing scheme *beforehand*, the CDA did not bar an action under state law for failure to warn."). Where, as here, the duty "would necessarily require an internet company to monitor third-party content," the claim is barred. *Id.*

Cal. 2016), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018); *Igbonwa v. Facebook, Inc.*, 3:18-cv-2027, 2018 WL 4907632, at *6 (N.D. Cal. Oct. 9, 2018).

Under these cases and others like them, Plaintiffs' claims are barred by Section 230 because they necessarily depend on Facebook's not preventing, or allowing, third party communications on its internet platform—*i.e.* the communications that traffickers made to Plaintiffs over that platform. *GoDaddy.com*, 429 S.W.3d at 758.

None of the cases cited in the response is contrary or even inconsistent. Putting aside the concurring opinion and amicus brief cited by Plaintiff, *see* Resp. at 16–17, which have no precedential value, the cases cited by Plaintiff as "limit[ing]" or "repudiat[ing]" "broad immunity" merely apply the accepted principle that Section 230 does not apply to a defendant's active participation in developing the harmful content at issue.[3] *See Fair Hous. Council of San Fernando Valley v. Roommates.com*, LLC, 521 F.3d 1157, 1166–67 (9th Cir. 2008). For example, *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, *affirmed* the district court's ruling that claims against Craigslist were barred because Craigslist was "not the author of the [allegedly harmful] ads and could not be treated as the 'speaker' of the posters' words." 519 F.3d 666, 671 (7th Cir. 2008); *accord Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 81 (Ga. Ct. App. 2018) (Section 230 did not apply "because there was no third-party user content published").

As Facebook argued in its motion, this distinction is crucial, as it serves to distinguish bad actors such as Backpage, who are alleged to have actively participated in creating illegal content, from neutral, "passive transmitters" (such as Facebook) who are generally immune. *See Roommates.com*, 521

[3] Plaintiffs also cite dicta from two Seventh Circuit decisions: *Doe v. GTE Corp.*, which expressly declined to "decide which understanding of § 230 is superior" and affirmed dismissal on other grounds, 347 F.3d 655, 660–62 (7th Cir. 2003); and *City of Chicago, Ill. v. StubHub!, Inc.*, which briefly noted that Section 230 "limits who may be called the publisher of information that appears online" but was "irrelevant" to the City of Chicago's authority to tax the resale of event tickets sold online, 624 F.3d 363, 366 (7th Cir. 2010) ("Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker.'").

F.3d at 1166–67 (Section 230 barred claims based on Roommates.com's publication, as written, of third parties' comments on their profile pages).

Significantly, one of the critical cases on which Plaintiffs rely for the proposition that Section 230 "'does not protect a website operator from liability that arises from its own conduct in facilitating user activity'" (Resp. at p. 16, quoting *Daniel v. Armslist*, LLC, 913 N.W.2d 211, 214 (Wis. Ct. App. 2018), was reversed just this week by the Wisconsin Supreme Court, *Daniel v. Armslist, LLC*, --- N.W.2d ---, 2019 WI 47 (Wisc. April 30, 2019). In *Armslist*, the Wisconsin Supreme Court held that, to prevent the "obvious chilling effect" on free speech of "impos[ing] [] tort liability for hosting third-party content," Section 230 "immuniz[es] interactive computer service providers from liability." *Id.* at *4. Section 230 "prevents the specter of tort liability from undermining an interactive computer service provider's willingness to host third-party content." *Id.* The Wisconsin Supreme Court adopted the "material contribution" test from *Roommates.com*, and so rejected the very theory pressed by Plaintiff here:

> Daniel's negligence claim is simply another way of claiming that Armslist is liable for publishing third-party firearm advertisements and for failing to properly screen who may access this content. The complaint alleges that Armslist breached its duty of care by designing a website that could be used to facilitate illegal sales, failing to provide proper legal guidance to users, and failing to adequately screen unlawful content. Restated, it alleges that Armslist provided an online forum for third-party content and failed to adequately monitor that content. The duty Armslist is alleged to have violated derives from its role as a publisher of firearm advertisements. This is precisely the type of claim that is prohibited by § 230(c)(1), no matter how artfully pled.

Id. at *10–*11 (citing *Barnes*, 570 F.3d at 1101–02, and *MySpace*, 528 F.3d at 416, 420). The Wisconsin Supreme Court's reversal of the one of Plaintiffs' leading appellate cases makes clear that, contrary to the central premise of Plaintiffs' argument, the overwhelming trend continues to be *toward* broad immunity, not away from it.

II. Courts have read and interpreted CDA 230 correctly.

Plaintiffs do not dispute that the courts' consistent reading of the law bars their claims—the response effectively admits that it does. Instead, the response argues that this court should not follow

these cases. Resp. at 1 (asserting that "[t]he majority of the federal courts, and subsequently the state courts" are "wrong"). Plaintiffs' various arguments for why this Court should depart from consistent and overwhelming precedent are meritless.

A. Subsequent Technological and Social Changes Do Not Alter the Text or the Meaning of Section 230

The response first argues that this Court should disregard existing decisional law interpreting Section 230 because the internet has changed and grown dramatically since 1996, when Section was enacted. This argument is both legally and logically flawed. A court cannot change the text or meaning of a statute simply because surrounding circumstances have changed since the statute's enactment. Rather, "[i]n the absence of a specific amendment, a statute should be given the meaning which it had when enacted." *Chamul v. Amerisure Mut. Ins. Co.*, 486 S.W.3d 116, 125 (Tex. App.-Houston [1st Dist.] 2016, pet. denied) (quoting *Taylor v. Firemen's & Policemen's Civil Serv. Comm'n of City of Lubbock*, 616 S.W.2d 187, 189 (Tex. 1981)).

The meaning of a federal statute follows its text, and in construing that text, courts look to "the ordinary meaning of the term[s] … at the time Congress enacted the statute ." *Perrin v. U. S.*, 444 U.S. 37, 42 (1979). Although the purpose and context of the statute when enacted may bear upon how that text is interpreted, the meaning of the text does not change over time based on real-world changes. Where a statute is meant to change based on such changes in the real world, Congress can so indicate. *See Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) (discussing interpretation of statutes that, unlike Section 230, expressly "refer[] to" and incorporate a subject that is subject to change). Otherwise, it is up to Congress to make such changes. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). The reason is clear: "if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands." *Id.* (internal quotation marks omitted). Put another way, "*stare decisis* carries enhanced force when a decision … interprets a statute because, unlike with a

constitutional provision, any errors in the court's analysis can easily be corrected by Congress." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015); *see also United States v. Wise*, 370 U.S. 405, 411 (1962) ("[S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage.").

Moreover, even if none of these principles applied, it is not at all clear that the changes in the internet would warrant *less* protection for platforms, given the greater volume of traffic on the internet and the degree to which our economy has come to depend on it. If platforms or other internet sites had to monitor any and all posts to ensure that no such posts could possibly do real-world harm, the crushing burden on platforms would be even greater now than it would have been in 1996 absent Section 230, given the much larger volume and complexity of internet communications today. But in any event, even if some such adjustments in the statutory scheme could possibly be warranted to account for technological advances, it is for Congress to make those adjustments—not this Court.

B. The Legislative History of the 2018 Amendment Does Not Exempt State Law Civil Actions from Section 230

The response's argument that this Court should depart from existing precedent in this case is rendered even more implausible by the 2018 amendments that Congress actually did make to Section 230—precisely to address the issue of child trafficking that is the centerpiece of Plaintiffs' entire argument. Specifically, Congress enacted the Allow States And Victims To Fight Online Sex Trafficking Act of 2017 ("FOSTA"), Pub. L. 115-164, Apr. 11, 2018, 132 Stat. 1254, in response to overwhelming information that advocacy groups and affected parties presented to Congress to document and highlight the growing problem of child trafficking. Presented with voluminous evidence regarding the proliferation of child trafficking on the internet—and specifically trafficking over sites like backpage.com that were knowingly used to buy and sell children for sex—Congress amended both the underlying federal substantive law and Section 230 to address the problem.

First, it created a new federal civil cause of action against operators of interactive computer services who intentionally "promote or facilitate the prostitution of another person." *Id.* at § 6 (codified at 18 U.S.C. § 2421A).

Second, it amended Section 230 to create a specific exception to Section 230 immunity for federal civil claims brought under 18 U.S.C. § 1591 and § 1595 (which together provide a federal civil cause of action against knowing and reckless participants in sex trafficking).[4] FOSTA, § 4 (codified at 47 U.S.C. § 230(e)(5)(A)).

Finally, it also exempted certain types of state criminal prosecutions. Notably, it did not exempt state civil actions at all. *See* 47 U.S.C. § 230(e)(5)(B)–(C).

The response contends that the legislative history of this amendment shows Congress's desire to allow any and all civil actions by victims of sex trafficking. *See* Resp. at 23–24. But that argument ignores what Congress actually wrote into law, as the text of FOSTA makes clear that state civil claims are not exempted from Section 230. The amendments to Section 230 expressly carve out the specific federal causes of action, and also expressly exempt state criminal prosecutions based on conduct that would violate 18 U.S.C. § 1591 or § 2421A, but they contain no provision exempting state *civil* claims from the reach of Section 230. *See* 47 U.S.C. § 230(e)(5). If Congress had intended to exempt state civil actions, it would have said so. *See*, *e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (applying the negative-implication canon); *Russello v. United States*, 464 U.S. 16, 23 (1983) (same). The fact that Congress exempted certain claims and not others, makes clear that it intended to limit the scope of the exemptions enacted through FOSTA. In carefully crafting specific exemptions to Section 230 to combat the scourge of child trafficking while retaining the important protections necessary for internet

[4] Notably, Section 1595 also permits state attorneys general to bring claims under the new federal cause of action as parens patriae. 18 U.S.C. § 1595(d).

service providers to continue operating their platforms in the face of otherwise potentially limitless liability, Congress chose not to exempt state civil claims from Section 230 immunity.

Contrary to Plaintiffs' argument, FOSTA's legislative history confirms that Congress sought to exempt only certain state *criminal* proceedings based on the exempted federal causes of action, a solution strong and precise yet carefully limited in scope. The House Judiciary Committee Report noted that FOSTA "is designed to combat online sex trafficking by providing new tools to law enforcement through a new federal criminal statute and by making it easier for *states to prosecute criminal actor websites* by amending section 230 of the Communications Decency Act, 47 U.S.C. S 230." H.R. REP. 115-572, 3, 2018 U.S.C.C.A.N. 73, 74 (emphasis added). The report continued, explaining that FOSTA "will allow vigorous criminal enforcement against all bad-actor websites, not just Backpage.com, through the creation of a new federal law and by explicitly permitting states to enforce criminal laws that mirror this new federal law and current federal sex trafficking law. With this robust criminal enforcement, victims will have more opportunities to obtain restitution." *Id.* at 73, 77. Nowhere does the Report mention abrogating Section 230 for state civil claims.

To the extent that Plaintiffs' argument is based on statements in the legislative history supposedly evincing a broader intent to address child trafficking, those statements are entirely consistent with the limited remedy that Congress enacted—and in any event, the legislative history cannot be use to extend the amendments to subjects not covered in the express text. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("[T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."); *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010) (same); 47 U.S.C. § 230(e)(5); *accord* H.R. REP. 115-572, 3, 2018 U.S.C.C.A.N. 73, 74, 77.

C. A Statement of Purpose Does Not Change the Meaning of a Statute

Nor does the statement of purpose in FOSTA—which makes a general, imprecise reference to state and federal criminal and civil claims—mean that state civil claims are now exempted from Section 230. *See* Resp. at 24–25. The law is clear that this kind of prefatory language is not operative law and cannot change the operative statutory text. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009). This type of uncodified statement of purpose "recite[s] facts which are supposed to represent the justification, in the minds of the legislature, for the provisions adopted in the ensuing enactment." *See* N. Singer & S. Singer, 1A SUTHERLAND: STATUTES AND STATUTORY CONSTRUCTION § 20:3 (7th ed. 2008); *accord* A. Scalia & B.A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 219 (2012). ("[A]n expansive purpose in the preamble cannot add to the specific dispositions of the operative text. After all, no legislation or private disposition pursues its stated purposes at *all* costs. And there is no requirement that the limitations contained in the enactment must be recited in the prologue.").

Even if a statement of purpose is part of the legislation enacted by Congress, is not law unto itself and cannot "change the plain meaning of the operative clause" of the statute. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016). When faced with a prefatory provision such as this, a court simply "has no license to make [the statute] do what it was not designed to do." *Hawaii*, 556 U.S. at 175 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 578 n.3 (2008)); *see also Yazoo & Miss. Valley R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) ("[A]s the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up.").

That is especially true here. FOSTA created three discrete, narrowly tailored exemptions to Section 230, none of which covers state civil claims. Reading a state civil claim exemption into

FOSTA's prefatory language would improperly "change the plain meaning of [FOSTA's] operative clause," 47 U.S.C. § 230(e)(5). *Kingdomware Techs.*, 136 S. Ct. at 1978. As the Supreme Court has explained, it is "the job of Congress by legislation, not [courts] by supposition, both to write the laws and to repeal them." *Epic Sys.*, 138 S. Ct. at 1624.[5]

D. The Express Exemptions from Section 230 Make Clear That Other Categories of Human Trafficking Cases, Including State Law Civil Actions, Remain Preempted.

Finally, the response suggests that the express preemption clause in 47 U.S.C. § 230(e)(3) does not apply to state law causes of action that are "consistent" with Section 230. Resp. at 28. What the response fails to mention is that this language was in Section 230 from its inception, and courts have been aware of it even as they have interpreted Section 230 to provide broad immunity and bar state failure to warn and negligent undertaking claims. That this language was left untouched when Congress amended the statute (to add *limited* exceptions not relevant here) indicates an intent to *retain* this immunity, not to repeal it *sub silentio*. *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) ("'If a word or phrase has been … given a uniform interpretation by inferior courts …, a later version of that act perpetuating the wording is presumed to carry forward that interpretation.'" (quoting Scalia & Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012)); *Grimes Cty. Bail Bond Bd. v. Ellen*, 267 S.W.3d 310, 315

[5] Plaintiffs' argument that a statement in FOSTA's legislative history establishes that Section 230 was never intended to apply to state civil claims like hers (Resp. at 25–26) is even further afield. Unenacted speculation by the 2018 Congress about what the intentions of the 1996 Congress cannot alter the meaning of Section 230. A later Congress cannot change the meaning of a statute enacted by an earlier Congress simply by saying something on the record. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."); *In re Doe*, 19 S.W.3d 346, 352 (Tex. 2000) ("[C]ourts construing statutory language should give little weight to post-enactment statements by legislators. Explanations produced, after the fact, by individual legislators are not statutory history, and can provide little guidance as to what the legislature collectively intended." (internal quotation omitted)). Congress has the power to amend the statute—as it has done—but in order to do so, it must amend the text. Broad policy statements, even if contained in legislative "findings," cannot effect an implied repeal of a prior statute—only actual enacted statutory text can do that. *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996) ("[T]he view of a later Congress cannot control the interpretation of an earlier enacted statute."); *see also In re Doe*, 19 S.W.3d at 352.

(Tex. App.—Houston [14th Dist.] 2008); *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993) (where Congress re-enacts language that has been subject to a settled judicial interpretation, the Supreme Court will "apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them"); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

FOSTA expressly carves out three specific exceptions to the broad preemptive effect of Section 230(e)(3): one for a newly created federal civil cause of action, and two for certain kinds of state criminal prosecutions. *See* 47 U.S.C. § 230(e)(5). Plaintiffs would have the Court create a fourth exception—for state civil causes of action addressing sex trafficking—on the theory that this fourth exception would be consistent with one of the exceptions that Congress actually created. But if Congress had intended to exempt state civil actions, it would have said so. *See Jennings*, 138 S. Ct. at 844; *Russello*, 464 U.S. at 23. Where, as here, a statute contains a "meticulous . . . enumeration of exemptions and exceptions . . . [,] courts are not authorized to create additional exceptions." *Law v. Siegel*, 571 U.S. 415, 424 (2014).

Plaintiffs' argument is, in effect, that FOSTA *impliedly* repealed Section 230 immunity as applied to state civil claims relating to sex trafficking. As the Supreme Court reaffirmed just last term, "[a] party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). The intent must be "clear and manifest," as there is a "'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operation in a later statute."

Id. (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974), and *United States v. Fausto*, 484 U.S. 439, 452, 453 (1988)).

Where it is argued that a later federal statute overrides an earlier provision, as the response does here, the court must determine whether there is a clear and irreconcilable conflict between the two provisions, meaning a later-enacted statute must "expressly contradict" an earlier statute or be so incompatible that inferring amendment or repeal "is absolutely necessary … in order that [the] words [of the later statute] shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (statutes are in "irreconcilable conflict" when there is a "positive repugnancy between them or … they cannot mutually coexist"). Even where such a conflict is found, there must be a manifest expression of Congressional intent that the later enactment supersede or displace the earlier provision. *Branch v. Smith*, 538 U.S. 254, 273 (2003); *Morton*, 417 U.S. at 551; *Radzanower*, 426 U.S. at 153; *accord J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001) ("The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue.").

Section 230 and FOSTA express no such "irreconcilable conflict," because the two statutes comfortably coexist as written. FOSTA addresses the problem of child trafficking on the internet by creating a new federal cause of action and abrogating Section 230 immunity for specific federal causes of action and for certain state criminal prosecutions. FOSTA, §§ 4, 6; *accord* H.R. REP. 115-572, 3, 2018 U.S.C.C.A.N. 73, 74. That FOSTA did not go further to exempt state *civil* claims from Section 230 immunity does not create an "irreconcilable conflict." Rather, it reflects Congress's careful balancing between providing a response to child sex trafficking and permitting internet service providers to continue operating their platforms without fear of boundless liability. FOSTA's new federal cause of action and its exceptions for certain federal civil claims and certain state criminal

prosecutions provide crucial tools in the fight against child sex trafficking, and their value exists apart from any exemption for state civil claims. As a result, this is not a case where inferring amendment or repeal "is absolutely necessary … in order that [the] words [of the later statute] shall have any meaning at all," *Nat'l Ass'n of Home Builders*, 551 U.S. at 662. Because the "two statutes are capable of co-existence, it is the duty of the courts … to regard each as effective." *Radzanower*, 426 U.S. at 155.

E. Plaintiffs' Counsel Made A Strategic Choice Not to Plead the Federal Claim Provided By Congress

The response suggests that, unless this court breaks from all relevant federal and Texas precedent and reads a new exception into CDA 230, victims will never recover for their injuries and bad actors will never be held accountable. But, as Facebook pointed out in its motion to dismiss, Congress has provided a federal cause of action specifically to address these concerns. It even went so far as to permit state attorneys general to bring claims under the new federal cause of action as *parens patriae*. 18 U.S.C. § 1595(d). Plaintiffs' counsel chose not to plead these cases under the new federal cause of action, which she certainly could have done against the Backpage defendants. Rather, Plaintiffs' counsel instead chose to plead state law claims against Facebook in state court. It is now quite clear why. First, Plaintiffs do not even arguably have a claim against Facebook under the federal causes of action, which require multiple elements that she cannot allege—including the intent requirement and the "venture" requirement. Second, Plaintiffs' counsel likely wanted to avoid removal because the federal courts have applied Section 230 to claims such as these, and they may have wished to argue to this Court that it should disregard the overwhelming body of precedent interpreting Section 230. So they chose to forego the federal cause of action expressly provided by Congress to pursue Plaintiffs' cases in state court, under state law, and now must accept the consequence that CDA 230 applies.

Accordingly, this case is not about whether sex trafficking victims *can* sue internet service providers—or even about whether criminals engaged in such trafficking can be prosecuted. Congress

has ensured that victims will have a remedy against perpetrators—and websites that openly foster the sex trafficking trade—and that certain state criminal proceedings can also go forward. Rather, it is about whether Plaintiffs can deploy these limited amendments to evade the application of Section 230 in a state law action against an internet platform. Under the regime created by Congress pursuant to its power to regulate interstate commerce, they cannot do so.

III. The New Causes of Action in Plaintiff's Third Amended Petition Are Barred by Section 230

On the same day Plaintiffs filed their response, they also amended their petitions to add claims for negligent undertaking and strict products liability. These claims are barred for the same reasons as the original claims.

Notably, even the narrower "Good Samaritan" meaning of CDA 230 for which the response advocates applies fully to Plaintiffs' claims. An internet service provider "cannot be held liable for its good faith efforts to restrict access to or availability of certain [third-party] material." *Davis v. Motiva Enterprises, L.L.C.*, 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied). As the negligent undertaking claim makes explicit, Plaintiffs' claims seek to use against Facebook the fact that Facebook is and has been actively working to prevent its site from being used for harm, including harm to teenagers on its site.

As the response acknowledges, Facebook has always been dedicated to protecting against harmful uses of its site. Resp. at 21. The petitions expressly try to use Facebook's own Safety policies and procedures against Facebook—indeed, they now say that Facebook is liable for negligent undertaking, and should be "strictly liable" for any misuse of its site. Plaintiffs also say that Facebook should be liable not because it is not taking protective steps, but because it *is* taking such steps but, according to Plaintiffs, it should have taken different or better protective steps, and should be liable every time those steps fail to prevent some harm. *See* Resp. at 21 (noting that Facebook employs "advanced technical systems to detect misuse of [its] Products, harmful conduct towards others, and

situation where we may be able to help support or protect our community."). This is precisely the type of liability for third-party content that CDA 230 was intended to prevent, even under the "narrow" interpretation for which the response advocates. *Davis v. Motiva Enterprises, L.L.C.*, 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (holding negligent undertaking claim against internet service provider was barred "[b]ecause § 230(c)(2) allows an interactive computer service provider to 'establish standards of decency without risking liability for doing so'"). Accordingly, all of Plaintiffs' claims against Facebook, including—especially—those added by the Third Amended Petition, are barred by Section 230.

CONCLUSION

Any further amendment would be futile. Federal and Texas courts consistently have held Plaintiffs' theory of liability is barred by Section 230. Each Plaintiff has already amended her petition multiple times, and has only added more barred causes of action. Accordingly, it is clear that further leave to amend would serve no purpose. *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 753 (Tex. App.—Beaumont 2014, pet. denied) (reversing trial court and dismissing claims with prejudice); *Davis v. Motiva Enterprises*, L.L.C., No. 09-14-00434-CV, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (affirming dismissal with prejudice).

Subject to its Special Appearance, Facebook asks the Court to dismiss all of Plaintiffs' causes of action against Facebook with prejudice pursuant to Rule 91a.[6]

[6] As stated in Facebook's Original and Amended Motions to Dismiss, Facebook is willing to waive its right, should the Court grant its motion, to any award of its legal fees pursuant to Texas Rule of Civil Procedure 91a.7.

Dated: May 2, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd of May, 2019, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Russ Falconer
Russell H. Falconer

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Filed: 5/10/2019 5:34 PM

No. 2018-69816

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc.; Backpage.com, LLC	§	
d/b/a Backpage; Carl Ferrer;	§	Harris County, Texas
Michael Lacey; James Larkin;	§	
John Brunst; America's Inns,	§	
Inc. d/b/a America's Inn 8201	§	
Southwest Freeway, Houston,	§	
TX 77074; and Texas Pearl, Inc.	§	334th Judicial District

No. 2018-82214

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc. d/b/a Instagram, Inc.;	§	Harris County, Texas
Backpage.com, LLC d/b/a Backpage;	§	
Carl Ferrer; Michael Lacey;	§	
James Larkin; John Brunst; and	§	
Babasai, Inc. d/b/a Siesta Inn	§	334th Judicial District

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Introduction

This post-hearing brief has three major sections. In the first, we discuss why Plaintiffs' claims do not treat Facebook as a publisher or speaker of third-party content. Preemption is the subject of the second section. In the final section, we take each of the Court's main questions from the hearing—we count fourteen of them—and briefly answer those questions.

Argument

I. Plaintiffs' Claims Do Not Treat Facebook As a Publisher or Speaker of Third-Party Content

A. Section 230 Does Not Apply Because Plaintiffs' Claims Are Based on Content Facebook Should Create or Actions It Should Take

A single sentence of Section 230 has been interpreted as providing broad immunity to internet service providers: "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). The Court asked, "What is it Facebook does that . . . isn't a speaker and not a publisher?" Reporter's Record, Motion Hearing May 3, 2019, p. 49 (hereafter, "R.R. 49"). The answer is that Facebook may be a publisher in some scenarios, but Plaintiffs do not seek to impose liability on Facebook for publisher functions. Rather, Plaintiffs' claims are based on Facebook's failure to warn or act.

When a statute uses a word that it does not define, courts must determine the word's common, ordinary meaning by examining, among other things, the context in which it is used, the legislative history of the statute, dictionary definitions, treatises and commentaries, and judicial constructions of the word in other contexts. *Yates v. United States*, 135 S. Ct. 1074, 1082-85 (2015); *Jaster v. Comet II Constr., Inc.*, 438 SW.W.3d 556, 563 (Tex. 2014). With respect to Section 230, the word "publisher" must have a meaning relevant to legal causes of action based on publisher status.

Under the principle of *noscitur a sociis*, "a work is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breath to the Acts of Congress." *Yates*, 135 S. Ct. at 1085. Thus, "publisher" should be construed consistently with the word that accompanies it, "speaker." Liability based on one's status as a publisher or speaker is encompassed by defamation law. The *Zeran* line of decisions and Facebook construe "publisher" in a way that stretches that word well beyond its common legal meaning and the meaning of the word "speaker" with which it is paired.

Black's defines "publish" as (1) "to distribute copies (of a work) to the public," (2) "[t]o communicate (defamatory words) to someone other than the person defamed," (3) "[t]o declare (a will) to be the true expression of

one's testamentary intent," and (4) "[t]o make (evidence) available to a jury during trial." *Black's Law Dictionary* 1352 (9th ed.). The second definition, expressly related to defamation, is the only one that makes sense in the statutory context. And under the common law, publication occurs when "statements are communicated orally, in writing, or in print to some third person," i.e., libel or slander. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 579 (Tex. 2017).

Additionally, as discussed in Plaintiffs' Responses, the legislative history of Section 230 indicates that one of Congress's specific purposes was to overrule *Stratton-Oakmont v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). That opinion held Prodigy potentially liable as publisher of defamatory statements posted on its site by a user.

Nothing in the text or history of Section 230 indicates an intent to give the word "publisher" a broader meaning than it has in defamation law. Thus, in a plain language construction of Section 230, Facebook cannot be liable for a libel claim, which treats it as a publisher, based on defamatory statements written by a user on his Facebook page; nor can it be liable for a slander claim, which treats it as a speaker, based on defamatory statements made by a user in a video.

Here, Plaintiffs' claims are that Facebook knowingly facilitates and benefits from sex trafficking, is negligent, and has negligently undertaken actions to combat its problem with human trafficking. For each claim, Plaintiffs allege that Facebook should have created its own content—warnings. Additionally, for each claim, Plaintiffs allege Facebook should have taken affirmative steps to protect potential victims of sex trafficking such as the Plaintiffs.

For example, with respect to the Chapter 98 sex trafficking claim, Plaintiffs contend Facebook knowingly facilitated and benefited from sex trafficking by, *inter alia*, "not using advertising space for public service announcements regarding the dangers of entrapment, grooming, and recruiting methods used by sex traffickers."[1] That is, Facebook should have created content. Plaintiffs also contend Facebook negligently failed to discharge its duty to warn by failing to warn of the danger of "grooming" by sex traffickers.[2] Similarly, Plaintiffs allege Facebook negligently undertook

[1] For Jane Doe 1 (No. 2018-69816): Third Amended Petition, ¶ 327a; For Jane Doe 2 (No. 2018-82214): Second Amended Petition, ¶ 324.a.

[2] For Jane Doe 1: Third Amended Petition, ¶ 339; for Jane Doe 2: Second Amended Petition, ¶ 330.

to warn users and "failed to exercise reasonable care in warning Jane Doe about sex trafficking recruitment on its platforms."[3]

Because these claims assert Facebook should have created its own content, they do *not* treat Facebook as a publisher or speaker of third-party content. "[A]n alleged tort based on a duty that would require . . . a self-produced warning falls outside of section 230(c)(1)." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016); *see also Huon v. Denton*, 841 F.3d 733, 742-43 (7th Cir. 2016) (reversing dismissal where some of plaintiff's allegations did not fall within Section 230). Therefore, none of the claims or allegations should be dismissed.

B. Negligent Undertaking

With respect to Plaintiffs' negligent undertaking claims, the Court asked how the allegations squared with the provisions of Section 230. R.R. 44. Counsel, unfortunately, launched into a discussion of preemption and legislative history, which is certainly not the most direct way of dealing with the Court's question. *See* R.R. 45-49. The most direct answer is that the provisions of the statute do not concern the same type of content as would be involved in the undertaking allegations.

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[3] For Jane Doe 1: Third Amended Petition, ¶ 331; for Jane Doe 2: Second Amended Petition, ¶ 337.

In Texas, the elements of a negligent undertaking claim are (1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection, (2) the defendant failed to exercise reasonable care in performing those services, and either (3) the plaintiff relied upon the defendant's performance, or (4) defendant's performance increased the plaintiff's risk of harm. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 838 (Tex. 2000).

Plaintiffs have pled that Facebook:

- Undertook to warn users about and to screen for illegal conduct on its platforms because it knew or should have known such actions were necessary to protect Plaintiffs,[4]
- Failed to exercise reasonable care in warning Plaintiffs about sex trafficking recruitment on its platforms, in screening and identifying sex traffickers on its Platforms, and in identifying and reporting Plaintiffs' Facebook/Instagram friend,[5]
- Plaintiffs relied on these undertakings or Facebook's negligent performance increased the risk of harm to Plaintiffs,[6] and

[4] For Jane Doe 1: Third Amended Petition, ¶ 330; for Jane Doe 2: Second Amended Petition, ¶ 336.

[5] For Jane Doe 1: Third Amended Petition ¶ 331; for Jane Doe 2: Second Amended Petition, ¶ 337.

[6] For Jane Doe 1: Third Amended Petition, ¶¶ 332-33; for Jane Doe 2: Second Amended Petition, ¶¶ 338-39.

- Facebook's negligent undertaking proximately caused Plaintiffs' harm.[7]

As explained in Section I(A) above, these allegations are not inconsistent with the provisions of subsection 230(c)(1) (treatment as a publisher/speaker) because the allegations relate to information provided by Facebook, but Section 230(1)(c)(1) only applies to information provided by a third party.

Additionally, the allegations do not conflict with subsections (c)(2)(A) or (B). Subsection (A) precludes liability for actions 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." 47 U.S.C. § 230(c)(2)(A). That subsection is obviously intended to protect internet service providers from liability connected with pornography, and the undertaking allegations do not relate to content that is objectionable from that standpoint. Similarly, subsection (B) prevents liability for "actions taken to enable or make available . . . the technical means to restrict access" to the same material, i.e., pornographic content. 47 U.S.C. § 230(c)(2)(B).

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[7] For Jane Doe 1: Third Amended Petition, ¶ 334; for Jane Doe 2: Second Amended Petition, ¶ 340.

It should be added that Plaintiffs do not know what Facebook has actually done with respect to the undertaking allegations, they only know what Facebook *says* it has done. Thus, even if Facebook's objections to the undertaking claims were potentially well-taken, they would pose an evidentiary issue that cannot be resolved by a motion to dismiss on the pleadings.

C. None of Facebook's Examples of Cases Where Section 230 Did Not Apply Followed Facebook's But-For Test

According to Facebook, Section 230 bars liability when "the cause of action depends *in any way* [on] the chain of causation on a third-party [content] that's posted on the site or shared on the site." R.R. 8 (emphasis added). In other words, Facebook asks the Court to apply a but-for test for determining whether Section 230(c) applies to Plaintiffs' claims. *See* R.R. 10.

In response to the Court's question about what kind of claims would not be barred by Section 230, Facebook described three cases from the Seventh and Ninth Circuits. R.R. 14-15. But Facebook ignored the fact that those courts rejected the but-for test. Rather, they recognized that "[t]o provide broad immunity 'every time a website uses data initially obtained from third parties would eviscerate [the CDA].'" *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009)).

Facebook first discussed *City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363 (7th Cir. 2010), in which the defendant (like Facebook) asked the court to apply a but-for test. It argued Section 230 prevented Chicago from assessing taxes on sales conducted on its site because the tax statute sought to make "on-line sites liable for activities conducted on those sites by third parties." Brief for Appellee, *City of Chicago, Ill. v. StubHub!, Inc.*, No. 09-3432, 2010 WL 3950593 at *15 (7th Cir. Feb. 5, 2010). The Seventh Circuit disagreed, holding that "subsection (c)(1) does not create an 'immunity' of any kind." *StubHub!, Inc.*, 624 F.3d at 366. It noted that Section 230 matters "for defamation, obscenity, or copyright infringement" claims, but the tax did not depend on "who 'publishes' any information or is a 'speaker.'" *Id.*

Facebook also relied on *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), which involved a failure to warn claim brought by a rape victim against a social networking site. In that opinion, the Ninth Circuit explained why the but-for test effectively deletes the phrase "treated as the publisher or speaker" from Section 230. It acknowledged that "Internet Brands acted as the 'publisher or speaker' of user content by hosting Jane Doe's user profile on the Model Mayhem website, and that action could be described as a 'but-for' cause of her injuries." *Id.* at 853. But "[p]ublishing activity is a but-for cause of just about everything [the defendant] is involved

in" and "[w]ithout publishing user content, it would not exist." *Id.* at 853. The but-for test "stretch[es] the CDA beyond its narrow language and its purpose." *Id.* at 853.

And the Ninth Circuit reaffirmed its rejection of the but-for test in *HomeAway.com*, 918 F.3d at 682. It held Section 230 did not apply to a city ordinance prohibiting online rentals with unlicensed third parties merely because the ordinance would require the internet service provider to remove third-party content. *Id.* at 683.

In short, the instances in which courts do not bar claims under Section 230 do not apply Facebook's but-for test. Those courts concluded that the but-for test rewrote Section 230 by eliminating "treated as a publisher or speaker." *See Internet Brands, Inc.*, 824 F.3d at 853; *HomeAway.com, Inc.*, 918 F.3d at 684. Because the plain language of the Section 230 invalidates Facebook's but-for test, that test should not be applied to determine whether Section 230 bars Plaintiffs' claims.

D. *Internet Brands*, not *MySpace*, is Instructive

Facebook claims that the Fifth Circuit's opinion in *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) is "very similar" to Plaintiffs' lawsuit. R.R. 58. But, of all the cases the parties discussed, *Internet Brands* is the most analogous.

Facebook incorrectly suggests that *MySpace* concerned a failure to warn claim. Rather, the plaintiffs only sought "to hold MySpace liable for its failure to implement measures that would have prevented Julie Doe from communicating with [her sex trafficker]." *MySpace, Inc.*, 528 F.3d at 420. The court, relying heavily on block quotes from the *Zeran* line of cases and the trial court's opinion, affirmed dismissal of the plaintiffs' claims. *Id.* at 419-20. It then proceeded to chastise plaintiffs' counsel for his oral arguments. *See id.* at 420-22.

The plaintiff in *Internet Brands* did assert a failure to warn claim. She was an aspiring model who posted a profile on the internet service provider's platform. After seeing her profile, two predators contacted her through the platform pretending to be talent scouts and lured her to a fake modeling audition where they drugged and raped her. 424 F.3d at 849, 851.

The plaintiff alleged that the internet service provider failed to warn its members that they were at risk of being victimized by predators. *Id.* at 849. The Ninth Circuit decided the claim did not treat the internet service provider as a publisher or speaker of third-party content because it was based on self-produced content. *Id.* at 852-54. As a result, the court reversed the dismissal of the plaintiff's claims. *Id.* at 854.

Likewise, Plaintiffs seek to hold Facebook liable for its own content and conduct. Under *Internet Brands*, Section 230 does not bar their claims.

II. Even if the *Zeran* Line of Cases Is Accepted, It Does Not Matter: Plaintiffs' Claims Are Not Preempted by Section 230

A. The *Medtronic* Presumption

At the hearing, we argued that the U.S. Supreme Court decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), established a presumption against federal preemption of state law in areas of traditional state concern, absent a "clear and manifest" expression of Congressional intent. Counsel for Ms. Linsley suggested that *Medtronic* has been essentially overruled by *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016). R.R. 55-57. The Court should reject that suggestion.

The *Medtronic* decision arose out of negligence and strict-liability claims against the manufacturer of a heart pacemaker lead. *Medtronic*, 518 U.S. at 480-81. The manufacturer argued that the plaintiffs' state law claims were preempted by the provisions of the Medical Device Amendments of 1976, 90 Stat. 539. *Id.* at 481. Thus, *Medtronic* dealt with the same situation confronting the Court: a defendant claiming traditional state law theories were preempted by a federal statutory change.

The Supreme Court observed that "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the

States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 485 (internal citations omitted).

In response, Facebook argued that *Puerto Rico*, which involved Puerto Rico's attempts to restructure some of the Commonwealth's massive debt, had impliedly overruled *Medtronic*. In *Puerto Rico*, the Court wrote: "because the statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause." *Puerto Rico*, 136 S. Ct. at 1946 (quoting *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011)).

First, the Court did not overrule or even mention the *Medtronic* decision in its *Puerto Rico* opinion.

Second, *Puerto Rico* dealt with federal bankruptcy laws, which are not an area of traditional state regulation or historic police powers. *Medtronic*, on the other hand, expressly dealt with "the historic police powers of the States" in the form of tort law. *Medtronic,* 518 U.S. at 485.

The federal courts have had an inconsistent reaction to *Puerto Rico*. The Third Circuit continues to apply the presumption against preemption of claims "historically regulated by states," because such claims were not

implicated by *Puerto Rico*'s analysis of bankruptcy issues. *Lupian v. Joseph Cory Holdings*, 905 F.3d 127, 131 (3rd Cir. 2018). The Second and Ninth Circuits have continued to apply the presumption against preemption in cases involving historic state police powers without commenting on *Puerto Rico*. *See Marentette v. Abbott Labs, Inc.*, 886 F.3d 112, 117 (2nd Cir. 2018); *Lazar v. Kroncke*, 862 F.3d 1186, 1195 (9th Cir. 2017); *Depot, Inc. v. Caring for Montanans, Inc.*, 862 F.3d 1186, 1195 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2647 (2018).

The Fourth Circuit noted the Supreme Court's "somewhat varying pronouncements on presumptions in express preemption cases," and decided not to apply the presumption in a series of cases involving airline deregulation. *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 (4th Cir. 2018). Other circuit courts have followed that approach. *See EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017); *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017). These decisions do not support Facebook's contention that *Puerto Rico* has impliedly overruled *Medtronic* because airline deregulation is not a traditional concern of the states.

Perhaps most significantly, two Texas courts of appeals have applied the presumption against preemption since *Puerto Rico*, and neither commented on the decision. One of those opinions—*In re Union Pac. R.R.*

Co., No. 14-18-01046-CV, 2018 WL 6836827, at *2 (Tex. App.—Houston [14th Dis.] Dec. 28, 2018, no pet.)— is binding on this Court. *See also Sunset Transp., Inc. v. Texas Dep't of Transp.*, 557 S.W.3d 50, 65 (Tex. App.—Austin 2017, no pet.).

In conclusion, there is no legal support for Facebook's assertion that *Medtronic* has been overruled or limited. That being so, the presumption against preemption should apply. There is no reasonable argument that any of the statutory language shows a "clear and manifest" Congressional intent. The Court should reject Facebook's position that the Communications Decency Act preempts Jane Doe's common-law and statutory claims under state law.

B. Facebook's Argument that "Congress Did Not Carve Out State Civil Actions in the 2018 Amendments" Should Be Rejected

The 2018 amendment, codified in Section 230(e)(5), states that nothing in the section should "be construed to impair or limit":

- Claims in civil actions brought under the federal human trafficking statute, Section 1595 of Title 18, based on conduct that violates the federal criminal statute, Section 1591;
- Criminal charges brought under state law based on conduct that violates Section 1591; or
- Criminal charges brought under state law in jurisdictions where prostitution is illegal based on conduct that violates Section

> 2421A, which criminalizes the promotion or facilitation of prostitution over the internet.

47 U.S.C. § 230(e)(5). Facebook argued that civil claims under state law are preempted because they are not expressly mentioned in this amendment. R.R. 18-28.

At the hearing, Facebook also argued that the amendment does not change the preemption analysis. R.R. 24. In other words, the amendment was promulgated and passed in order to solve the problems that Congress perceived that the *Zeran* line of cases had created with respect to human trafficking via the internet. But Facebook contends that background has no bearing on the scope of Section 230's preemptive effect.[8]

First. If the Court accepts the preemption argument advanced in Section II(A), that argument disposes of Facebook's contention. That is because Facebook argues for preemption by implication, i.e., because Section 230(e)(5) applies to three types of claims, it must mean that no other types of claims are allowed. But preemption by implication is not a "clear and manifest" expression of Congressional intent to preempt.

[8] Facebook also seemed to contend that Section 230(e)(3) only referred to Section 230 as it existed prior to the amendment. R.R. 24-26. But once the amendment was signed into law, it modified Section 230. At that point, Section 230(e)(3) applies to the modified Section 230.

Second. The act through which Congress amended Section 230—the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA)—clearly states what Congress was trying to do, and shows it was not trying to limit state civil law claims unless those claims were "inconsistent with" Section 230, as provided in the pre-existing preemption provision. 47 U.S.C. § 230(e)(3). Congressional intent can be seen in FOSTA's preamble: "To amend the Communications Act of 1934 to clarify that section 230 of such Act does not prohibit the enforcement against providers and users of interactive computer services of Federal and *State* criminal and *civil* law relating to sexual exploitation of children or sex trafficking, and for other purposes." Pub. L. No. 115-164, 132 Stat. 1253 (2018) (emphasis added).

FOSTA states that Section 230 "was never intended to provide legal protection to . . . websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims" and that "clarification of such section is warranted to ensure that such section does not provide such protection to such websites." *Id.* at sec. 2, §§ (1), (3). Section 7 of FOSTA, the "Savings Clause," provides that "[n]othing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (*including State statutory law and State common law*) . . . that was not limited or preempted

by section 230 . . . as such section was in effect on the day before the date of enactment of this Act." *Id.* at 132 Stat. 1255 (emphasis added).

Facebook will argue, of course, that Section 230 had previously preempted all claims that could be based on third-party content, so nothing was preserved by the savings clause. But Congress said that was not its intent. And the fact that Congress specifically "saved" state statutory and state common law claims that might have made it through the gamut of pre-amendment decisions certainly shows that *Congress did not intend to preempt those types of claims*. The savings clause must also have some meaning, given the rule that statutes are to be construed "so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn,* 542 U.S. 88, 101 (2004)).

Third. FOSTA's legislative history shows Congress did not intend the types of claims listed in the amendment to be exclusive. It was attempting, in part, to make it easier for prosecutors to bring criminal charges against internet service providers that facilitate human trafficking. A congressional report discussed how, pre-amendment, a state criminal law could be enforced against an internet service provider "as long as it is 'consistent' with § 230." H.R. Rep. No. 115-572, at 9 (2018). However, that provision was "problematic" because the states were forced to litigate the application of

Section 230. *Id.* So Congress amended the section "to allow states to enforce certain criminal laws without litigating the application of § 230." *Id.*

Congress created "an explicit carve out to permit state criminal prosecutions." *Id.* "The language used in the carve-out is designed to ensure that [internet service providers] are subject to one set of criminal laws, rather than a patchwork of various state laws." *Id.* at 10. The carve-outs that were created by FOSTA are listed in Section 230(e)(5)(B) and (C) and are codified at 18 U.S.C. § 1591 and 18 U.S.C. § 2421A, which refer to sex trafficking of children and promotion of prostitution, respectively.

In the final version of the amendment, Congress added another carve-out to ensure that federal civil claims under 18 U.S.C. § 1595 would not be subject to analysis under Section 230. 47 U.S.C. §230(e)(5)(A). As we have argued before, Texas's civil human trafficking statute, Chapter 98, tracks the federal civil remedy almost exactly. Response, pp. 29-30. It is therefore consistent with Section 230 and is not preempted.

Facebook's argument at the hearing was that because the 2018 amendment did not carve out state civil actions, it preempted them—but that is not how express preemption works. Congress has to demonstrate "clear and manifest" intent to preempt. What Congress showed with respect to sections 230(e)(5)(A), 230(e)(5)(B), and 230(e)(5)(C) was an intent to (1)

streamline and make uniform criminal proceedings involving human trafficking and prostitution and (2) to provide a federal civil remedy that did not previously exist.

This Court is in the same position as the Supreme Court was in *Medtronic*, when it observed that "[t]here is, to the best of our knowledge, nothing in the hearings, the Committee Reports, or the debates suggesting that any proponent of the legislation intended a sweeping pre-emption of traditional common-law remedies against manufacturers and distributors of defective devices." 518 U.S. at 491. The Court continued: "If Congress intended such a result, its failure even to hint at it is spectacularly odd, particularly since Members of both Houses were acutely aware of ongoing products liability litigation." *Id.* (footnote omitted).

Substitute "internet service providers" for "manufacturers and distributors of defective devices" and "ongoing human trafficking litigation" for "ongoing products liability litigation," and the conclusion is clear: Facebook has not shown an intent to preempt state law claims.

III. Plaintiffs' Answers to the Court's Questions

Questions to Ms. Lindsley

1. "Explain to me how a statute that's entitled "Protection for Private Blocking and Screening of Offensive Material" becomes this extreme bar to any claim against your client?" R.R. 11-12.

This is, of course, the overarching question: what is the proper interpretation of Section 230? Part of the answer to that question is that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998).

2. "The Fifth Circuit—did it [read Section 230 broadly] as well?" R.R. 12.

Section I(D) of this brief analyzes the *MySpace* opinion of the Fifth Circuit.

3. "So if the language was intended to be that broad, why are there also exemptions or protections from liability in [230(c)(2)], and in the Digital Millennium Copyright Act, why do we have separate protections for [Facebook] for other actions?"

The Court's question illustrates why the interpretation of Section 230 adhered to by the *Zeran* line of cases and by Facebook is wrong—it renders

230(c)(2) meaningless because 230(c)(2) does not add anything to the "broad immunity" they believe is conferred by 230(c)(1).

4. "So how does [(e)(5)] come into play, then?" . . . The sex trafficking law, no effect on sex trafficking." R.R. 18.

Section II(B) of this brief discusses this question.

5. "[T]alk to me about (e)(3) then." R.R. 22.

Section II deals with the preemption provision of Section 230 generally.

6. "[D]oes the addition of the sex trafficking piece in (5) change the [preemption] analysis?" R.R. 24.

See Section II(B).

7. "So how is her cause of action preempted under 230?" R.R. 27.

See Section II.

Questions to Plaintiffs' Counsel

8. "So let me just start with what is it Facebook is actually doing that you are seeking to hold them liable for?" R.R. 35.

This question is addressed in both Sections I(A) and I(B) of the brief.

9. "Why is Facebook not essentially a publisher?" R.R. 39.

Section I of the brief deals with this issue.

10. "Are you sure about [the 2018 amendment carving out 'the entire area of sex trafficking, including state civil causes']? Because I see what the purpose is, but the specifics they drafted was Section (e), which lists—doesn't list state civil action." R.R. 40.

See Section II(B).

11. "The negligent undertaking, meaning they've negligently failed to protect?" R.R. 44.

Section I(C) deals with negligent undertaking.

12. "So this language, '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' doesn't include common law claims? . . . It had to say 'common law claims?'" R.R. 45.

Yes; if Congress intended to preempt all common-law claims, it would have said so. *See Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 250 (Tex. 1994) ("We conclude that the precepts that preemption clauses must be narrowly construed and that Congress' intent to preempt must be 'clear and manifest' counsel us to decline to read 'law or regulation' so broadly as to include state common-law claims."). The only clear and manifest intent expressed in Section 230 is to preempt defamation-type claims under the common law that rely on publisher or speaker liability.

13. "Was that a defamation claim? The *Prodigy* case was a defamation claim?" R.R. 48.

Yes. *See Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995) ("A finding that PRODIGY is a publisher is the first hurdle for plaintiffs to overcome in pursuit of their defamation claims.").

14. "How does 98 fall—where does Chapter 98 fall within this federal statute, or does it?" R.R. 51.

Chapter 98 is a state law that is not preempted because it is not inconsistent with Section 230. It imposes liability on the same grounds as the federal statutes that are expressly exempted by the amendments in subsection (e)(5).

Prayer

The motions to dismiss should be denied and the Court should entertain a motion to establish the amount of Plaintiffs' attorney's fees and expenses.

Respectfully submitted,

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/s/ Timothy F. Lee

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CAUSE NO. 2018-69816

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHWEST FWY, HOUSTON, TX 77074; and TEXAS PEARL., INC.,	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

CAUSE NO. 2018-82214

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC. d/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	§	
	§	
Defendants.	§	
	§	**334th JUDICIAL DISTRICT**

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTIONS OF DEFENDANT FACEBOOK, INC. TO DISMISS PURSUANT TO RULE 91A

I. INTRODUCTION

Defendant Facebook, Inc. ("Facebook") files this Supplemental Brief in support of its Rule 91a motions to dismiss the claims against it in these two cases, in response to an invitation from the Court at the close of the May 3, 2019 hearing in these matters.[1] This brief addresses four points that were raised at last Friday's hearing. First, contrary to comments by counsel for the two Jane Doe Plaintiffs ("Plaintiffs") at the hearing, Facebook works diligently to protect minors from sexual exploitation on the Facebook platform, as the Petitions acknowledge. Second, Plaintiffs concede that their claims here are barred under a mountain of federal and state case law interpreting Section 230 of the Communications Decency Act. Third, nothing in the 2018 amendments to Section 230 changed that result—on the contrary, those amendments only further confirm that Plaintiffs' claims against Facebook are inconsistent with the immunity created by Section 230. Finally, the preemptive language in Section 230 applies squarely to all of Plaintiffs' claims against Facebook in these cases. Accordingly, the Court should dismiss those claims with prejudice.

II. ARGUMENT

A. Plaintiffs' Petitions Show that Facebook Works Diligently to Protect Minors from Sexual Exploitation

During the May 3 hearing, Plaintiffs' counsel made several inaccurate and inflammatory statements about Facebook. Specifically, Plaintiffs' counsel stated, in open court, that Facebook "has created a product that is being used to rape children. Facebook knows it. Facebook allows it. Facebook facilitates it." Exhibit A, May 3, 2019 Hearing Transcript ("Hearing Tr.") 49:23-50:10. Facebook has the deepest sympathy for all victims of human trafficking, but this rhetoric leveled by Plaintiffs' counsel is not only untrue, but is belied by the myriad allegations in Plaintiffs' own Petitions

[1] Facebook files this Supplemental Brief subject to and without waiving its previously filed Special Appearances to Contest Personal Jurisdiction, Object to Improper Venue and Motion to Dismiss for Improper Forum, and Answer.

acknowledging that Facebook has implemented significant controls and practices to prevent its site from being misused—including controls, such as content monitoring, specifically directed at various forms of exploitation of children.

For example, Plaintiffs admit that Facebook "do[es] not allow content that sexually exploits or endangers children," and that when such content is discovered, Facebook "will report it to the National Center for Missing and Exploited Children [("NCMEC")]." Cause No. 2018-69816, Third Amended Petition ("Third Am. Pet. (69816)") ¶ 161; Cause No. 2018-82214, Second Amended Petition ("Second Am. Pet. (82214)") ¶ 167. This is more than just a policy—Plaintiffs concede that Facebook does in fact "report instances" of "child abuse," "sexual assault of a child," and "child human trafficking" to NCMEC. Third Am. Pet. (69816) ¶¶ 40-42; Second Am. Pet. (82214) ¶¶ 40-42. NCMEC itself has acknowledged that Facebook is a key partner in this regard:

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

Partners, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/supportus/partners (last visited May 8, 2019).

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

- Facebook "has taken precautions specific to child users between the age of 13-17.[2] Third Am. Pet. (69816) ¶¶ 109-10; Second Am. Pet. (82214) ¶¶ 112-13.

[2] Plaintiffs admit that a user must be 13 or over to join Facebook. Third Am. Pet. (69816) ¶ 134; Second Am. Pet. (82214) ¶ 138. This comports with Congress's decision in the Children's Online Privacy Protections Act to require parental consent for children under 13 to share personal information on the internet, but not to require such consent for children 13 and over. *See* 15 U.S.C. §§ 6502(a)(1), 6501(1).

- Facebook "has monitored content" and continues to monitor content on its site regarding "sexual exploitation of minors" and "human trafficking of minors." Third Am. Pet. (69816) ¶¶ 45-46; Second Am. Pet. (82214) ¶¶ 45-46.

- Facebook prohibits any person that is involved in human trafficking from "having a presence on Facebook." Third Am. Pet. (69816) ¶ 160; Second Am. Pet. (82214) ¶ 165.

- Facebook has "provided information to Texas law enforcement agencies regarding the trafficking of minors in Texas." Third Am. Pet. (69816) ¶¶ 44; Second Am. Pet. (82214) ¶¶ 44.

- Facebook has blocked users on Facebook for explicit content, including that involving the sexual exploitation of minors. Third Am. Pet. (69816) ¶¶ 51; Second Am. Pet. (82214) ¶¶ 51.

- Facebook prohibits all nude images of children, even those (such as family photos) that might be shared with good intentions, due to the "potential for abuse by others and to help avoid the possibility of other people reusing or misappropriating the images." Third Am. Pet. (69816) ¶ 161; Second Am. Pet. (82214) ¶ 167.

- Facebook "work[s] with external experts, including the Facebook Safety Advisory Board, to discuss and improve [its] policies and enforcement around online safety issues, especially with regard to children." Third Am. Pet. (69816) ¶ 161; Second Am. Pet. (82214) ¶ 167.

- Facebook prohibits sexual solicitation on its platform. Third Am. Pet. (69816) ¶ 162; Second Am. Pet. (82214) ¶ 168.

One of the important objectives of Section 230 was to "encourage service providers to self-regulate the dissemination of offensive material over their services." *Bennett v. Google, LLC*, 882 F.3d 1163, 1165 (D.C. Cir. 2018). Among other objectives, Congress wanted to "incentivize companies to neither restrict content nor bury their heads in the sand in order to avoid liability." *Id.* As is clear from the above litany of policies that Plaintiffs acknowledge in their operative Petitions, Facebook is not burying its head in the sand.

To the contrary, Facebook is working diligently to protect minors from sexual exploitation in any form. Section 230 sweeps broadly to protect platforms from liability for civil claims that turn on third-party content—in part because Congress did not want to chill efforts such as those that Facebook has taken here to prevent human trafficking and the exploitation of children. Because

Plaintiffs' claims in these matters stem entirely from third-party content on Facebook's platform, and because none of the legal arguments that Plaintiffs' counsel has made against the application of Section 230 has merit, the Court should dismiss Plaintiffs' claims against Facebook.

B. This Court Should Decline Plaintiffs' Request That This Court Depart From the Consistent Interpretation of Section 230 by Texas and Federal Appellate Courts

At the May 3, 2019 hearing, Plaintiffs' counsel all but conceded that, under the last 22 years of Texas and federal Section 230 precedent, Plaintiffs' claims against Facebook are barred.[3] Rather than arguing otherwise, Plaintiffs ask this Court to hold that that all cases including and since *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), "were incorrectly decided," and to decline to follow the myriad cases from across the country holding that civil causes of action should be dismissed when an internet service provider did not directly or materially participate in creating the content at issue. Hearing Tr. 53:12–54:11 ("We think *Zeran* and all of the cases following it were incorrectly decided … [a]nd there are a lot of them, and we acknowledge that.").

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," and 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(c)(1), (e)(3). Since *Zeran*, courts across the country (including in Texas) have confirmed that Section 230 immunizes internet service providers—and in particular, social media platforms—from liability for allegedly harmful

[3] At last Friday's hearing, Plaintiffs' counsel effectively conceded that Plaintiffs' claims are barred for an additional reason by answering "Yes" to the question "you want to impose some affirmative duty [on Facebook] to protect children?". Hearing Tr. 37:11, 9–10. "As a general rule, a person has no legal duty to protect another from the criminal acts of a third person … ." *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). A "special relationship may sometimes give rise to a duty to aid or protect others," *Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 504 (Tex. 2017), but there is no such "special relationship" between an online platform and its users that would give rise to an affirmative duty to protect those users from third-party harm, *e.g.*, *Beckman v. Match.com, LLC*, 743 F. App'x. 142 (9th Cir. 2018) (men.), *cert. denied*, 139 S. Ct. 1394 (2019).

third-party communications conveyed through their services.

For example, in 2008, the Fifth Circuit addressed this issue in *Doe v. MySpace, Inc.*, a remarkably similar case in which the plaintiff claimed that her daughter joined MySpace (a social medial platform) at age 13 by lying about her age, and then was contacted by another user on the site, agreed to meet with him off-line, and was sexually assaulted by the other user during the off-line encounter. 528 F.3d 413, 416 (5th Cir. 2008). She alleged that MySpace had "failed to implement basic safety measures to prevent sexual predators from communicating with minors on its Web site," including measures to prevent underage individuals from lying about their age to join the site. *Id.* at 414–17.

The Fifth Circuit held that the claim was barred by Section 230. The court looked to both the plain language and the consistent judicial interpretations of the statute to conclude that Section 230 extends "broad immunity … to Web-based service providers for all claims stemming from their publication of information created by third parties." *Id.* at 418. And the plaintiffs' claims, though couched in terms of "failure to implement basic safety measures to protect minors," were "merely another way of claiming that MySpace was liable for publishing the communications" of third parties. *Id.* at 419–20. Accordingly, the Court held that these claims were barred by Section 230 "notwithstanding [the plaintiffs'] assertion that they only sought to hold Myspace liable for its failure to implement measures that would have prevented Julie Doe from communicating with [the sexual predator]." *Id.*

The Texas Court of Appeals in Beaumont came to the same conclusion in 2014 in *GoDaddy.com LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied). In *GoDaddy*, a class of women alleged that they were victims of non-consensual postings of pornographic images of themselves on two "revenge porn" websites that were hosted by GoDaddy. *Id.* at 753. The plaintiffs alleged that GoDaddy "knew of the content, failed to remove it, and then profited from the activity on the websites." *Id.* GoDaddy filed a Rule 91a Motion to Dismiss, arguing that it was immune from

civil liability under Section 230. The trial court denied the motion (*id.*), but the Court of Appeals reversed, finding that "[a]llowing [the] plaintiffs to assert any cause of action against GoDaddy for publishing content created by a third party, or for refusing to remove content created by a third party would be squarely inconsistent with section 230." *Id.* 758.

Finally, just 10 days ago, in *Daniel v. Armslist, LLC*, ---N.W.2d---, the Wisconsin Supreme Court reaffirmed that Section 230 bars any claim—"no matter how artfully pled," and even if allegedly based on an internet platform's "own actions"—where the claim turns on an allegation that the platform "provided an online forum for third-party content and failed to adequately monitor that content." 2019 WL 1906193, at *11 (Wisc. April 30, 2019). The Court employed this legal framework to hold that Section 230 barred claims by a shooting victim that the online gun merchant from which the shooter purchased the weapon had deliberately designed its website to enable "prohibited persons" such as the shooter (i.e., persons prohibited by law from possessing a firearm) to avoid federal background checks and waiting periods by guiding them to the "private sale" option, which did not include those restrictions. The plaintiff argued, and the mid-level Wisconsin appellate court agreed, that Section 230 did not apply because plaintiff was challenging the website's "own conduct in facilitating user activity" through the design of its site, not the underlying content of the advertisements. *Daniel v. Armslist*, 913 N.W.2d 211, 214 (2018). The Wisconsin Supreme Court reversed, holding that the Court of Appeals' reading did not give effect either to the plain language of Section 230, or to the many judicial decisions construing it. The Court noted that the purpose of Section 230 was to "prevent[] the specter of tort liability from undermining an interactive computer service provider's willingness to host third-party content." *Id.* Because all of the plaintiffs' claims

"require[d] Armslist to be treated as the publisher or speaker of information posted by third parties on armslist.com, her claims are barred by § 230(c)(1)."[4]

In short, both the text of Section 230 and all relevant precedent are clear: Section 230 provides broad immunity to internet service providers for state law claims stemming from their publication of information created by third parties. Because Plaintiffs' claims against Facebook stem entirely from content created by third parties, this Court should dismiss Plaintiffs' claims against Facebook under Section 230. Plaintiffs have cited no authority for holding otherwise. And, the arguments Plaintiffs presented at the hearing in an effort to justify a departure from over two decades of Section 230 precedent should be rejected for the reasons set forth below.

C. Plaintiffs' Claims Are Inconsistent with Section 230 Even Under the 2018 Amendments to Section 230

In addition to asking the Court simply to ignore decades of adverse precedent, Plaintiffs contend that this precedent no longer applies because their claims are now allowed by the 2018 Amendments to Section 230 in the Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA"). But the amendments in FOSTA only further confirm that Section 230 bars private civil actions under state law, including the claims against Facebook in these cases.

As noted in Facebook's reply, Congress enacted FOSTA in response to overwhelming information presented by advocacy groups and affected parties to document and highlight the growing problem of child trafficking. Presented with extensive evidence regarding the proliferation of child

[4] Plaintiffs' response briefs relied on the Wisconsin Court of Appeals decision that this case reversed. Resp. 16. Just two days ago, Eric Goldman, a well-regarded expert on Section 230 and Professor of Law and Director of the High Tech Law Institute in Santa Clara University, wrote that the Wisconsin Supreme Court had "corrected" a "bizarre opinion" from the Wisconsin intermediate court to "restor[e] sanity to Wisconsin's Section 230 jurisprudence." E. Goldman, *Wisconsin Supreme Court Fixes a Bad Section 230 Opinion—Daniel v. Armslist*, TECH. & MARKETING LAW BLOG (May 7, 2019), https://blog.ericgoldman.org/archives/2019/05/ wisconsin-supreme-court-fixes-a-bad-section-230-opinion-daniel-v-armslist.htm.

trafficking on the internet—and after much discussion and compromise—Congress amended both the underlying federal substantive law and Section 230 to address the problem.

The 2018 amendments added three exemptions to the immunity created by Section 230:

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

Crucially, ***none*** of these exemptions applies to state-law civil actions brought by private plaintiffs.

Despite Congress's enacting of three express exemptions and its failure to enact an exemption covering state-law civil claims, Plaintiffs ask this Court to read into FOSTA an *implied* exemption for state-law civil claims brought by private plaintiffs. *See* Hearing Tr. at 51:4–10, 54:12–18. Plaintiffs point to the language in section (e)(5) that states that Section 230 does not bar enforcement of "any State law that is consistent with this section"—language that, notably, has been in the statute since the inception. They argue that this language applies because FOSTA created an exemption for federal civil claims to enforce the federal anti-trafficking statute and Texas's anti-trafficking statute is substantively "very similar to the federal" anti-trafficking statute. Hearing Tr. at 51:8–9. Thus, Plaintiffs contend, their state-law claims are "consistent with" Section 230 and therefore not barred. *See* Ps' Resp. Br. at 28–30.

This argument fails for three reasons. ***First***, FOSTA did not create an exemption to Section 230 for state-law civil claims, and where Congress has expressly created a limited number of exceptions

to a statute, it is "inconsistent with" the statute for a court to create additional exceptions by implication. *See* 47 U.S.C. § 230(e)(3). As noted above, Congress created three express exemptions to Section 230 for human-trafficking claims: one for a federal civil claim; one for certain state criminal prosecutions; and one for certain state-law civil actions brought in *parens patriae* by state attorneys general. Congress did ***not*** create a fourth exemption for state-law civil claims brought by private plaintiffs. The "meticulous … enumeration of exemptions" in FOSTA "confirms that courts are not authorized to create additional exceptions." *See Law v. Siegel*, 571 U.S. 415, 424 (2014); *accord Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (the existence of an "express exception" "precludes the [creation] of implicit" exceptions); *see also Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

Second, the legislative history of FOSTA shows that Congress's omission of any exemption for state civil actions such as this one was no accident. The original version of the Bill that became FOSTA, introduced in April 2017, would have included a broad exemption that expressly carved out from the scope of Section 230(e) "any other Federal or State law that provides a cause of action, restitution, or other civil remedies to victims of [trafficking]." *See* H.R. 1865 115th Cong. (1st Sess. 1997). But a year later, when Congress enacted FOSTA, Congress ***dropped*** the exemption for state civil claims**.** In other words, Congress expressly considered the very exemption to Section 230 that Plaintiffs now ask the Court to create—an exemption for civil actions under state law brought by private plaintiffs—but rejected such a provision in the final version of FOSTA. It would be inappropriate for this Court (or any court) to amend the statute judicially to create an exception that Congress considered and rejected. *See Camacho v. Samaniego*, 831 S.W.2d 804, 814 (Tex. 1992) ("The deletion of a provision in a pending bill discloses the legislative intent to reject the proposal." (quoting *Smith v. Baldwin*, 611 S.W.2d 611, 616–17 (Tex. 1980))); *Russello v. United States*, 464 U.S. 16, 24–25 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to

enactment, it may be presumed that the limitation was not intended."). If Congress had wanted to create an additional exception to Section 230 for civil claims by private plaintiffs under state anti-trafficking statutes, it would have written that exception into FOSTA.

Finally, with no exemption for Plaintiffs to fall back on, it is clear that their claims against Facebook in this case are "inconsistent with this section" within the meaning of 47 U.S.C. § 230(e)(3) because those claims would hold Facebook liable for harm allegedly caused by third-party content and are therefore barred by 47 U.S.C. § 230(c)(1). If section (c)(1) did not, by its terms, bar civil claims against interactive computer service providers under these anti-trafficking statutes, there would have been no reason for Congress to create the express carve-out in section (e)(5)(A) for civil claims to enforce the ***federal*** anti-trafficking statute. Plaintiffs concede that their state-law claims are "very similar to the federal civil remedy for human trafficking" (Hearing Tr. at 51:8–9) for which Congress chose to create a statutory exemption. But Congress chose not to create a similar exemption for private state civil claims. Any attempt to override that choice and allow Plaintiffs to proceed with their claims against Facebook would be inconsistent with the immunity created by Section 230 and the carefully crafted remedial scheme that Congress created with FOSTA.

D. The Express Preemption Provision in Section 230 Preempts All of Plaintiffs' Claims, Including Their Common Law Claims

At the hearing, Plaintiffs argued that—despite 22 years of contrary precedent—Section 230 does not preempt state law claims because its preemption provision is not sufficiently "specific" and there should be a "presumption" against preemption in this context. Hearing Tr. 40:16-19. But Section 230(e)(3) is an express preemption provision, and where, as here, a "statute contains an express preemption clause,' [courts] do not invoke any presumption against pre-emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent,'" *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011)). And in any event, there is no need for a

"presumption" here because, as multiple courts have held, the plain wording of Section 230 could not be clearer: "***no*** cause of action may be brought and ***no*** liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3) (emphasis added). Given this unambiguous language, the Court need not employ any presumption for or against preemption—if a state-law cause of action is "inconsistent with" Section 230 (as all of Plaintiffs' causes of action are), it is necessarily preempted. *See Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018) ("[T]he best course is simply to follow as faithfully as we can the wording of the express preemption provision, without applying a presumption one way or the other.").

Equally unavailing is Plaintiffs' argument that Section 230(e)(3) does not preempt her non-statutory claims because it does not use the phrase "common law" or state "a specific state act [that] is being preempted." Hearing Tr. 40:16-19; 45:1-5. That argument fails for two reasons. First, the Beaumont Court of Appeals has already found that Section 230 preempts Texas statutory and common law. *See e.g.*, *GoDaddy*, 429 S.W.3d at 756 ("We recognized that [Section 230] 'overrides the traditional treatment of publishers, distributors, and speakers under *statutory and common law*.'" (emphasis added) (quoting *Milo v. Martin*, 311 S.W.3d 210, 214–15 (Tex. App.—Beaumont 2010, no pet.)). Plaintiffs lean heavily on the fact that these decisions are not formally binding on this Court, but a Texas court "should not ignore a case in point from a sister court," *Eubanks v. Mullin*, 909 S.W.2d 574, 576 (Tex. App.—Fort Worth 1995, no writ).

Second, Plaintiffs' argument runs counter to precedent construing other federal preemption statutes, none of which has adopted the kind of "magic words" requirement Plaintiffs ask this Court to require. The phrase "common law" does not appear in the text of ERISA's preemption provision, *see* 29 U.S.C. § 1144(a), and "ERISA preempts state common law causes of action," *Colo. v. Tyco Valves & Controls, L.P.*, 432 S.W.3d 885, 891 (Tex. 2014) (quotation marks and citations omitted)). Likewise, that phrase does not appear in the preemption provision of the Airline Deregulation Act, yet the

Supreme Court had "little difficulty rejecting th[e] argument" that ADA preemption does not apply "to a common-law rule," *Northwest., Inc. v. Ginsberg*, 572 U.S. 273, 281 (2014). The same is true of the preemption provision in the Federal Cigarette Labeling and Advertising Act: the phrase "common law" does not appear in the statute, *see* 15 U.S.C. § 1334, and the statute "easily encompass[es]" certain "obligations that take the form of common-law rules," *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992). As these cases make clear, Congress meant exactly what it said: "***no*** cause of action may be brought and ***no*** liability may be imposed"—by state statute, common law, or otherwise—that is inconsistent with Section 230. 47 U.S.C. § 230(e)(3) (emphasis added).

III. CONCLUSION

For all of the reasons stated herein, Facebook respectfully asks this Court to grant its Motions to Dismiss Pursuant to Rule 91a.

Dated: May 10, 2019

Respectfully submitted,

/s/ Russ Falconer

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th of May, 2019, this document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Russ Falconer
Russell H. Falconer

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Facebook, Inc., dba Instagram, Inc. et al	§	**334th JUDICIAL DISTRICT**

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*, 841F.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 pre-dated 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 this May 22, 2019

Signed:
5/23/2019

STEVEN KIRKLAND
Judge Presiding

FILED
Marilyn Burgess
District Clerk
MAY 22 2019
Time: Harris County, Texas
By Deputy

V

CAUSE NO. 2018-69816

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHWEST FWY, HOUSTON, TX 77074; and TEXAS PEARL., INC.,	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

CAUSE NO. 2018-82214

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC. d/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

DEFENDANT FACEBOOK INC.'S AMENDED MOTION FOR RECONSIDERATION

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Subject to and without waiving its previously-filed Special Appearance to Contest Personal Jurisdiction, Defendant Facebook Inc. ("Facebook") moves for reconsideration of the Court's May 23, 2019 order denying Facebook's motion to dismiss under Rule 91a (the "Order").[1]

INTRODUCTION

Facebook asks that the Court reconsider its Order denying Facebook's Rule 91a motion to dismiss Plaintiffs' claims pursuant to Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"). The Court denied Facebook's motion on the grounds that Plaintiffs' petitions include claims based on an alleged duty to warn, the cases cited by Facebook did not specifically address claims under the Texas anti-trafficking statute, and those cases also pre-dated Congress's recent amendments to Section 230 through the Allow States And Victims To Fight Online Sex Trafficking Act of 2017 ("FOSTA"), Pub. L. 115-164, Apr. 11, 2018, 132 Stat. 1254, § 4 (codified at 47 U.S.C. § 230(e)(5)(A)). Order at 2.

Facebook respectfully submits that the Court erred on these points for the following reasons:

First, multiple cases have held that Section 230 applies to duty to warn claims, just as it does to the myriad other legal theories parties have offered in an effort to avoid the scope of Section 230. The critical question in deciding whether a claim is barred by Section 230 is not how the plaintiff's cause of action is styled, but rather whether the plaintiff's legal theory necessarily seeks to hold a defendant liable for third-party content transmitted or posted through the defendant's internet platform. Where the claim turns on third-party content, Section 230 applies, even if the claim is phrased in terms of something that the defendant should have done differently—such as monitoring content on the platform, implementing different policies or protocols to prevent bad actors from

[1] Concurrently with this motion, Facebook is filing a motion in the alternative for permission to take an interlocutory appeal from the Court's Order.

using the platform, or warning users that bad actors may transmit harmful content or use the platform for harmful purposes. And Plaintiffs' duty to warn theories—like their assertions that Facebook failed to monitor or take down content or to design its platform to prevent harmful communications—necessarily turn on the assertion that Plaintiffs were harmed by third-party content transmitted via the Facebook or Instagram platforms.

Second, like the duty to warn claim, Plaintiff's claim under the under the Texas anti-trafficking statute is barred by Section 230 because, again, it necessarily turns on the alleged use of Facebook's platform by bad actors to transmit harmful content relating to Plaintiffs. Courts have held that nearly identical statutory claims asserted against platforms are barred by Section 230.

Third, FOSTA does not change the applicability of Section 230 to Plaintiff's claims. With FOSTA, Congress created limited exceptions to Section 230 for a newly-created federal civil cause of action for sex trafficking, and for certain other non-civil proceedings and state Attorney General actions, but it created no such exception for state private civil actions such as this one.

In light of these considerations, Facebook respectfully submits that the Court should amend its Order to grant Facebook's motion pursuant to Rule 91a.

ARGUMENTS AND AUTHORITIES

The Court should reconsider its Order because its reasons for finding that Section 230 does not apply were mistaken. This Court has plenary power to reconsider interlocutory orders at any point before a final judgment is signed. *Callaway v. Martin*, 2017 WL 2290160 at *3 n.3 (Tex. App.—Fort Worth 2017, no pet.); *see also Flagstar Bank, FSB v. Walker*, 451 S.W.3d 490, 504 (Tex. App.—Dallas 2014, no pet.) ("[A] trial court has the inherent right to change or modify any interlocutory order or judgment until the judgment on the merits of the case becomes final."). Facebook respectfully submits that the Court erred in its application of Section 230 to these cases, and requests that it reconsider its Order and grant Facebook's motion to dismiss under Rule 91a.

The Court's Order offers several reasons for denying Facebook's motion. The Order first concludes that "the failure to warn cause of action presented in this case mirrors that presented in the 9th Circuit case" of *Doe v. Internet Brands*, 824 F.3d 846 (9th Cir. 2016). Order at 2. It further notes that none of the cases cited by the parties specifically addresses the statutory cause of action at issue here, and that all of these cases pre-date the FOSTA amendments that Congress adopted in 2018. Finally, the Order notes that the Texas cases that have addressed Section 230, and on which Facebook relied, "come out of the Beaumont Court of Appeals" and do not "deal with the same causes of action or facts as are presented in this case." Order at 2. As shown below, these reasons do not, either individually or together, support the conclusion that Facebook is not entitled to immunity under Section 230.

I. Section 230 immunity applies regardless of the specific cause of action alleged when the claims seek to hold the defendant liable for third-party content

Section 230 bars the types of civil claims asserted in these cases because they seek to hold Facebook liable as the publisher or speaker of third-party content. Plaintiffs do not allege any involvement by Facebook in the acts of violence that Plaintiffs suffered at the hands of the unnamed traffickers and assailants who injured them. Rather, they seek to hold Facebook liable for the fact that communications by some of these perpetrators were transmitted on the Facebook or Instagram platforms, including under theories that Facebook failed to verify the identity of Facebook and Instagram users; to engage in sufficient monitoring of messages, including detecting "red flags" such as the words used by the other user; or to warn Plaintiffs about, block, or remove the content that the traffickers allegedly created and transmitted on the Facebook or Instagram platforms. Third Am. Pet. (Case No. 2018-69816) ¶¶ 201–210; Second Am. Pet. (Case No. 2018-82214) ¶¶ 213–22. All of these claims necessarily depend on communications by third parties on Facebook or Instagram—not on messages or content created by Facebook or Instagram, and not on any offline conduct by Facebook.

Courts across the country, both state and federal, have held that Section 230 immunizes online

platform providers such as Facebook from claims, however styled, where the plaintiff alleges that a third party used the defendant's platform to communicate harmful content generated by that third party. As one court recently put it, such a claim "derives from [the platform's] role as a publisher and is therefore prohibited by § 230(c)(1), no matter how artfully pled." *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 726 (Wis. 2019); *see also Doe v. MySpace, Inc.*, 528 F.3d 413, 419–20 (5th Cir. 2008) (claims couched in terms of "failure to implement basic safety measures to protect minors" online were "merely another way of claiming that [the defendant] was liable for publishing the communications" of third parties). Because Plaintiff's underlying theory of liability necessarily seeks to hold Facebook liable for the communication of third-party messages, Section 230 immunity applies.

The Court's Order notes that the cases from the Beaumont Court of Appeals construing Section 230 do not "deal with the same causes of action or facts as are presented in this case." Order at 2. But as courts universally have recognized, immunity under Section 230 does not turn on the specific causes of action a plaintiff has pled. Rather, "[w]hat matters" for Section 230 is not the "label[]" placed on the claim but "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101–03 (2009); *see also GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 758 (Tex. App.—Beaumont 2014, pert. Denied) ("Allowing [the] plaintiffs to assert any cause of action against GoDaddy for publishing content created by a third party, or for refusing to remove content created by a third party[,] would be squarely inconsistent with section 230.");[2] *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) ("[Plaintiff's] effort to circumvent the CDA's protections through 'creative' pleading fails, and the district court did not err in granting Yelp's motion to dismiss."); *MySpace,* 528

[2] That these cases issued from the Beaumont Court of Appeals does not make them any less deserving of this Court's attention: a Texas court "should not ignore a case in point from a sister court," *Eubanks v. Mullin*, 909 S.W.2d, 574, 576 (Tex. App.—Fort Worth 1995, no writ).

F.3d at 420 (Section 230 applied "notwithstanding [the plaintiff's] assertion that they only sought to hold Myspace liable for its failure to implement measures that would have prevented Julie Doe from communicating with [the sexual predator]"); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) (Section 230 bars claim that depends on the assertion that the online service was used as an "intermediar[y]" for "other parties' potentially injurious messages"); *Gibson v. Facebook, Inc.*, Cause No. 6:19-CV-00169, Order Granting Defendants' Motion to Dismiss with Prejudice (Dkt. No. 7) (W.D. Tex. June 3, 2019) (plaintiff's claim against Facebook for "fail[ing] to enforce its own safety polic[y] that requires it to monitor and delete harmful content" was barred by Section 230); *Murphy v. Twitter, Inc.*, Case No. CGC-19-573712 (Cal. Super. June 14, 2019) (plaintiff cannot avoid Section 230 by recasting claims as "breach of contract, promissory estoppel, and unfair competition"); *Grossman v. Rockaway Twp.*, 2019 N.J. Super. Unpub. LEXIS 1496, *11–*12, *38–*39 (June 10, 2019) (Section 230 applied to a products-liability claim based in part on the allegation that the online platform "[f]ail[ed] to have adequate warnings on the product").

Under these cases—including the applicable Texas cases—Section 230 bars all of Plaintiffs' claims against Facebook because each of those claims seeks to hold Facebook liable based on allegedly harmful third-party content published on the Facebook or Instagram platform. A contrary reading would frustrate Congress's purposes in enacting Section 230. *See generally Klayman v. Zuckerberg*, 753 F.3d 1354, 1355 (D.C. Cir. 2014).

II. Section 230 immunity applies to failure to warn claims that turn on the risk of harm created by third-party content and Internet Brands does not hold otherwise

The Court's suggestion that Section 230 does not apply to failure to warn claims is incorrect. The Second Circuit reached precisely that conclusion earlier this year in affirming the dismissal of failure to warn claims in *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579 (S.D.N.Y. 2018). In that case, as here, the plaintiff alleged a "failure to warn claim—also pleaded as products liability and negligence—based on Grindr's failure to warn that the app can be used as a tool for harassment and

that Grindr has limited ability to stop abuse." The district court held the claim barred by Section 230, reasoning that, to the extent that the plaintiff had "identified a defect in Grindr' design or manufacture or a failure to warn," those alleged flaws were "inextricably related to Grindr's role in editing or removing offensive content—precisely the role for which Section 230 provides immunity." *Id.* at 588. The court reasoned that the duty to warn claim necessarily required reference to the harmful third-party content itself, *id.* at 591, and moreover, requiring the platform to provide warnings would be no different functionally from requiring it to monitor or edit the content—either way, the claim would require a court to treat the platform as a publisher, *id.* at 591-92.

The district court in *Herrick* found *Internet Brands* inapplicable because, in *Internet Brands*, the alleged duty to warn claim had nothing to do with user-generated content: "[t]he bad actors … did not post any content to the website," they "contacted Doe offline," and there was "no allegation that [the defendant] transmitted any potentially harmful messages between … Doe and the [two men.]" 306 F. Supp. at 592 (alterations the court's). By contrast, the court held, the duty to warn claim in *Herrick* turned on user-generated content—harmful profiles and communications on the platform directed to the plaintiff—and also would result in dictating the platform's execution of its editorial functions. *Id.* Accordingly, the court held, *Internet Brands "*does not apply" to the duty to warn claims. *Id.* The Second Circuit affirmed, agreeing with the district court that the failure to warn claim, unlike that in *Internet Brands*, was "inextricably linked" to the claim that the defendant failed to edit, monitor, or remove the offensive content. *Herrick v. Grindr, LLC*, 765 F. App'x 586, 591 (2d Cir. 2019).

The Third Circuit reached a similar conclusion with respect to duty to warn claims in *Oberdorf v. Amazon.com Inc.*, —F.3d—, 2019 WL 2849153, at *12 (3d Cir. July 3, 2019). In *Oberdorf*, a pet owner was injured by a dog collar that she purchased pursuant to a third-party listing on Amazon.com. *Id.* at *1. She sued Amazon, alleging, among other claims, that Amazon failed to supplement the listing with warnings about the dog collar. *Id.* at *10. The court held the duty to warn claims barred by

Section 230 to the extent they rested on allegations "that Amazon failed to provide or to edit adequate warnings regarding the use of the dog collar," because that alleged activity "falls within the publisher's editorial function." *Id.* at *11. The court reasoned that such "failure to warn claims are barred by the CDA" because they would penalize Amazon for "fail[ing] to add necessary information to content o[n] the website." *Id.* at *12. As these cases show, Section 230 bars *any* claim that depends on third-party content that was transmitted via an online platform, whether the claim is styled as failure to monitor, failure to warn, failure to censor or edit, simple negligence, or any other theory. *See*, *e.g.*, *Herrick*, 765 Fed. Appx. at 590; *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *Jones v. Dirty World Entertainment Recordings LLC*, 775 F.3d 398, 406-09 (6th Cir. 2014); *Daniel v. Armslist, L.L.C.*, 926 N.W.2d 710, 726 (Wisc. 2019).[3]

As the courts in *Herrick* made clear, *Internet Brands* does not create an exception to Section 230 for failure to warn claims. It held only that Section 230 does not apply where the alleged duty to warn does not arise from or relate to third-party content. *See Internet Brands*, 824 F.3d at 851. In *Internet Brands*, the plaintiff, an aspiring model, posted a profile on a modeling website. 824 F.3d at 846. Two predators found the profile, contacted her, lured her into a fake modeling audition, drugged her, and raped her. *Id.* at 848–49. There was no allegation that the predators posted anything on the platform or that the platform "transmitted any potentially harmful messages between Jane Doe" and the predators. *Id.* Accordingly, the plaintiff's duty to warn claims did not implicate any aspect of the platform's function as a platform for the publication of third-party content and for that reason Section 230 did not bar the claims. By contrast, in this case, as in *Herrick* and *Oberdorf*, the duty to warn claims do turn on third-party content—namely, the risk of harmful messages and posts that Plaintiffs allege

[3] *See also Estate of McCoy v. Will*, Case No. 15-CV-7342 (Wis. Cir. Ct. May 9, 2018) (claims alleging failure to investigate, vet, edit, or remove third party content was barred by Section 230); *Bell v. Care.com*, 2016 WL 12583333 at *4 (Neb. Dist. Ct. Mar. 22, 2016) (claim premised on failure to screen third-party content barred by Section 230).

were transmitted by their assailants and traffickers over the Facebook and Instagram platforms. As in *Herrick* and *Oberdorf*, those duty to warn claims—like Plaintiffs' claims for failure to monitor, failure to implement safety measures, failure to take down or censor content, and simple negligence—are barred by Section 230.

Nor would an exception to Section 230 for duty to warn claims comport with the rationale of the statute. Where the alleged duty is to warn about risks created by third-party content—such as users' profiles, posts, messages, or requests on Facebook's platforms—it is "inextricably linked to [the website's] alleged failure to edit, monitor, or remove the offensive content." *Herrick*, 765 Fed. Appx. at 591. A duty to warn about third-party content necessarily entails a duty to monitor third-party content (to locate content that should be the subject of a warning) or a duty to screen out content that would trigger a warning. And claims based on "failure to warn" about offensive third-party content ultimately reduce to claims that the website should be liable for publishing the content without a warning. Imposing liability on that basis unavoidably treats the website "as the publisher or speaker of … information provided by [third parties]," contrary to the mandate of Section 230.

Courts repeatedly have refused to allow Section 230 to be circumvented in this way. Section 230 "is implicated not only by claims that explicitly point to third-party content but also by claims which, though artfully pleaded to avoid direct reference, implicitly require recourse to that content to establish liability." *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150 (N.D. Cal. 2017) (brackets omitted) (quoting *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156 (E.D.N.Y. 2017)).[4]

[4] *Huon v. Denton*, the other case cited in the Order, is inapposite. 841 F.3d 733 (7th Cir. 2016). In that case, the Seventh Circuit held that Section 230 does not immunize an internet service provider from claims arising out of content posted on its website by its own employees, because in that context the defendant is an "information content provider" to which Section 230 does not apply. *See id.* at 742–43. *Huon* is inapplicable here. Plaintiffs have not (and could not have) alleged that Facebook or any of its employees created or developed any of the allegedly harmful messages that led to their injuries. And allegations that Facebook's warnings were inadequate also does not make this case about Facebook-generated content, because the liability that Plaintiffs allege still flows from the third-party content to which the warnings would relate. *Herrick*, 765 F. App'x. at 591.

III. Section 230 applies to claims brought under the Texas anti-trafficking statute

For the same reasons, the Court's observation that there are no cases applying Section 230 to claims under the Texas anti-trafficking statutes is not a reason for denying Facebook's motion. For Section 230 purposes, statutory claims of this sort are no different from the other legal theories discussed above: to the extent they turn on a defendant's alleged role in allowing third-party content to appear on its platform or to be transmitted via its messaging service, they are barred by Section 230. In fact, the First Circuit held that Section 230 barred claims brought under a very similar Massachusetts anti-trafficking statute. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (2d Cir. 2016).[5] The court found that Section 230 immunity applied because "third-party content … appears as an essential component of" the plaintiff's claims and the claims therefore treated the defendant "as the publisher or speaker of content provided by third parties." *Id.* at 22 & n.7. That the claims were based on a statute, as opposed to the common law, was immaterial.

Here, Plaintiffs concede that the Texas anti-trafficking statute "tracks the language of the federal human trafficking statute—Sections 1591 and 1595 of Title 18." Plaintiff's Responses to Rule 91a Motion to Dismiss at 29; *see also* Hearing Tr. at 43:19–23 ("our human trafficking statute, is very, very similar to the federal human trafficking statute"). Before Congress amended Section 230 through FOSTA in 2018 (the FOSTA amendments are discussed in more detail below), federal courts had held that Section 230 barred claims against internet platforms under the federal anti-trafficking law. *See Jane Doe No. 1*, 817 F.3d at 18–24; *M.A. ex rel P.K. v. Village Voice Media Holdings*, 809 F. Supp. 2d 1041, 1048–50 (E.D. Mo. 2011). Indeed, one of Congress's main changes to Section 230 in FOSTA was to exempt federal anti-trafficking claims from Section 230 (an exception that, as discussed below, does not extend to private civil claims under state anti-trafficking statutes). *See* 47 U.S.C. § 230(e)(5)(A).

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[5] *Compare* Mass. Gen. Laws ch. 265, § 50(d), with Tex. Civ. Prac. & Rem. Code § 98.002(a).

Congress thus acknowledged that, absent such an exemption, Section 230 immunity would bar state statutory anti-trafficking claims.

IV. The FOSTA amendments confirm that Plaintiffs' claims are barred

The Court's Order next notes that the cases Facebook cited "pre-dated the amendments adopted in 2018" through FOSTA. Order at 2. That is true, but FOSTA only confirmed that Section 230 bars private civil actions under state law, including the claims against Facebook here. Section 230 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). As explained above, any claim that treats an online platform as the publisher or speaker of third-party content is inconsistent with Section 230 unless an exemption applies. *See supra* § I.A.

FOSTA created three exemptions to Section 230: one for certain federal civil causes of action; one for *parens patriae* claims brought by state Attorneys General; and one for certain types of state-law criminal prosecutions. *See* FOSTA § 4, 47 U.S.C. § 230(e)(5); *see also* Facebook's Post-Hearing Mem. at 7–8.

Crucially, FOSTA did *not* create an exemption for state law civil actions brought by private plaintiffs, and where, as here, a statute contains an express "enumeration of exemptions," the "courts are not authorized to create additional exceptions," *Law v. Siegel*, 571 U.S. 415, 424 (2014). In fact, Congress considered and rejected a version of FOSTA that would have added a broad exemption for state-law civil claims, further showing its intent that immunity under Section 230 continue to bar such claims. *See* Facebook's Post-Hearing Memo at 9–12. Congress's rejection of an exception to Section 230 that would have applied here confirms that Section 230 continues to apply to the instant claims.

PRAYER

Defendant respectfully requests that the Court reconsider its May 23, 2019 Order and grant Facebook's motion to dismiss pursuant to Rule 91a.

Dated: August 1, 2019

Respectfully submitted,

/s/ Kristin A. Linsley

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2019, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Russ Falconer
Russell H Falconer

W

CAUSE NO. 2018-69816

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHWEST FWY, HOUSTON, TX 77074; and TEXAS PEARL., INC.,	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

CAUSE NO. 2018-82214

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC. d/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

DEFENDANT FACEBOOK INC.'S AMENDED MOTION
FOR PERMISSION TO TAKE AN INTERLOCUTORY APPEAL

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Subject to and without waiving its previously-filed Special Appearance to Contest Personal Jurisdiction, Defendant Facebook Inc. ("Facebook") moves for permission to take an interlocutory appeal of the Court's May 23, 2019 order denying Facebook's motion to dismiss under Rule 91a (the "Order"). In the alternative to its concurrently filed motion for reconsideration, Facebook respectfully requests that the Court amend the Order to allow Facebook to seek an interlocutory appeal.

INTRODUCTION

Concurrent with the filing of this motion, Facebook has filed a motion asking the Court to reconsider its Order denying Facebook's Rule 91a motion to dismiss Plaintiffs' claims pursuant to Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"). If this Court does not reconsider its Order, Facebook respectfully requests that the Court amend the Order with the findings necessary to allow Facebook to seek an interlocutory appeal from the Court of Appeals. *See* Tex. Civ. Prac. & Rem. Code § 51.014(d); Tex. R. Civ. P. 168.

The Section 230 issue raised by Facebook's motion is well-suited to resolution by an interlocutory appeal and meets all of the criteria for such treatment. The applicability of Section 230 is a controlling issue of law, there is "substantial ground for difference of opinion" as to whether the Court's resolution of that issue was correct, and an immediate appeal may result in the "ultimate termination of the litigation." *Id.* § 51.014(d)(2); Order at 1. Tex. Civ. Prac. & Rem. Code § 51.04(d)(1); *see also* Order at 2. More broadly, it makes sense for the Court of Appeals to evaluate the Section 230 issue at this stage. Section 51.014(d) reflects a "legislative intent favoring early, efficient resolution of determinative legal issues in [appropriate] cases." *See Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 732 (Tex. 2019).

Section 230 creates an immunity that, if applicable, will decide all of Plaintiffs' claims against Facebook, and Texas courts have long recognized that immunities should be addressed at the earliest stage of a case—as both the district court and the Beaumont Court of Appeals recognized in allowing

an interlocutory appeal of the Section 230 issue in *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 759 (Tex. App.—Beaumont 2014, pet. denied). Early resolution of the Section 230 issue also allows the Court of Appeals to provide guidance and direction on an important legal issue that will affect a number of similar cases pending in Texas trial courts.

ARGUMENTS AND AUTHORITIES

If the Court does not reconsider its ruling, it should amend the Order to allow Facebook to take an immediate interlocutory appeal. To promote efficiency and conserve resources, the Texas Legislature has provided for permissive interlocutory appeals of certain trial court orders. *See* Tex. Civ. Pract. & Rem. Code § 51.014(d); *Sabre Travel*, 567 S.W.3d at 733. Where, as here, the order at issue does not contain such permission for an interlocutory appeal, it "may be amended to include such permission." Tex. R. Civ. P. 168; *see also Heinrich v. Strasburger & Price, L.L.P.*, 2015 WL 5626507, at *1 (Tex. App.—Houston [1st Dist.] Sept. 24, 2015, no pet.). Once a trial court issues an order with permission to appeal, the Court of Appeals can decide whether to accept the case for interlocutory review. *Colvin v. B. Spencer & Associates*, P.C., 2015 WL 2228728, at *1 (Tex. App.—Houston [1st Dist.] May 12, 2015, no pet.).

The Texas Supreme Court has emphasized that permissive interlocutory appeals advance important public policies and has encouraged district courts to allow them where appropriate. *Sabre Travel*, 567 S.W.3d at 732–33 (section 51.014(d) evinces a "legislative intent favoring early, efficient resolution of determinative legal issues"). An interlocutory appeal allows the "parties and the courts [to] be spared the inevitable inefficiencies of the final judgment rule in favor of early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation." *Id.* at 733. "Indeed, the Legislature enacted section 51.014 to provide 'for the efficient resolution of certain civil matters in certain Texas courts' and to 'make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all

taxpayers.'" *Id.* Thus, "in many instances, courts of appeals should do exactly what the Legislature has authorized them to do—accept permissive interlocutory appeals and address the merits of the legal issues certified." *Id.*

Here, as in *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, all of the criteria for an interlocutory appeal are present, and allowing such an appeal would further all of these policies.

I. All three prerequisites to a permissive immediate interlocutory appeal are present here.

These cases satisfy each of the statutory requirements for an immediate interlocutory appeal. Section 51.014(d) provides that the Court may, "by written order, permit an appeal from an order that is not otherwise appealable if" three criteria are satisfied: (1) "the order to be appealed involves a controlling question of law;" (2) "there is a substantial ground for difference of opinion" as to that question of law; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Tex. Civ. Prac. & Rem. Code § 51.014(d). All of these factors are present here.

A. This Court's Order addresses a controlling question of law

As the Court recognized, the issue presented by Facebook's motion is a legal one, in that, "[a]t 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." Order at 1. The immunity provided by Section 230 is an absolute defense to liability and its availability is a pure question of law. *See, e.g.*, *GoDaddy.com*, 429 S.W.3d 752. Likewise, the preemption questions that are triggered by Section 230 immunity also are controlling questions of law appropriate for interlocutory appeal. *See Sabre Travel*, 567 S.W.3d at 733 (accepting interlocutory appeal to determine whether a federal statute preempted the plaintiff's state tort claim). And whether Section 230 applies is a "controlling" question because, if resolved in Facebook's favor, it would resolve all of Plaintiffs' claims against Facebook, as this Court recognized. *See* Order at 1.

B. There are substantial grounds for difference of opinion regarding the application of Section 230 to Plaintiffs' claims

Although the Court found against the application of Section 230 immunity, it acknowledged that the question was uncertain and that there are substantial authorities supporting a contrary result. The Court acknowledged that "[t]he language of the statute is broad and both parties have cited cases that support their positions." Order at 2. And the Court acknowledged that Facebook's position finds support in other cases, including, "among others," "*Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) ... and *Zeran v, America Online Inc.*, 129 F.3d 327 (4th Cir. 1997)." Plaintiffs themselves have acknowledged that the overwhelming weight of case law supports an outcome different from the one the Court reached in its Order. *See* Hearing Tr. at 53:12–54:11 ("We think *Zeran* and all of the cases following it were incorrectly decided …[a]nd there are a lot of them, and we acknowledge that."). And, as set out above, there are substantial authorities holding, contrary to the Court's conclusion, that duty to warn claims are covered by Section 230.

C. An interlocutory appeal may end this litigation

Finally, an immediate interlocutory appeal will materially advance the ultimate termination of the litigation, as the Order notes: "a ruling in Facebook's favor may end the case for Facebook." Order at 1; *accord GoDaddy.com*, 429 S.W.3d at 761 (dismissing all claims with prejudice under Section 230); *MySpace*, 528 F.3d at 415 (affirming dismissal of Texas-law claims under Section 230).

II. The Court should exercise its discretion to permit an interlocutory appeal

An immediate appeal here not only would satisfy the statutory criteria, but it would advance the legislative policies outlined above. At least three factors weigh heavily in favor of allowing an immediate appeal of the Section 230 issue.

A. An immediate appeal is essential to ensure that the immunity from suit that Section 230 creates will not be lost

Most importantly, immunities such as Section 230 are ideal candidates for interlocutory review

because an immunity, by its nature, should protect a defendant not just from liability but from having to stand trial—so that the question should be resolved at the outset of a case to prevent a defendant that is entitled to the immunity from having to litigate the case against it. That is precisely the nature of Section 230, which, "[b]y its plain language," creates "a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service," *Zeran*, 129 F.3d at 330, and which has been interpreted as not only an immunity from liability, "but also the right to be immune from being sued," *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 155 n.4 (D. Mass. 2015), *aff'd*, 817 F.3d 12 (1st Cir. 2016). For that reason, courts "aim to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from ultimate liability, but also from having to fight costly and protracted legal battles." *Nemet Chevrolet Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009).

The Texas Legislature has recognized in an analogous context the indispensable role that interlocutory appeals play in ensuring full vindication of a statutory right to be immune from suit. Under Texas law, officers and employees of the state enjoy official immunity from certain kinds of civil suits. *See generally Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 422–24 (Tex. 2004). The Legislature has provided for an interlocutory appeal of right from any order denying a motion for summary judgment on grounds of official immunity. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(5). As the Texas Supreme Court has explained, interlocutory appeals are a critical component of this immunity from suit because "[t]he very reasons for the grant of immunity are effectively unsalvageable if the official is determined to be immune from liability only after a trial on the merits." *Travis v. City of Mesquite*, 830 S.W.2d 94, 102 n.4 (Tex. 1992); *accord Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("an immunity from suit ... is effectively lost if a case is erroneously permitted to go to trial" (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The same policy concerns that led the Legislature to enact § 51.014(a)(5) weigh in favor of permitting an immediate interlocutory appeal in cases presenting

immunity questions under Section 230.

Other Texas courts agree. As noted above, in *GoDaddy.com*, after the district court denied the defendant's Rule 91a motion to dismiss under Section 230, the court amended its order to grant the defendant's motion for permission to appeal. *See* Petition for Order Permitting Interlocutory Appeal at iv–v, viii, *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.—Beaumont 2014, pet. denied) (No. 09-13-1285-CV), available here. The Beaumont Court of Appeals then "granted GoDaddy's request to file an interlocutory appeal" and held that the defendant was entitled to immunity under Section 230. *GoDadd.com*, 429 S.W.3d at 753. To ensure that "the policies set forth in the CDA" receive the fullest protection in these cases, *see id.* at 761, this Court should follow the same path.

B. Concerns about judicial resources counsel in favor of permitting an immediate appeal

A single question of federal law controls whether this action and others like it will go forward. If the Court of Appeals holds that Section 230 applies to Plaintiffs' claims against Facebook, that ruling would fully resolve these cases as between Plaintiffs and Facebook and thereby "forestall burdensome and costly ... discovery," motions practice, expert reports, and trial. *See Sabre Travel*, 567 S.W.3d at 736. On the other hand, if the Court of Appeals were to accept the appeal and affirm the Court's Order, the parties and the Court could proceed towards trial without any uncertainty about how the Section 230 issue should be addressed.[1] Either way, "[t]he pure legal question at issue here is precisely the sort of question section 51.014(d) was enacted for." *Id.* Allowing an immediate appeal

[1] Furthermore, under Texas's proportionate responsibility scheme, "each defendant," "each settling person," and "each responsibility third party" who has been properly designated must be listed on the verdict form, and the jury must assign a percentage of responsibility to each one. *See* Tex. Civ. Prac. & Rem. Code § 33.003(a). It is not clear that a non-party may be listed on the verdict form and assigned a percentage of responsibility if that party is immune from liability. *See id.* § 33.004(g)(1); *see also Holland v. Lovelace*, 352 S.W.3d 777, 795 (Tex. App.—Dallas 2011, pet. denied); *but see Elliot v. Turner Const. Co.*, 381 F.3d 995, 1003 (10th Cir. 2004). If, after a trial, Facebook were held to be immune from liability under Section 230, that holding could necessitate a new trial with Facebook omitted from the verdict form.

of the Section 230 issue is the best way to minimize the risk of unnecessary trial proceedings.

C. The Section 230 issue presented here is relevant and important to a number of cases pending in Texas courts

Finally, this case involves an important question of law that will affect multiple cases pending in Harris County and elsewhere in Texas. Plaintiffs' counsel in this case have named Facebook as a defendant in three trafficking cases here in Harris County, and have brought similar trafficking claims against at least one other technology company in Harris and Nueces Counties.[2] The question whether Section 230 immunity bars these claims is a central issue in all of these cases. And there appears to be no appellate-level precedent in Texas or elsewhere on the question of how Section 230 applies to claims under state-law anti-trafficking statutes following the 2018 FOSTA amendments. In light of the recurring nature and exceptional importance of the Section 230 issue, an interlocutory appeal is warranted. *See, e.g.*, *EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014) (the fact that an "appeal will permit the resolution of an unsettled legal question of general importance" weighs in favor of interlocutory review) (quotation omitted);*Coll. of Dental Surgeons of Puerto Rico v. Conn. Gen. Life Ins. Co.*, 585 F.3d 33, 39 (1st Cir. 2009) (accepting an interlocutory appeal of an "important, unsettled, and recurrent" question that "[a]bsent an interlocutory appeal" would "in all probability escape meaningful appellate review").

An interlocutory appeal is particularly appropriate because the Order is in tension with several decisions from the Beaumont Court of Appeals. *See GoDaddy.com,* 429 S.W.3d at 759 ("Allowing [the] plaintiffs to assert any cause of action against GoDaddy for publishing content created by a third party, or for refusing to remove content created by a third party[,] would be squarely inconsistent with section 230."); *Davis v. Motiva Enterprises, L.L.C.*, 2015 WL 1535694, at *4 (Tex. App.—Beaumont Apr.

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[2] *Jane Doe #4 v. Salesforce.com, Inc. et al.*, Cause No. 2018-12747 (Harris County); *Jane Doe #8 v. Salesforce.com, Inc. et al.*, Cause No. 2018-CCV-61041 (Nueces County).

2, 2015, pet. denied) (Section 230 barred plaintiff's negligence claims because the "theory of liability" was "based on [the defendant] allowing [a third party] access to the Internet … to publish fake Craig's List posts and failing to prevent those posts from being published"); *Milo v. Martin*, 311 S.W.3d 210, 215 (Tex. App.—Beaumont 2010, no pet.) (following *Zeran* and other federal cases that "applied section 230 broadly"). Allowing an immediate appeal would give the Houston Courts of Appeals the opportunity to address this conflict.

For all of these reasons, Facebook respectfully requests that the Court amend its Order to state that whether the application of Section 230 immunity applies to Plaintiffs' claims against Facebook is a controlling question of law about which there is a substantial ground for difference of opinion and that an interlocutory appeal will materially advance the ultimate termination of the litigation, and to provide that Facebook may petition the Court of Appeals for leave to file an immediate interlocutory appeal.

PRAYER

Defendant respectfully requests that the Court reconsider its May 23, 2019 Order and grant Facebook's motion to dismiss pursuant to Rule 91a or, in the alternative, amend the Order to grant permission for Facebook to petition the Court of Appeals for leave to file an immediate interlocutory appeal.

Dated: August 1, 2019

Respectfully submitted,

/s/ Kristin A. Linsley

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2019, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Russ Falconer
Russell H Falconer

X

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No. 2018-69816

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc.; Michael Lacey;	§	Harris County, Texas
James Larkin; John Brunst;	§	
America's Inns, Inc. d/b/a America's	§	
Inn 8201 Southwest Freeway,	§	
Houston, TX 77074; and	§	
Texas Pearl, Inc.	§	334th Judicial District

No. 2018-82214

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc. d/b/a Instagram, Inc.;	§	Harris County, Texas
Backpage.com, LLC d/b/a Backpage;	§	
Carl Ferrer; Michael Lacey;	§	
James Larkin; John Brunst; and	§	
Babasai, Inc. d/b/a Siesta Inn	§	334th Judicial District

Plaintiff's Response to Amended Motion to Reconsider the Ruling on Facebook's 91a Motion to Dismiss

The Court denied Facebook's Rule 91a motion to dismiss after considering substantial pre and post-hearing briefing, lengthy oral argument, and innumerable legal authorities. It should deny Facebook's motion for reconsideration because:

(1) The Court does not have authority to reconsider its order denying Facebook's motion to dismiss under Rule 91a;

(2) Courts are never required to reconsider their prior rulings;

(3) Facebook mischaracterizes the Court's order; and

(4) Facebook has not raised any new arguments in support of its motion.

First, Rule 91a sets specific deadlines for motions, responses, and rulings, all of which have long since passed. In particular, "[a] motion to dismiss must be . . . granted or denied within 45 days after the motion is filed." Tex. R. Civ. P. 91a.3(c). The Court granted Facebook's motion to enlarge the time for that ruling until May 24, 2019.[1] Any ruling on Facebook's Rule 91a motion therefore had to be entered by that date, and Facebook should not be permitted to reset the statutory deadlines under the guise of reconsideration. While courts generally have power to reconsider their prior rulings, they may not do so in direct violation of the rules of procedure. *See In re Med. Carbon Research Inst., L.L.C.*, 14-07-00935-CV, 2008 WL 220366, at *1 (Tex. App.—Houston [14th Dist.] Jan. 29, 2008, no pet.) (noting that procedural rules do not permit reconsideration of motions to transfer venue).

Second, courts are not required to reconsider their prior rulings and may deny motions for reconsideration without considering their substance.

[1] *See* Order of May 14, 2019.

E.g., *Oceanografia, S.A. de C.V.*, 492 S.W.3d 330, 337 n.6 (Tex. App.—Corpus Christi 2014, orig. proceeding) (denial of forum non conveniens), *rev'd on other grounds*, 494 S.W.3d 728 (Tex. 2016); *PNP Petroleum I, LP v. Taylor*, 438 S.W.3d 723, 729-30 (Tex. App.—San Antonio 2014, pet. denied) (summary judgment); *Elec. Data Sys. Corp. v. Tyson*, 862 S.W.2d 728, 737 n.5 (Tex. App.—Dallas 1993, orig. proceeding) (sanctions order); *J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Whittington*, 843 S.W.2d 77, 87 n.9 (Tex. App.—Dallas 1992, orig. proceeding) (no right to reconsider ruling requiring production of documents claimed to be privileged).

Third, Facebook mischaracterizes the Court's reasons for denying its motion and then argues those reasons were "mistaken." While the order makes several observations about the issues involved, it does not purport to explain the basis of the ruling. And it certainly does not make the sweeping pronouncements Facebook attributes to it. In particular, the Court's observation that "the failure to warn cause of action presented in this case mirrors that presented in the 9th Circuit case" is not a conclusion, as Facebook asserts, that Section 230 can never apply to failure to warn claims. *See* Amended Motion for Reconsideration at 3-8.

Finally, Facebook does not raise any new arguments. Rather, it repeats its previous positions that Jane Doe's claims are based on third-party content and that the 2018 amendments to Section 230 did not create an "exception for state private civil actions." Both of those positions are wrong for the reasons explained at length previously. And Facebook has wholly failed to address the issue of preemption, which it must establish to prevail under Section 230.

Prayer

Jane Doe respectfully request that the Court deny Facebook's amended motion to reconsider the Court's denial of Facebook's Rule 91a motion to dismiss without explanation, and that the Court grant Jane Doe any other relief to which she is entitled.

Respectfully submitted,

/s/ Annie McAdams

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Certificate of Service

I certify that on September 11, 2019, true and correct copies of the foregoing document were served via ProDoc EFiling service and email on the following counsel of record:

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No. 2018-82214

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc. d/b/a Instagram, Inc.;	§	Harris County, Texas
Backpage.com, LLC d/b/a Backpage;	§	
Carl Ferrer; Michael Lacey;	§	
James Larkin; John Brunst; and	§	
Babasai, Inc. d/b/a Siesta Inn	§	334th Judicial District

Order

Defendant Facebook, Inc.'s motion to reconsider the Court's order of May 23, 2019 denying its motion to dismiss under Rule 91a is hereby DENIED.

SIGNED this _____ day of _____, 2019.

Signed:
9/16/2019

Hon. Steven Kirkland,
Judge Presiding

MR503

Z

No. 2018-82214

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc. d/b/a Instagram, Inc.;	§	Harris County, Texas
Backpage.com, LLC d/b/a Backpage;	§	
Carl Ferrer; Michael Lacey;	§	
James Larkin; John Brunst; and	§	
Babasai, Inc. d/b/a Siesta Inn	§	334th Judicial District

Plaintiff's Response to Facebook's Amended Motion for Permissive Appeal

Section 51.014 of the Texas Civil Practice and Remedies Code must be strictly construed "as an exception to the general rule that only final judgments are appealable." *Hebert v. JJT Const.*, 438 S.W.3d 139, 142 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *City of Houston v. Estate of Jones*, 388 S.W.3d 663, 666 (Tex. 2012) (per curiam)). And under the plain language of the statute, a trial court is never required to grant permission to appeal an otherwise non-appealable interlocutory order. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d) (stating that a trial court "may" permit an appeal); Tex. R. Civ. P. 168 (same). There are two broad reasons the Court should deny Facebook's amended motion for permission to appeal the order denying its Rule 91a motion to dismiss.

First, the Rule 91a order does not involve "a controlling question of law as to which there is a substantial ground for difference of opinion." Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d)(1). As discussed at length in response to the 91a motion, Congress passed FOSTA in 2018 to amend the CDA to exclude human trafficking claims from the immunity provided interactive computer services. All of Jane Doe's claims against Facebook involve allegations of human trafficking. Whether those claims are barred under the CDA as amended was not an uncertain question, as Facebook contends. Under Congress's express mandate in FOSTA, the Court's ruling was clearly correct.

Facebook is simply wrong that "there are substantial authorities supporting a contrary result" and that "the overwhelming weight of case law supports an outcome different from the one the Court reached in its Order." *See* Motion at 4. No authority supports a contrary result. Since the 2018 amendments, no other court in the country that we know of has considered whether human trafficking claims can ever be barred under the CDA. Facebook only cites one case involving human trafficking, and it predates the amendments by a decade. *See Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008). There is also no tension between the Court's order and the decisions from Beaumont, because they all predate the amendments and none

involved human trafficking.[1] Any case predating the amendments is irrelevant, as is any case not involving human trafficking.

Given the clear language of FOSTA and the complete absence of any authority to the contrary, Facebook has not shown that there is a substantial ground for difference of opinion on a controlling legal issue.

Second, even if the statutory requirements were met, the Court should deny permission to appeal for reasons of efficiency and fairness. Facebook claims the "most important" reason for granting permission to appeal is that it should not have to stand trial if it is correct that all of Jane Doe's claims are preempted by the CDA. Motion at 4-6. But Facebook is a long way off from standing trial. As noted in the Court's order, Facebook's Rule 91a motion was just "one of several" procedural motions Facebook has or intends to file to avoid "full litigation of the underlying claims."

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[1] *See* Motion at 7-8 (citing *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752 (Tex. App.–Beaumont 2014, pet. denied); *Davis v. Motiva Enterprises, L.L.C.*, 2015 WL 1535694 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied); *Milo v. Martin*, 311 S.W.3d 210 (Tex. App.—Beaumont 2010, no pet.)). Facebook even acknowledges in the same paragraph that there is "no appellate-level precedent in Texas or elsewhere on the question of how Section 230 applies to claims under state-law anti-trafficking statutes following the 2018 FOSTA amendments." *Id.* at 7.

Facebook has also filed a special appearance, which is set for hearing at the same time as its motion for permissive appeal. If the Court denies the special appearance, Facebook will have an automatic right to appeal without the need to seek permission. Tex. Civ. Prac. & Rem. Code 51.014(7). A concurrent appeal from the 91a order would waste time and resources and further prejudice Jane Doe's right to obtain discovery and develop her case.[2]

And Facebook will have an opportunity to raise these arguments again via summary judgment—after the parties have conducted discovery and developed the factual record. *See ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 880 (Tex. 2018) (noting that arguments in 91a motions may be raised again at summary judgment stage). If Facebook's arguments are rejected as applied to facts and not just pleadings, it will have another opportunity to seek permission for interlocutory review.

Finally, Facebook argues: "The Texas Legislature has recognized in an analogous context the indispensable role that interlocutory appeals play in ensuring full vindication of a statutory right to be immune from suit." Motion

[2] Facebook has refused to provide even jurisdictional discovery relevant to its special appearance, for which the Court is hearing a motion to compel at the same time as the special appearance and motion for permissive appeal.

at 5. Facebook is referring to official immunity for government employees, which is not an analogous situation because the CDA does not grant Facebook any "immunity." And government employees denied official immunity are statutorily permitted an interlocutory appeal only after a denial of summary judgment. Tex. Civ. Prac. & Rem. Code § 51.014(a)(5). If there truly is a substantial ground for difference of opinion on whether the CDA protects Facebook, that question is also more appropriately raised to a court of appeals after summary judgment.

Prayer

Jane Doe asks that the Court deny Facebook's amended motion for permissive appeal and grant her any other relief to which she is entitled.

Respectfully submitted,

/s/ Annie McAdams

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AA

CAUSE NO. 2018-69816

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. d/b/a AMERICA'S INN 8201 SOUTHWEST FWY, HOUSTON, TX 77074; and TEXAS PEARL., INC.,	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

CAUSE NO. 2018-82214

JANE DOE,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
FACEBOOK, INC. d/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN	§	
	§	
Defendants.	§	**334th JUDICIAL DISTRICT**

REPLY IN SUPPORT OF DEFENDANT FACEBOOK, INC.'S AMENDED MOTION FOR PERMISSION TO TAKE AN INTERLOCUTORY APPEAL

ARGUMENT

A. There are substantial grounds for a difference in opinion with regard to the controlling issue of law in this case.

Plaintiffs make the remarkable argument that interlocutory appeal is not warranted here because the applicability of CDA 230 to Plaintiffs' claims "was not an uncertain question." Resp. 2. This is an astonishing change of tune. Plaintiffs have made it no secret that they seek a dramatic re-interpretation of CDA 230, one that they admit *no other court has ever accepted.* This is the very definition of an "uncertain" issue of law.

On Facebook's Motion to Dismiss, Plaintiffs argued that "[t]he majority of the federal courts, and subsequently the state courts" "got [CDA 230] wrong" and that this Court should not follow these cases. Pltfs. Resp. to Mot. To Dismiss at 1; *see* also Hearing Tr. at 53:12–54:11 ("We think *Zeran* and all of the cases following it were incorrectly decided …[a]nd there are a lot of them, and we acknowledge that."). Indeed, this Court's Order denying Facebook's motion stated that there are substantial grounds for disagreement on this issue, with cases on both sides. Order at 2 ("The language of the statute is broad and both parties have cited cases that support their positions."); *see also, e.g., Herrick v. Grindr LLC*, 765 F. App'x. 586, 591 (2d Cir. 2019) (CDA 230 barred failure to warn claim); *Oberdorf v. Amazon.com Inc.*, 2019 WL 2849153, at *12 (3d Cir. July 3, 2019) (same).

Even now, Plaintiffs' Response does not cite a single case that has considered a CDA 230 defense to a claim brought under a state anti-trafficking statute since the enactment of FOSTA/SESTA in 2018, much less any case that supports Plaintiffs' position. And Plaintiff's own petition in Cause No. 2018-69816 is at odds with Plaintiffs' current position, pleading that Facebook "faces negligible risk in not warning . . . about human trafficking" because CDA 230 "protects it from liability for most private law claims," including those alleging failure "to warn of human trafficking." Third Amended Petition ¶¶ 214, 210.

In their Response, Plaintiffs argue, bizarrely, that that there is not a substantial ground for difference of opinion *because* there are no cases directly on point, essentially contending that there may never be an interlocutory appeal on an issue of first impression. *See* Resp. 3 & n.1. But the lack of authority to support Plaintiffs' position on this controlling issue of law renders their position *more* uncertain, not less so. *Gulf Coast Asphalt Co., L.L.C. v. Lloyd*, 457 S.W.3d 539, 545 (Tex. App. — Houston [14th Dist.] 2015, no pet.) ("Substantial grounds for disagreement exist when the question presented to the court is novel or . . . there simply is little authority upon which the district court can rely."). Indeed, the very purpose of § 51.014(d) is to permit "early, efficient resolution of controlling, uncertain issues of law," of which legal issues of first impression are a prime example. *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 733 (Tex. 2019); *Alpine Indus., Inc. v. Whitlock*, 554 S.W.3d 174, 177 (Tex. App. —Fort Worth 2018, pet. filed) (interlocutory appeal from "case of first impression"). Moreover, early appellate review will be particularly efficient here because resolution of this issue will also affect multiple other cases pending in this state. *See* Mot. for Permission to Take Interlocutory Appeal at 7 & n.2.

B. Immediate appellate review will serve the interests of efficiency and fairness.

Delaying appellate review of the controlling issue of law in this case will not advance the ultimate termination of the litigation. The immunity provided by Section 230 is an "immunity from suit" and its availability is therefore a pure question of law. *See GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 761 (Tex. App.—Beaumont 2014, pet. denied). Accordingly, there is no need to "develop[] the factual record" before resolving this purely legal issue. *See id.* (reversing the trial court's denial of the defendant's Rule 91a motion on interlocutory appeal). In that regard, Facebook's immunity defense here is analogous to a plea to the jurisdiction by a governmental entity. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) ("[I]mmunity [under CDA 230] is an immunity from suit rather than a mere defense to liability and ... is effectively lost if a case is

erroneously permitted to go to trial." (internal quotation marks omitted)). Thus, as in *GoDaddy*, an immediate interlocutory appeal is necessary to avoid prejudice to Facebook's "immunity from suit for its alleged conduct as an interactive computer service provider." *GoDaddy.com*, 429 S.W.3d at 761; *see also Nemet Chevrolet*, 591 F.3d at 255 (courts should resolve "the question of § 230 immunity at the earliest possible stage of the case").

Finally, piecemeal appeals, as advocated by Plaintiffs (Resp. 3-4), would be inefficient and potentially wasteful. If the Court were to deny Facebook's special appearance, Facebook would have an immediate appeal as of right from that ruling. Allowing Facebook to concurrently appeal the denial of its Rule 91a motion to dismiss would be far more efficient—for the parties and the Court—than the multiple-appeal approach Plaintiffs advocate. If this litigation were to continue and Facebook appealed and prevailed on the CDA 230 issue after summary judgment or post-trial, this case will have needlessly generated multiple appeals, and resolution of this case will have taken much longer than if the Court permits immediate appeal of the Rule 91a motion concurrently with an appeal on the special appearance. Such inefficiency can be avoided if the Court permits immediate appeal of the Rule 91a motion, concurrent with an appeal of a decision on Facebook's special appearance.

CONCLUSION

For all of these reasons, Facebook respectfully asks the Court to amend its Order to provide that Facebook may petition the Court of Appeals for leave to file an immediate interlocutory appeal.

Dated: September 19, 2019

Respectfully submitted,

/s/ Kelly Sandill

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2019, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Russell H. Falconer
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BB

No. 2018-82214

Jane Doe	§	In the District Court of
	§	
v.	§	
	§	
Facebook, Inc. d/b/a Instagram, Inc.;	§	Harris County, Texas
Backpage.com, LLC d/b/a Backpage;	§	
Carl Ferrer; Michael Lacey;	§	
James Larkin; John Brunst; and	§	
Babasai, Inc. d/b/a Siesta Inn	§	334th Judicial District

Order

Defendant Facebook, Inc.'s amended motion for permission to appeal the Court's order of May 23, 2019 denying its motion to dismiss under Rule 91a is hereby DENIED.

SIGNED this _____ day of _____, 2019.

Signed:
10/7/2019

Hon. Steven Kirkland,
Judge Presiding

MR517

CC

TRIAL COURT CAUSE NO. 2018-69816
REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME(S)

JANE DOE Plaintiff V. FACEBOOK, INC., BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACY; JAMES LARKIN; JOHN BRUNST; AMERICA'S INNS, INC. D/b/a AMERICA'S INN 8201 SOUTHWEST FREEWAY, HOUSTON, TX 77074; and TEXAS PEARL, INC. Defendants	IN THE DISTRICT COURT HARRIS COUNTY, TEXAS 334TH JUDICIAL DISTRICT

JANE DOE Plaintiff V. FACEBOOK, IN. D/b/a INSTAGRAM, INC.; BACKPAGE.COM, LLC d/b/a BACKPAGE; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and BABASAI INC., d/b/a SIESTA INN Defendants	IN THE DISTRICT COURT HARRIS COUNTY, TEXAS 334TH JUDICIAL DISTRICT

MOTIONS HEARING
May 3, 2019

On the 3rd day of May, 2019, the following proceedings came on to be heard in the above-entitled and numbered cause before the HONORABLE STEVEN KIRKLAND, Judge presiding, held in Houston, Harris County, Texas;

Proceedings reported by machine shorthand.

CYNTHIA BERRY, CSR

OFFICIAL COURT REPORTER - 334TH DISTRICT COURT

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May 3, 2019

P R O C E E D I N G S

THE COURT: 2018-69816.

MS. MCADAMS: Judge, we have a couple issues before the Court this morning: Facebook's motion to dismiss against us; we believe that we have, just to update the Court, resolved the motion to compel that was also pending that we had filed.

THE COURT: Okay.

MS. MCADAMS: For our protection, we request to read the agreement into the record, only because we have only received 71 pages of objections with zero substantive responses since November.

THE COURT: Okay. So does this motion to compel apply to both cases that are pending?

MS. MCADAMS: This one is only on the motion to compel with Instagram, Jane Doe vs. Instagram, on general discovery responses.

THE COURT: So is that 6-9-8-1-6?

MS. MCADAMS: I believe it is 8-2-2-1-4.

THE COURT: 8-2-2-1-4. All right.

MS. MCADAMS: Judge, we've agreed that within 14 days defense counsel will amend their objections and their responses in an attempt to move discovery along. And we just want to make sure it's clear that we should receive those

amended responses within 14 days.

MR. FALCONER: Yes, Your Honor, that's correct.

MS. MCADAMS: That's our motion to compel.

THE COURT: That's it?

MS. MCADAMS: That's it.

THE COURT: Boy, that was neat, clean and tidy. What else?

MR. FALCONER: Your Honor, I'm Russ Falconer. I'm one of the lawyers here for Instagram and Facebook. And we had one preliminary matter we would like to raise with the Court, which is to -- I'd like to move for the pro hac vice admission of my colleague, Kristin Linsley, who is here with me this morning, and is going to be arguing the motion to dismiss on behalf of Facebook. We have the pro hac vice papers prepared, we have the certificate from the board of law examiners. We wanted to raise this with the Court this morning, out of on abundance of caution, to make sure that by Ms. Linsley moving for her own admission and my motion supporting her admission is not going to be held against Facebook as a waiver of a special appearance, under the rule that says Facebook can't file another motion and get it heard before a special appearance, since these motions are being filed by Ms. Linsley and by myself, and not by Facebook. We don't think there should be any waiver issues, but we just wanted to make sure that everyone is in agreement on that

before we move forward with the pro hac vice process.

THE COURT: Ms. McAdams?

MS. MCADAMS: That's fine. No objection.

THE COURT: Okay. Well, submit the paperwork. I'll review the paperwork and order on the paperwork.

Ms. Linsley, if you tend to speak today, you are welcome to speak today. The only time I have ever denied a motion pro hac vice is when the movant couldn't figure out what to call the Judge, and didn't know what Court she was in, and that was denied. I trust you will not be making those same silly mistakes, so that won't be a problem.

MS. LINSLEY: I assure you, Your Honor, I will not be making those mistakes.

THE COURT: You-all can be seated by the way, or be comfortable.

What else are we doing here today? You've got two motions, right?

MS. LINSLEY: We have the motion in both cases to dismiss under Rule 91a, Your Honor.

THE COURT: And it's essentially the same motion, if I'm right?

MS. LINSLEY: Correct, yes, sir. And those are exempted from the rule that Mr. Falconer just referenced by the language of 91a, which says you can bring a 91a motion without waiving the special appearance.

THE COURT: All right. So if you lose 91a, you'll be back on the special appearance?

MS. LINSLEY: Correct.

THE COURT: All right. And then if you lose that, you'll be back on the TCPA? Okay.

MS. LINSLEY: We do have other defenses, Your Honor, yes.

THE COURT: All right. So do I understand that the entirety of your argument is that 230 of that particular code section exempts or gives you -- not exemption -- but it's total bar to liability...

MS. LINSLEY: To the extent the cause of action depends in any way in the chain of causation on a third-party contact that's posted on the site or shared on the site. In this case we have a messengering function that Facebook has. And as the case law in our motion indicates, that CDA 230 -- CDA 230, I'm sorry, CDA 230, the Communication Decency Act, Section 230 applies to messengering functions, as well as to postings that are made more broadly. In other words, it applies to one-on-one communications, as well as to more public postings. So, yes, our argument is that CDA --

THE COURT: So with respect to Messenger, you are an ISP. You are the platform with respect to -- there's two things you got to be, right, under the 230?

MS. LINSLEY: You have to be an internet service

provider.

THE COURT: Right. That's providing the connectivity, right?

MS. LINSLEY: Right. And that's where you are providing, you're hosting a communication of some kind, whether it's a public posting, a classified add, whether it's a Facebook page, whether it's Messenger, and via Facebook separate messengering functions, whether it's an Instagram posting, whatever you're posting, third-party contact or third-party communications are covered by the statute. And I don't think here there's any dispute between the parties that Facebook and Instagram both qualify as internet service providers in that sense.

So then there's two other elements to this statute, as it's written. One, it has to be based upon third-party content, not content created by the site itself. So, for example, if a site like Facebook posts its own content on its site, that would not be third-party content. That wouldn't come within Section 230; it's when the site is serving as a forum or a means or medium for communication by third parties. So that's one thing.

And then the other thing is that the cause of action has to depend in its own way on the third-party content. And there's probably the most case law is filled on that set of issues, but as the plaintiffs' brief and as our brief, our

reply brief and opening brief all show, the courts have overwhelmingly read that provision broadly, what does it mean to be a publisher, third-party content. That includes functionality of the website that's designed to make that content available to -- to make a -- to provide a forum for that content or that communication. So the cases have read that provision very broadly.

So that's our argument, yes, Your Honor, that that -- because each of the plaintiffs causes of action here, including the two new ones she's added in the third amended petition in the 6-9-8-1-6 case, and the second amended petition that was added in the 8-2-2-1-4 case, the Instagram case, in both of those, all of the causes of action now in the amended petitions are covered because they necessarily depend on third-party communication.

Here, plaintiff's claim fundamentally is that she -- well, the two plaintiffs, as we understand it, the plaintiffs agreed to allow a person who they did not know to be their Facebook friend. That -- apparently in one case it's alleged, in the 6-9-8-1-6 case, it's alleged that this person was friends with some of her other friends. So that apparently must have led her to think this person was okay, so she "friended" that person and they engaged in communication. He allegedly told her a lot of things that were nice, that she was beautiful, that she could be a model, et cetera. This

communication occurred on Facebook's Messenger App. And eventually she had a dispute with her mom, and he told her, look, I can get you a job as a model, I'll set you up, you'll be able to afford your own apartment. And then he led her into an offline meeting wherein she was then raped and brought into a sex trafficking operation via a separate website, Backpage.com. It was put up for advertising, advertising for sex on that website, and then was brought to various hotels where that happened.

So that's the tragic facts that we have here. There's no question but what happened here to this plaintiff is a tragedy. What happened to the other plaintiff in the Instagram case is similarly a tragedy. Very similar facts, less detailed in the petition as to the step-by-step conversations that caused this to happen; but at least the allegations seem to indicate that she, again, was led to, via communications with this person, to an offline meeting where these horrible things happened.

THE COURT: So even -- let me stop you there and let's -- and I appreciate the refresher on the facts, but let's jump back to the law, Section 230.

MS. LINSLEY: Um-hmm, sure, yes.

THE COURT: Explain to me how a statute that's entitled "Protection for Private Blocking and Screening of Offensive Material" becomes this extreme bar to any claim

against your client?

MS. LINSLEY: I will do that, Your Honor.

Well, the language itself is very broad. So the operative language in 230 says that no interactive service provider shall be held liable as a publisher or speaker of the third-party contents.

THE COURT: That's really --

MS. LINSLEY: It's very broad and it's been read broadly by every court, including the Fifth Circuit, in the Doe vs. MySpace case and three Texas Court of Appeals cases from Beaumont.

THE COURT: The Fifth Circuit did it as well?

MS. LINSLEY: Correct, yeah. Correct.

THE COURT: Doe vs. MySpace?

MS. LINSLEY: Doe vs. MySpace, yeah, Fifth Circuit. And in those cases --

THE COURT: You referenced that one in your reply, right?

MS. LINSLEY: It's referenced in our opening brief and in the reply, yes, Your Honor.

THE COURT: Okay.

MS. LINSLEY: And in that case, that case had remarkably similar facts to hear. The courts -- the courts, following a series of other courts -- the Fourth Circuit in the Zeran case, the Fifth Circuit in MySpace and the Ninth Circuit

as well -- read the statute very broadly, because it was said that -- first of all, in terms of the blocking, the blocking, plaintiffs cite some legislative history that talks about a case involving Stratton Oakmont.

THE COURT: Right.

MS. LINSLEY: And in that case the Court held against Stratton Oakmont by saying, hey, you blocked some content, but we're holding you liable for not blocking this other content. That's the Good Samaritan instinct that was part of the impetus to the statute, but --

THE COURT: Right, right. And you --

MS. LINSLEY: -- but the --

THE COURT: -- you shouldn't be punished for that.

MS. LINSLEY: -- the court has said that that wasn't -- that wasn't the limit of what the statute did. That was part of what the statute did, but the other part is much more broad. So the other, the other part is not limited to any kind of good faith blocking.

So the heading of the statute doesn't limit the text of the statute. And that's what -- if you look at the Zeran, the Fourth Circuit case, it's one of the early cases in the history of the statute, that the Court said that the language is very broad and needs to be construed as such in order to implement Congress' broader intent to allow free

communication on the internet.

THE COURT: So if the language was intended to be that broad, why are there also exemptions or protections from liability in 230 (1), and in the Digital Millennium Copyright Act, why do we have separate protections for you for other actions?

MS. LINSLEY: Well, the statute is broad, but it's not -- it's not unlimited, because of the way it functions. It functions as a result of the nature of the claim that is brought against the defendant. So those other --

THE COURT: So if it's not unlimited -- so if it's not unlimited, give me an example of something that would not be barred by the statute.

MS. LINSLEY: I can give you an example of some cases that have found no coverage, and that is where the plaintiff's cause of action didn't depend in any way on third-party content. There's a Seventh Circuit case that deals with the payment of taxes, did the website have to pay certain taxes. The answer was, yes, because there was no cause of action that depended on third-party content.

There's a case where the plaintiff had her own posting on a website, she had her own page, and someone offline saw that page and contacted her in a harmful way; but they didn't do so through any communication on the site, so her cause of action didn't depend on any third-party content

communicated on the site.

So those are examples. Other examples are --

THE COURT: So taxes --

MS. LINSLEY: -- transactions that result from. There's a case, Home Away, that was recently decided by the Ninth Circuit, where it's a transaction that results from an online posting. And in that case the City of Santa Monica prohibited the execution of a transaction by a home sharing site. So even though the add was posted -- and the add would have been protected because it was a protected communication third-party posting on the site's website. The city was going after the monetary transaction that resulted from that. So the court said that monetary transaction, since it didn't depend on the content of the posting, was not covered by the statute.

So that's -- those are examples where courts have held them not to be covered.

THE COURT: So you would say, then, that her cause of action against Backspace would be like the Home Away situation?

MS. LINSLEY: Well, the cause of action against Backspace has a couple of issues that one would look at. I don't know that it's -- I don't know that it's like Home Away, because I don't think that cause of action depends on a resulting transaction. I think it still depends upon online postings, but I think in that case their argument is and the

way they've alleged it in the petition -- I gather they dropped their claims against Backpage, but they --

THE COURT: Is Backpage even around any more?

MS. LINSLEY: -- they've been seized by the federal government.

THE COURT: So, not much point in chasing that.

MS. LINSLEY: Right. Exactly. But I think the theory of the claim there that the plaintiffs have articulated in their petitions are, is that Backpage manipulated the content. So Backpage, it wasn't entirely based on third-party content. Backpage, itself, essentially co-drafted some of the ads that are being challenged. Whether that is true or not, I don't know the ins and outs of the actual facts relating to that, but I do know that that's their theory, is that Backpage created content and, therefore -- that's another example of where you would have no coverage of the statute.

The Roommates.com case in the Ninth Circuit did a similar thing to the plaintiff's theory against Backpage. They said if the website is the one that contributes to the illegality of the content, then it might not be covered, because it's the website's own content that's being challenged, not the third-party content.

So in that case, for example, Roommates set up a questionnaire that was required to be filled out by anyone posting for either a roommate -- people were posting for

roommates. So I have an apartment, I want to get a roommate, or I'm a person that wants the space, I'm posting to try to get a room. They were asking questions like, what is your race, what's your gender, what's your sexual preference, would you welcome children into your household. These are questions that are not permitted to be asked, according to the case that got filed by the Housing Authority. It violates anti-discrimination laws to even ask those questions, if you are seeking -- if you're seeking a tenant.

So the Court said that because the website had required those questions to be answered, it had created the illegality, if you will, in the third-party content. So it was the one that -- it was the website's own content that created the illegality that was being complained of.

So that's an example, too, of what -- that is sort of the theory I think the plaintiffs have alleged in their claims against the Backpage defendants.

THE COURT: So, essentially, they're seeking to create sex trafficking law here, as a private cause of action.

MS. LINSLEY: Correct, yes.

THE COURT: Which is recognized under federal statute.

MS. LINSLEY: Right.

THE COURT: And I think it's also recognized under Texas statute.

MS. LINSLEY: Correct, right.
THE COURT: So how does (c) (5) come into play, then?
MS. LINSLEY: (c) (5) is the preemption provision that juxtaposes activity that is consistent with Section 230, or causes of action that are consistent with 230 with causes of action that are not, causes of action that are not -- that are pre-empted. So that section looks -- am I correctly identifying the section Your Honor is looking at?
THE COURT: The sex trafficking law, no effect on sex trafficking.
MS. LINSLEY: Oh, I'm sorry. Yes, of course. I was thinking of the preemption exemption. My mistake.
THE COURT: So which one are you calling --
MS. LINSLEY: So here's what the --
THE COURT: -- which one are you calling --
MS. LINSLEY: Let me just go through --
THE COURT: -- calling the preemption provision?
MS. LINSLEY: (e)(5) is the -- (e)(5) is the exemptions that were just created for, under FOSTA for sex trafficking.
THE COURT: Right. (e)(5) would be the exemptions to this bar.
MS. LINSLEY: Correct. So let me walk through those.

So (e)(5) states that nothing in Section 230 (c)(1) -- first of all, even apart from 230 (e)(5) that's newly added, it's important to understand the rest of what FOSTA did. FOSTA created a new federal cause of action, civil cause of action for -- it expanded existing remedies relating to sex trafficking, including a new cause of action, 2421 of Title 18, which is the criminal offense, but it has attached to it a civil offense for an aggregated -- called the aggregated offense, where a person owns, manages, or operates an interactive computer service with the intent to promote or facilitate the prostitution of another person. That's the criminal provision.

The aggregated version requires there to be a promotion or facilitation of prostitution of five or more persons, and it must be in reckless disregard of the fact that such content contributes to sex trafficking in violation of a separate provision of Section 1591, which I'll get to in a minute. That's an existing sex trafficking provision that was then amended and supplemented in the same set of amendments.

So Congress creates that, and then it creates the civil cause of action for the aggregated offense that I just described. That's a federal cause of action.

So then you come to the point, the point you're talking about, Your Honor, and that's Section 230 (e)(5), which says that nothing in Section 230 shall be construed to prohibit

that civil cause of action, the federal cause of action that Congress just created, or -- and this is (e)(5). That's (e)(5)(A).

THE COURT: (A).

MS. LINSLEY: And then (e)(5)(B) says it will not immunize or charge in a criminal prosecution brought under state law if the conduct underlying the charge would constitute a violation of Section 1591. That's the sex trafficking statute as amended in FOSTA.

THE COURT: So --

MS. LINSLEY: So there's criminal -- the state criminal is preserved. And then the second -- the next section, (e)(5)(C), preserves a charge in a criminal prosecution brought under state law if the conduct underlying the charge would constitute a violation of 2421. That's the provision we just read. And then finally --

THE COURT: So if Ms. McAdams were, instead of being her wonderful self, were our district attorney, you wouldn't be here?

MS. LINSLEY: Correct. As long as the conduct that she is charging -- however styled, it doesn't matter what cause of action the prosecutor brings the claim under, as long as it's a state criminal statute, presumably -- as long as the conduct would itself violate the federal statutes, one or the other of them.

And then finally there's a provision that authorizes the state Attorney General -- if the state Attorney General perceives that there is conduct that violates these provisions -- again, the underlying conduct would violate these provisions -- that is detrimental to the residents of that person's state, the Attorney General's state, the Attorney General may bring a civil action on behalf of residents in parens patraie --

THE REPORTER: Parens?

MS. LINSLEY: P-a-r-e-n-s, p-a-t-r-a-i-e. Something like that.

THE COURT: Come on, Cynthia, don't you remember your Latin?

MS. LINSLEY: My Latin is a little sketchy.

Let me just get you that exact provision, Your Honor. It's D. This is -- this is not an exemption to 230, but it's -- it's a separate provision of 1595 that got added. These are the new causes of action, and it allows the Attorney General of the state, if he or she has reason to believe that an interest of the residents of the state has been or is threatened or adversely affected by any person who violates Section 1591, the Attorney General, as parens patraie, may bring a civil action against such person on behalf of residents of the state in an appropriate district court.

THE COURT: All right. Well, it's clear that

Ms. McAdams is not our District Attorney or our Attorney General, so we don't really have to spend a whole lot of time with either of those cases, but those are exemptions from the general bar.

MS. LINSLEY: Right. And our only point is that Congress took the time to pass these additional provisions, but when faced with an overwhelming wealth of evidence on the issue of sex trafficking, and the increased use of sex trafficking, the increased appearance of sex trafficking on the internet, took these steps to address it, expressly carved out multiple types of proceedings in Section 230, and did not carve out the state civil action, such as this one.

THE COURT: So talk to me about (e)(3) then.

MS. LINSLEY: About (e)(3)?

THE COURT: Yes. 230 (e)(3). Nothing in this section shall be construed to prevent any state from enforcing any state law that is consistent with this section.

MS. LINSLEY: Right, yeah. So that provision is not new; that provision has been in the statute from the inception. And it's coupled -- that's the provision I quoted, or I was referring to earlier.

THE COURT: That's your prevention argument -- preemption argument?

MS. LINSLEY: Preemption provision, yes. So that provision has two parts. It says that if it's consistent

with Section 230, that Section 230 will not preempt it. If it's inconsistent with Section 230, Section 230 will preempt it.

So it's a pretty straight-forward provision; there's nothing new or magical in there. It's been there since the inception. And it talks about the section, Section 230. It's not talking about other laws. It's not saying if the state provision is consistent with some other federal law. It's self-contained.

So if there's a -- if the court -- courts since the beginning have been looking at that preemption provision, and have found that if the state cause of action turns on treating the internet interactive website or the platform as a speaker or third-party content, however the cause of action is styled, if that's part of the chain of causation, that is inconsistent with Section 230 that says you can't do that. It's very straight forward.

And so the flip side is I guess what we were talking about a moment ago, with roommates and the other cases, if the cause of action does not treat the party as a speaker in that way, because either the internet website is creating its own content, or the plaintiff's cause of action relates to something entirely different, like taxes or something else, well then that first sentence applies, because the state cause of action is not inconsistent with the section, because it

doesn't require the court to treat that platform as a speaker of the contents, or hold them liable in some way for the contents.

THE COURT: So does the addition of the sex trafficking piece in (5) change the analysis?

MS. LINSLEY: No, it doesn't, Your Honor.

THE COURT: Why not?

MS. LINSLEY: That's an excellent question, and I know plaintiffs did raise that argument. Because of what I just said, that it's the same analysis that I just -- that I was saying as applied to the new statutes.

The first sentence refers to this section. It doesn't refer to the new provisions we just created. It doesn't refer to organic operative federal law to say if the state cause of action is similar to a federal cause of action you can go forward with it.

It says if the -- if the imposition of liability would be inconsistent with or consistent -- consistent or inconsistent with this section, Section 230. So adding a new federal provision that gives the plaintiff certain limited rights doesn't change the analysis, even if Texas has a similar provision, because what we're talking about is the underlying substantive law and that's not what the section is speaking to. That section is speaking to does the cause of action treat the interactive service provider as a speaker or publisher of the

third-party content.

So I think much more is being read into that section than is warranted, especially since that section has always been there, and no one has ever --

THE COURT: But if it's always been there, then it was part of the big broad-brush explanation you had before, and Congress did something to change that. And they changed that by carving out sex trading.

MS. LINSLEY: Well, it didn't carve out sex trading; it very specifically carved out three things. The new federal cause of action, which you can bring in federal or state court, plaintiffs can invoke that cause of action and bring it as a claim, which plaintiffs could have done here. Plaintiff's counsel chose not to plead the new federal cause of action. They chose to plead state causes of action. They absolutely had the right, if they wanted to and felt they could --

THE COURT: Of course.

MS. LINSLEY: -- meet the elements of that new federal cause of action, they could have brought it. They obviously didn't want to have the case removed. I don't mean to read into it very much but, you know, one suspects they didn't want the case --

THE COURT: They didn't want to go to the Fifth Circuit.

MS. LINSLEY: One maybe also suspects that maybe that cause of action has elements that would be difficult to meet, at least as against Facebook. But the statute was really written for sites like Backpage, when you read the language of the federal cause of action. It's not clear they have a strong claim against Facebook, or any claim against Facebook, and our position would be they wouldn't, because those elements aren't met. But they could have brought that claim against Backpage and they chose not to do that, either. Even when they were suing Backpage, they opted to sue Backpage under a state statute, and state common law claims. So that was their choice, but that's what Congress did. Congress did not say we are addressing sex trafficking and any and all claims relating to sex trafficking are now hereby exempt from Section 230. That's not what they said.

And there's no way you can read the pre-existing preemption provision which refers only to Section 230 itself, it's entirely self-preferential, to encompass this new separate cause of action, and say that now in addition to expressly carving out federal civil -- new civil cause of action, state criminal under two different provisions, very specific, conduct would have to violate one or the other of the two federal provisions. And third, the state Attorney General action, which was not carved out before, civil action by the Attorney General, now we're supposed to imply an entirely new exemption

that says, oh, by the way, state civil private actions are also exempted because we are going to imply it in this earlier language, even though Congress didn't say it. It's --

THE COURT: So has there been --

MS. LINSLEY: -- it is just not a plausible argument that they've made here.

THE COURT: -- has there been any preemption case since this new stuff was added, saying this new stuff doesn't change the scope of preemption? That's essentially what you are arguing.

MS. LINSLEY: I'm sorry, say it again, Your Honor.

THE COURT: You are saying this new stuff doesn't change the scope of whatever preemption arguments --

MS. LINSLEY: No, it absolutely does change the scope of preemption. It changes it as to the things that Congress carved out and said Section 230 shall not be construed to extend to these three specific situations.

THE COURT: So how is her cause of action preempted under 230?

MS. LINSLEY: So, first of all --

THE COURT: Not sure I understand.

MS. LINSLEY: -- the cause of action is preempted because the claim that they are alleging is inconsistent with Section 230 under the provision, the

preemption provision you were just looking at, because the effect of allowing the claim to proceed would be to create an exemption for state law civil actions, when Congress made a deliberate choice not to create that exemption.

So that's -- that is point number one. Point number two is that brings you back to the existing case law, which plaintiffs have cited at length in their brief, over and over again, saying that if you follow the existing federal law construing Section 230, as adopted by the Texas Courts of Appeals in all three of the Texas decisions that we and plaintiffs both cite, that their claim is barred because it necessarily depends upon third-party content. In this case, communications between the plaintiff and -- the respective plaintiffs and their respective assailants, communications between the parties posted on the platform of the site through the messenger service. So that's -- that's a necessary part of their claim that is barred, under the logic of all of these federal cases and these three Texas cases, including federal cases including the Fifth Circuit decision in Doe vs. MySpace.

So that is why, because the chain of causation, the theory of the case necessarily turned under third-party content; in other words, if it weren't for the third-party content, they wouldn't have a cause of action. The harm that they are alleging necessarily flows from the communications that are on the site.

And just to back up a little bit, the Zeran, the Fourth Circuit case that the Fifth Circuit adopts in it decision of Doe vs. MySpace, does an excellent job of describing why that's the case, why isn't it just that the only thing that is pre-empted is either the deprivation claim, where you are treating someone as a publisher in that sense of defamation, or why isn't it the case that it's limited to Good Samaritan types of claims.

By the way, here there is now Good Samaritan in the case, because the plaintiff's new causes of action allege negligent undertaking; Facebook undertook to, to take down content that was relating to sex trafficking, and they didn't do a good job of it. That's exactly what the Good Samaritan narrower reading of the statute that plaintiffs espouse would cover is, you know, if Facebook would be liable for not doing a good enough job on what it was trying to do, which was take down harmful content. But that's just a separate point relating to this case.

The courts have uniformly said that doesn't limit the statute; it's got to be broad, and it can't depend on the way the label, what label gets put on the cause of action. Otherwise, it would be very easily abated, and it's evident that what Congress' intent was, was to prevent causes of action that ultimately would require the site to actively monitor all the postings on the site.

There's just -- the internet is too important, and it's too important to keep the internet free, as a free means of communication and open means of communication, not having to have every single piece of content that gets transferred in private messaging, in private posts and public posts, to have to monitor all those things to make sure they're not defamatory, harmful, problematic, raise red flags. To impose such a monitoring obligation on interactive service providers would cripple the internet, and that's what, essentially, Zeran says. It's an excellent decision. Most of the other circuits have adopted the reasoning, including the Fifth Circuit.

And the other case that I would strongly recommend Your Honor reading is -- plaintiffs cited a case called Daniel, in which the mid-level Court of Appeals in Wisconsin had found against Rule 230 immunity in circumstances analogous to those here, where the plaintiffs argued, we're not trying to base liability on the ultimate third-party content, we're just saying that -- there was a gun case, where a person was killed by the sale of a gun on a site that specializes in the sale of guns.

The allegation was, well, you, gun website, designed your website in a way that allowed people to, according to the plaintiffs, evade the federal restrictions by focussing on private sales, which aren't subject to a lot of

the federal restrictions. So by channelling -- allowing people to channel their inquiries and their solicitations on the site to those categories, the website has designed a site that was -- that led, that catered to people that were bad actors, because they wanted -- they catered to people that wanted to avoid the federal restrictions. A guy bought a gun on the site, arranged the private sale, the next day went and shot his wife and three other people, including himself. And that -- the plaintiff brought that case saying that the site had caused that harm.

The case was originally dismissed by the trial court under CDA 230 because, because the cause of action depended, ultimately, on the content of that communication between the buyer and the seller. The Court of Appeals reversed, saying we don't think it applies where the plaintiff is complaining about the site's own actions, their own actions. They're not complaining about the communication; they're complaining about the actions that facilitated bad actors being on the site, even if that ultimately resulted in a communication. That's not what they were really complaining about, and so the Court of Appeals said that was not barred by Section 230.

The Wisconsin Supreme Court, in a decision just earlier this week -- and I highly recommend this decision because it is really one of the -- it is the latest major

decision on CDA 230 that we cited in our reply brief that we filed yesterday morning. Early yesterday morning, I think. It's called Daniel vs. Arms -- Arms something or other.

THE COURT: It's okay.

MS. LINSLEY: Yeah. And the cite for it, it's a Wisconsin cite, it's Arms List, 2019 WI 47. We would be happy to provide a copy to Your Honor if that would be helpful. That's how we cited it, because that's how -- it only came out on Tuesday of this week.

THE COURT: Well, if you have a copy, you may bring it up.

MS. LINSLEY: I think we can get a copy.

THE COURT: If you don't, I will find it.

MS. LINSLEY: Yeah. But anyway, what the Court -- the Court -- the Wisconsin Supreme Court considered this argument. Obviously, you know, the special group of Appellate Judges had agreed with this argument and said it just wasn't right, and that court after court, the federal courts construing this federal statute, states courts construing the same federal statute, all had uniformly gone the other way and said if it -- if there's a functionality that is complained about on the website, but ultimately allows content, if the complaint is you are allowing this content and not that content, you should be screening this content, you should be monitoring, you should be doing all these things to prevent

this bad conduct or these bad people from communicating, so even though it was a gun case, it was very analogous to this case because the argument was that the communication itself was with a bad actor, and that communication should never have happened.

So the court said, no, that that was not -- that was not a fair reading of the plain language of the statute. Plaintiffs have kind of set this up as plain language versus not plain language, but if you look at the decisions, the federal decisions and Daniel and other cases like this, the courts are applying the plain language of the statute. They're not going off the reservation with the text of the statute. Federal courts have consistently construed that plain language to mean that any cause of action that treats the website as a publisher in the sense that they are depending on third-party content is barred by the statute.

And the court goes on to say, helpfully -- and it's really, really worth reading this decision. If I had to recommend two decisions, or three, I'd recommend the Texas Court of Appeals Beaumont decision in the Go Daddy case, which is an excellent decision, I would recommend the Fifth Circuit decision in Doe vs. MySpace, and then this Wisconsin case.

But the court goes on to talk about the good -- whether -- whether -- the sort of knew or should have known argument, which plaintiffs here also make. If the website

should have known that there were going to be bad actors out there, it should have taken these precautions and screened the content, or put protections in place, or enhanced the protections they have.

In Facebook's case, plaintiffs recite the litany of protections Facebook already does have in their petition. Facebook takes down harmful content. It doesn't permit anything that even remotely resembles sex trafficking. It has -- and plaintiffs recite all those things in their petition. So, really, in Facebook's case it's you're not doing enough or you should have been doing it differently. Either way, if that's the nature of the cause of action, it's barred by -- it's barred, regardless of what you call the cause of action, and regardless of whether you knew or should have known.

And the Wisconsin Supreme Court goes into a great deal of detail about why there is no good faith element to the statute. There's no -- there's no -- no part of the statute that turns on what the defendant knew or should have known. What it turns on is whether the cause of action depends on third party content. So...

THE COURT: Okay. Ms. McAdams, I want to hear from you, but I need to take a short break.

(Recess)

THE COURT: Back to you-all.

So what action of Facebook -- how do I phrase this? I mean, there's about seven different ways to parse this, right?

We can start with preemption, but I don't know that that gets me there. So let me just start with what is it Facebook is actually doing that you are seeking to hold them liable for?

MS. MCADAMS: Judge, I wish I was here to talk to you on that topic today; we had split our argument among the plaintiff's team and my issues got resolved. So my co-counsel, Tim Lee, will be handling that argument today for Jane Doe one and two.

THE COURT: All right, Tim. Mr. Lee.

MR. LEE: May it please the Court. I'm going to refer to a couple of boards. So is it all right if --

THE COURT: Whatever.

MR. LEE: The plaintiffs' allegations are that Facebook knows that human trafficking is occurring on a regular basis on its site. Facebook knows that the pattern for human traffickers, and actually fairly well established in law enforcement documents, there's a characteristic pattern that human traffickers go through when they are recruiting and grooming potential victims, and Facebook knows that that's the case.

Facebook has the ability to tell when that is

going on, because the entire site is at least arguably more or less transparent to them. The Jane Does of the world get recruited, and Facebook is the intermediary that allows that recruitment to occur. Then, when the Jane Does of the world are sucked into the world of human trafficking, they get sold through on Facebook.

THE COURT: What action of Facebook are you after, not --

MR. LEE: A failure --

THE COURT: -- it sounds like everything you've said is this is third-party actions that Facebook is somehow enabling.

MR. LEE: No. It is a failure to warn theory, a failure to protect the Facebook community kind of theory.

THE COURT: Okay. So failure to warn, explain that one to me. What is it they don't warn people of?

MR. LEE: They don't warn the participants in the community of the, of the presence of sexual predators, of human traffickers, of the typical method by which that type of predation is taking place, and that they're -- that they are vulnerable. We are talking about minors in both of these cases, and in all of the rest of the cases.

THE COURT: So you are asking Facebook not to allow minors on the site?

MR. LEE: No, but we are asking Facebook -- we

are contending that Facebook ought to be preventing people who are not minors from contacting minors in a way that is characteristic of human trafficking type of predation. We are saying that Facebook ought to be warning minors of the phenomenon, and alleging that Facebook ought not allow a minor to have an account that is not linked with an adult account. We're suggesting -- we are alleging that there are ways to protect this community. Facebook knows that those ways exist.

THE COURT: So you've got the warning and you want to impose some affirmative duty to protect children?

MR. LEE: Yes. We think -- well, they say that they are protecting minor communities in the terms of service agreement, and so it's a duty that they have assumed.

THE COURT: You mean that thing nobody reads?

MR. LEE: But it's the thing that Facebook attaches to its pleadings when it's defending these cases. So they are obviously telling the Court that that is a duty that they have assumed.

THE COURT: Well, the duty that they have assumed, isn't that the purpose of 230, is to prevent them from being held liable for voluntarily undertaking something that we all think is a good deal?

MR. LEE: And so now let's transition from what's being alleged in the case to the preemption argument.

THE COURT: Is there -- is there any other

action that Facebook is going on -- doing that you contend gives liability to your client?

MR. LEE: Let me ask.

THE COURT: Anything independent?

MS. MCADAMS: Judge, it's our position that Facebook facilitates the access of predators directly to children. They failed to protect them against an inherent known danger.

THE COURT: So it's all because they are predators over here, there's nothing else that -- because predators use their system, there's nothing else that you would seek to hold them liable for.

MS. MCADAMS: They're the tool that facilitates the exposure of these children to this risk, yes.

THE COURT: So they are an aider and abetter?

MS. MCADAMS: They are knowingly facilitating human trafficking.

THE COURT: Knowingly facilitating? Okay. Where do we have evidence, or do we have evidence that they are knowingly facilitating? Where is that allegation from?

MR. LEE: Could I interject, because we are talking totally about a motion that is on the pleadings.

THE COURT: You're right. Never mind. Forget that question.

MR. LEE: And this is why you don't generally

want to have the law guy trying to respond to factual questions, but it's all been -- it's all been alleged because we --

THE COURT: So duty to warn, duty to protect. Is that it?

MR. LEE: Anything else?

MS. MCADAMS: No, Your Honor. That's it.

THE COURT: All right.

MR. LEE: Great. I got it right.

THE COURT: Why is Facebook not essentially a publisher?

MR. LEE: Okay. Let's start with the amendments.

THE COURT: Okay.

MR. LEE: The 2018 amendments. And this is a preemption argument. When Facebook --

MS. LINSLEY: Is there a version of this that we can see?

THE COURT: Counsel, you can move your chair.

MS. LINSLEY: Okay. We'll do that.

THE COURT: So long as you-all behave, I don't care where you stand or sit. Whatever works for you.

MR. LEE: If I heard correctly, we heard the argument that the 2018 amendments do not affect the preemption analysis. We disagree with that strongly.

This is the act that -- the prefatory --

THE COURT: This is the 2018 amendment?

MR. LEE: Yes, yes. And the preamble says that the reason that the amendment is being passed is to clarify that "Section 230 of such act does not prohibit the enforcement against providers and users of interactive computer services of federal and state criminal and civil law relating to sexual exploitation of children or sex trafficking and for other purposes."

So the amendments specifically tell us that the entire area of sex trafficking, including state civil causes, is being pulled out from underneath the purview of 230.

THE COURT: Are you sure about that? Because I see what the purpose is, but the specifics they drafted was Section (e), which lists -- doesn't list state civil action.

MR. LEE: But it doesn't need to. And the reason that's true is because for preemption to occur it has to be express -- there is a presumption against it. It has to be clear that a specific state act is being preempted.

Now, honestly, the preemption analysis as has been unfolded in the reply brief it's not something that we have worked on a whole lot because it just came in yesterday morning. But here's the deal on federal state preemption: If the federal statute has express preemption, and that's what we have in 230 --

THE COURT: 230 (e)(3)?

MR. LEE: Yeah, yes, I think that's correct. Then what it preempts has to be clearly stated. In other words, express preemption doesn't preempt by implication. The Supreme Court, in a case we just found yesterday -- the case is Medtronic Inc. vs. Lohr, and it's at 518 U.S. 470. 518 U.S. 470. I'd be happy to give you my copy, but it's already all marked up.

THE COURT: Well, then, you probably shouldn't share that one.

MR. LEE: You're probably right.

The Supreme Court says that the scope of the preemption of the statute begins with the text, and there are two concerns. First, this is the U.S. Supreme Court, in all preemption cases, and particularly in those in which Congress has legislated in a field in which the states have traditionally occupied -- like, for instance, tort law and public safety law -- we start with the assumption that the historic police powers of the state were not to be superseded by the federal act unless there's a clear and manifest intent of Congress. There's a presumption against the preemption of state police power regulations that supports that narrow interpretation.

So if the intention was to preempt state civil causes, the amendment needed to say that. What the legislative

history indicates is the reason --

THE COURT: Well, the amendments don't need to say that. If I listened to her, the statute already said that.

MR. LEE: But the statute doesn't say --

THE COURT: And, in fact, the statute already said that, and what the amendments did was carve out a particular piece --

MR. LEE: Right.

THE COURT: -- which was expressly limited to criminal actions at the state level.

MR. LEE: And that's because Congress was intending to avoid a non uniform system of state parallel criminal laws. If we look at the House of Representatives, the report 115-572, which is the document that we both rely upon, the committee ends up explaining what they are doing with regard to those carve-outs by saying that what they are -- what Congress is intending is to allow the immediate and unfettered use of the criminal provisions, because previously 230 had been being asserted as a defense to criminal prosecutions.

So you have the feds passing a criminal statute carving out sex trafficking over here under 230, and saying that the states, as long as they are following that federal criminal statute, will also be carved out, and they are doing that, the feds are doing that to ensure that the interactive computer services are subject to one set of criminal laws

rather than a patchwork of various state laws. In order to qualify for a carve-out the state's elements should mirror those in the federal statute.

Then the committee says that the savings clause, Section 5, clarifies that nothing in this act shall be construed to limit or preempt any civil action or criminal prosecution under federal or state law that was not limited or pre-empted by 230, of the Section 230 of the Communications Decency Act.

So the reason that you've got those three provisions -- talking about the federal criminal, the federal civil, and the state criminal -- is because Congress wanted to make sure that the state civil was following -- sorry --

THE COURT: The state criminal followed --

MR. LEE: -- the state criminal was following the federal criminal, in order that you didn't have an inconsistent regime of criminal law that applies to this area.

Congress didn't care enough on the civil side to say that you had to do the same thing. In Texas, on the statutory basis, that doesn't matter because Chapter 98, which is I think where we find our human trafficking statute, is very, very similar to the federal human trafficking statute. So, in fact, statutory relief is similar.

THE COURT: So are you bringing a cause of action that is not statutory? You were talking about failure

to warn --

MR. LEE: We are also bringing common law causes of action and that's because --

THE COURT: So those are negligence claims for failure to warn, failure to protect?

MR. LEE: Right. There's a negligent undertaking claim that is sort of an alternative to a failure to warn claim, if we run into a duty problem there. And that's -- yes, that is the negligence point.

THE COURT: The negligent undertaking, meaning they've negligently failed to protect?

MR. LEE: They represented that they were doing something and didn't use reasonable care in doing it. To the extent that they assumed the duty voluntarily, they've got to non negligently execute that duty. It's Stutsman (phonetic) vs. Torres, I think was the case, kind of analysis. When you assume a duty you've got to be non negligent in executing it.

THE COURT: I have a problem with the negligent assumption of a duty, because that's what I read 230 to have been about, was to protect --

MR. LEE: But --

THE COURT: -- because they --

MR. LEE: -- but with the amendments, we are cutting out sex trafficking related claims from the purview of 230.

Additionally, and this is the point I was trying to get around to making, if the feds are going to preempt common law claims at the state level, the jurisprudence says they have to specifically say that we are preempting common law claims, and that's because common law -- it's similar to --

THE COURT: Is that the Medtronic case?

MR. LEE: I don't know that Medtronic specifically -- I'd have to go back and look. I'm not sure that it specifically focuses on common law claims. Yes, it does, because it's a common law lower court claim. So, yes, Medtronic will be consistent with that concept.

There's a Texas Supreme Court case, it's the Moore case that we are citing in our briefing, that states the principle explicitly. That is, if they don't say that they are preempting common law claims, they're not preempting common law claims.

THE COURT: So this language, "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" doesn't include common law claims?

MR. LEE: Right, correct.

THE COURT: It had to say "common law claims"?

MR. LEE: Correct. That's the preemption analysis.

With regard to 320 (sic), you can easily do a

reading of the legislative history and come to the conclusion that 320 (sic) may have been intended to displace defamation and libel claims on the state level. It doesn't specifically do that, and so it runs into the preemption cases that I'm talking to the Court about. It's really of no particular significance to our case.

THE COURT: So you say 230 was aimed at defamation, not at this voluntary undertaking of blocking technology?

MR. LEE: There are two things that Congress was intending to accomplish --

THE COURT: The whole title there --

MR. LEE: -- one is when it passed the Communication Decency Act in 1996. Congress was exceptionally concerned about the presence of internet pornography. And if you remember 1996 --

THE COURT: Yeah, yeah.

MR. LEE: -- it was a big issue.

THE COURT: We were all hung up on sex.

MR. LEE: Which perhaps we still are.

And so that's where the voluntary self-policing concept fits.

THE COURT: Right.

MR. LEE: Part of what the Communication Decency Act was intending to accomplish was to incentivize the internet

service providers to voluntarily exclude offensive conduct, give parents a method to lock kids out of areas that involved offensive conduct.

THE COURT: Right.

MR. LEE: That's the primary thrust of the legislation.

THE COURT: And to protect them from liability in case it didn't work the way it was supposed to.

MR. LEE: Right. Not the way it was supposed to.

THE COURT: That's what Section (a) of the statute says, that's what Section (b) of the statute says --

MR. LEE: But the other thing --

THE COURT: -- and Section (c) says that. And then we come to Section (d) which is this different beast, because it's not talking about blocking technology or limiting access, it's talking about treating them as a publisher of third-party material.

MR. LEE: And the reason that that is there -- and, again, the legislative history is quite explicit on this -- is because of the Stratton Oaks (sic) vs. Prodigy case that you were hearing about before. In that case, Prodigy, a primitive early billboard kind of internet service provider, was sued because they screened, but they didn't screen out a specific posting, and they got sued for --

THE COURT: Not screening that one. That's the voluntary undertaking, right?

MR. LEE: And the Prodigy court held because you screened some, you have become -- you have put yourself in the position of being like a publisher.

THE COURT: You're a publisher, yeah.

MR. LEE: And so you are liable for a defamation claim. And that's what Congress is concerned about.

THE COURT: Was that a defamation claim? The Prodigy case was a defamation claim?

MR. LEE: Yes, as was Zeran, and the first three or four of the big federal cases. This all starts in the defamation arena, which is why nobody is really paying very much attention in the outside world that you have the courts talking in very broad, expansive terms because they are reaching the right result. They are --

THE COURT: For defamation.

MR. LEE: Yeah, they are taking care of defamation claims. If you look at the language, no provider, user, or any interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

When Facebook tells you, and when all of these federal courts tell you, and some of the state courts tell you, including the esteemed Court of Appeals Judges in Beaumont,

that that is broad language, that is simply not true. That's not broad language. That is clearly oriented toward defamatory torts. And we can tell it's going toward the defamatory torts because internet service providers are never speakers. They may sometimes be publishers, but they're never speakers. And that's the way we talk about defamation, publisher liability, speaker liability --

THE COURT: What is it Facebook does that doesn't -- it's not a speaker and not a publisher? What is it you're suing Facebook for in this instance where they are not one of those two things?

MR. LEE: It's a -- they're being sued for conduct, and that is what they are and are not doing. They are providing a platform in which human traffickers can find their victims and --

THE COURT: Would you also be able to sue a telephone company for the same thing?

MR. LEE: If you can imagine a telephone company that provides the same kind of interactive, transparent platform, I don't see why not. I just don't see how technically that can happen.

THE COURT: Ms. McAdams?

MS. MCADAMS: Judge, I'm going to add one thing specific to your question. The distinction between Facebook and a telephone company is Facebook has created a product that

is being used to rape children. Facebook knows it. Facebook allows it. Facebook facilitates it. That's what this case is about. It's in our pleadings and we intend to prove it. They're attempting today to just dismiss us on the face of the pleadings, saying that we have failed to state any cause of action based in law and fact, and that's just not the case.

We are really looking at this case as how Facebook has designed its product and continues to allow it to be used in the rape of children, like Jane Doe one and two in these cases.

THE COURT: The elegance of the argument is not lost on me; unfortunately, the law is not always as elegant as the argument would have us believe. So I have to parse it into the causes of action that exist.

How is that negligence, other than the way Mr. Lee has described it, which is the failure to warn or the failure to protect?

MS. MCADAMS: Chapter 98 allows a Texas cause of action to hold a party responsible for anyone who knowingly facilitates -- knowingly benefits from the facilitation of human trafficking, and that is exactly what Facebook is doing in this case, and we pled so.

THE COURT: So is that the only cause of action you have?

MS. MCADAMS: No, Judge. In addition to

Chapter 98, we've pled the ones that my co-counsel has set forth, such as negligence, negligent undertaking, and failure to warn.

THE COURT: How does 98 fall -- where does Chapter 98 fall within this federal statute, or does it?

MR. LEE: How does it fit? It's a state law that is not inconsistent with 230. We know it's not inconsistent, because it's very similar to the federal civil remedy for human trafficking. They are essentially parallel remedies.

THE COURT: How is that talking -- talk to me about (2)(B) down there.

MR. LEE: Any action -- oh, (2)(B)?

THE COURT: So if I take Ms. McAdams at her word that the negligence here is the creation of the platform --

MR. LEE: Right.

THE COURT: -- I still have to contend with (2)(B) there, don't I?

MR. LEE: (2)(B) immunizes an internet service provider for making available to others the technical means to be stripped access to the internet service provider's site. In other words, that was an immunity from civil liability if I, the service provider, was going to say to the parents, here's the lockout software.

THE COURT: That actually ties directly back to

the blocking and screening?

MR. LEE: Right. Correct, correct. And one of the reasons we know that (c)(1) can't be read broadly is because if it is read broadly the way the federal cases and the Facebook read it, nothing under (c)(2) makes any difference. This -- none of this material --

THE COURT: So that's unnecessary if (c)(1) is as broad as they say it is?

MR. LEE: That's absolutely right, because the service provider can't be liable, no matter what it's doing, if what it's doing involves communicating third-party content to an ultimate audience. That's the broad immunity that we're talking about that is coming about from that language. You just can't get there by a plain language analysis, because there's nothing about this that suggests that kind of immunity. It doesn't even say "immunity."

If it said computer service shall be immune from any information provided by another information content provider, you would be there; but that's not what that says. And you don't preempt, you don't occupy a field by implication. And so even if Zeran and those cases are right, and we think that they are all incorrectly decided, it doesn't make any difference with regard to the remedies that Texas can provide on the state level, because there's no express preemption here. And in order to -- in order to see that, all you need to do is

look at the preemption cases that require a really high level of specificity.

And as long as I'm thinking about it, let me say one other thing. I believe that Facebook's position on the amendment is, well, you don't look at the preamble, that that's not part of the analysis. But if you look at the Medtronic decision, you'll find the Supreme Court is doing just exactly that. In fact, they are looking at everything, which is kind of a reasonable way to go about it, if you're trying to develop a position on what did Congress intend to do.

THE COURT: Okay.

MR. LEE: So basically, we're taking three positions. We think Zeran and all of the cases following it were incorrectly decided, because we think that it is clear that if you look at the legislative history, that Congress didn't intend the result that those courts got to. And there are a lot of them, and we acknowledge that. They all -- they all follow Zeran in a very lock-step fashion, with the exception of a handful of cases from I think the Seventh and Ninth Circuit that apply somewhat different analysis and don't find an immunity.

But here's the thing about the federal cases: We're not here to fight over small distinctions; we're here saying on a very broad level those cases are incorrectly decided. This Court doesn't have to follow them, because none

of those cases are coming from a superior court that is controlling over this court, and it ought not follow them.

We are saying, secondly, that even if that wasn't true, the amendments make it painfully clear that Congress never intended for 230 to have the effect that it is having on human trafficking cases. And you can tell that by the language in the preamble that I pointed out to you. You can tell that by what it is that the Congress people were talking about as the legislation passed through the House and the Senate. They were specifically looking to curtail the Zeran approach when it came to human trafficking claims.

And the reason that they did it the way they did it, with the specific federal remedy on the criminal side and on the civil side, and a specific indication that the states were free to follow the federal remedy on the criminal side, was to ensure uniformity of the criminal jurisprudence, not to preempt the states from providing relief remedies that were not inconsistent with the statute overall.

So there's no preemptive implication. In fact, the amendments make it clear that the feds are not trying to preempt whatever Texas does on this particular problem.

And then, finally, even if those two things were not true, the preemption law is just so strong in this state that you can't preempt without specifically saying, look, we're occupying the field here, and nothing has said that.

THE COURT: Okay.

MR. LEE: Is there anything else that I can do for the Court?

THE COURT: I don't think so. Thank you, sir.

What else you got, Ms. McAdams?

MS. MCADAMS: Judge, the only thing I'd like to bring to the Court's attention once more is that this 91a is attacking our pleadings. And our pleadings clearly state multiple causes of action, one of which not only is Chapter 98 a Texas state statute, but it's also one of negligence, where we know an internet service provider is required to act as a reasonably prudent internet service provider would. And we know that the pleadings, as well as the evidence in this case are going to show that Facebook has not. We ask the Court, obviously, to deny the 91a, and Facebook who is not taking any responsibility for anything, anything that they do in regard to human trafficking, stop today, so we can proceed in this case. Thank you.

THE COURT: Okay. Anything else I need to hear over here?

MS. LINSLEY: Your Honor, I did hope to respond to a couple of counsels' points, if that works for Your Honor?

THE COURT: Sure.

MS. LINSLEY: So, just very quickly on the issue of Medtronic, Medtronic is a case that has been followed,

subsequently has been, if you will, altered by subsequent Supreme Court precedent. So if you're going to look at Medtronic, I think you have to look at a case called Puerto Rico vs. Franklin, California, Franklin Tax Free, 136 Supreme Court, 1938. It's a 2016 case, and at page 1946 of that decision the Court makes clear that where there is an express preemption provision, the presumption against preemption does not apply.

THE COURT: Okay.

MS. LINSLEY: So there's some chatter among the academics over whether Puerto Rico overruled Medtronic, it came later, and I think the general consensus is that it did. Even though it didn't quite come out and say that Medtronic is wrong, most of the Courts of Appeals that have looked at this on the federal side have said Puerto Rico overrules Medtronics as this point. So where you have an express preemption provision the Court says in Puerto Rico, in 2016, "Because the statute contains an express preemption clause, we don't invoke any presumption against preemption, but instead focus on the plain wording of the clause which necessarily contains the best evidence of Congress' preemptive intent." So we would point the Court to that case as the leading case on this presumption against preemption.

Obviously, the scope of preemption under a federal statute, especially an express one, is governed by

federal law, not by Texas state law. So Texas courts may have useful things to say on that issue, but the federal law governs the scope of preemption here. Court after court after court, including the Texas Court of Appeals, has said that the statute does preempt common law claims. There's no need for additional language than what the Court a moment ago read out loud to say that its state law includes state common law.

In fact, I'll just quote from the Go Daddy case, because it's very helpful just to capture some of the points we've been talking about here. Go Daddy was an intentional infliction of emotional distress case. It was decided by the Beaumont Court of Appeals. And in that case plaintiffs claimed that -- they were a class of women, it was a class action, who alleged that other defendants who weren't parties to the case, who owned two revenge porn web sites, published sexually explicit photographs of the plaintiffs without their consent, and the plaintiffs suffered harms as a result. It was an intentional infliction of emotional distress case.

And the Court said, "Allowing plaintiffs" -- after having analyzed the statute, analysis is very helpful -- "allowing plaintiffs to assert any cause of action against Go Daddy for publishing content created by a third party or for refusing to remove content created by a third party would be squarely inconsistent with Section 230."

That's the language, inconsistent with

Section 230. The Court cites Section 230 (e)(3). "No liability may be imposed under any state or local law that is inconsistent with this section."

So that's just a pretty straight-forward application. It's the same application that all these other courts -- the court goes on to cite Zeran, the Fourth Circuit case, the distributor theory of liability, which is merely a subset of publisher liability and, therefore, is also inconsistent with Section 230.

So in terms of the duty to warn, if you look at the Doe vs. MySpace case, which is the Fifth Circuit case, the Court had a very similar set of facts there. In that case a minor signed on to MySpace, despite that they had a rule that only a 14-year old could -- she signed on when she was 13 years old. And she was not old enough to do that, but she lied about her age. She had a very similar fact happen to her. There she was approached by a person who was -- she represented that she was 18 years old. She took up -- she took up communications with a young man who then raped her, and he was 19 years old. She brought a suit against -- against MySpace.

The Fifth Circuit said that that claim was barred by the statute, that's Section 230, including the claims that MySpace should have taken steps on their site to protect minors from this type of thing happening. It's basically on all fours with what plaintiffs are claiming here. The Court

said that that claim was barred by the statute because the statute did not have an intent element. The statute did not -- because the claim necessarily depended on this communication that MySpace had allowed to occur, and didn't take steps to prevent, it was barred because it was treating MySpace as a publisher within the meaning of the statute.

So I think that was -- oh, on the issue of the preamble, there's the loose reference to federal and state civil -- obviously, there's the civil cause of action that gets created in this statute for the state's Attorney General who can bring a civil action against a person that violates the statute.

The state causes of action on multiple -- those are criminal actions that can be brought for conduct that violates the statute. So all of that is consistent with the preamble. But to the extent that preamble can be read more broadly, the case law is clear, and we cited this in our reply brief, the case law is very clear that a preamble cannot change the wording of the statute. The preamble is not law, the Supreme Court has said. And we cited -- and it's certainly not law that can affect an implied repeal, which is what we would have here. So we cited the Heller decision, which is a prefatory provision such as this. The Court has no license to make the enactment that it was not designed to do. And same with a case called Hawaii vs. Office of Hawaiian Affairs.

Then in terms of legislative history, just the legislative history actually makes pretty clear, we cited it on page 10 of our reply brief, that what they were talking about in all of this broader language was the criminal provisions that they were saving for the states. That was not permitted before.

Under the earlier application of Section 230, states could not prosecute criminally conduct that would be within the scope of Section 230. Congress carved that out for conduct that would violate the federal sex trafficking statute, the criminal statutes.

So what the report and the legislative history -- we were talking about that, the judiciary board -- excuse me -- the House Judiciary report says that FOSTA "is designed to combat online sex trafficking by providing new tools to law enforcement through a new federal criminal statute and by making it easier for states to prosecute criminal actors' web sites" --

THE COURT: I can read the statute.

MS. LINSLEY: Okay. All right. So I think that was all the points that I wanted to follow up on, unless Your Honor has other questions.

THE COURT: Does Facebook concede that it has any responsibility here?

MS. LINSLEY: Facebook has, as the plaintiffs

allege in their complaint, has taken voluntary efforts over the years to combat all sorts of harm that can come of its site. It has made efforts and has stated its policy is to ensure Facebook is a safe space. That is not always perfect, but in terms of legal duties, civil duties, I don't think Facebook, no, has a duty that is within the scope of Section 230 to police conduct, to monitor conduct. I think Facebook, as Section 230 contemplates and seems to encourage, has undertaken a wealth of voluntary efforts to address these issues.

THE COURT: So the short answer is no?

MS. LINSLEY: The short answer is, is it does not have a legal duty under the state causes of action that the plaintiffs have alleged. I think we have to -- I'd like to confine the answer to what we are talking about here, which is these state causes of action. Obviously, there may be other duties and other contexts imposed by other laws, so I don't want to speak more broadly than what we have in front of us.

In this circumstance, if you're talking about a legal duty, that legal duty is covered by Section 230. Obviously, it's not covered by whatever other provisions may be in there by ways of exemption, et cetera. We don't believe that there could be a cause of action pled under the federal statute or, frankly, under the state statute, but that's really an issue for another day. And I don't think that the plaintiffs would agree with us on that and we'd have to

litigate that issue.

THE COURT: Okay.

MR. LEE: Judge, could I be heard on one question and one very short comment?

THE COURT: Sure.

MR. LEE: The very short comment is the cases we were just listening to, the Go Daddy case and the MySpace case, are pre amendment cases. There is no post amendment case.

THE COURT: Right. No post amendment case. So this is --

MR. LEE: Unless it was decided today.

Second, the question. The reply brief came in yesterday, and while we did work valiantly, we didn't do as much as we would expect to. If the Court has got any appetite for further briefing, particularly on the preemption-type arguments raised in the reply brief, we'd like to provide it to the Court, if the Court has that desire.

THE COURT: Well, you-all have heard my questions today. They were not as articulately framed as I like for my questions to be. I think that's because allergies have fogged my head this whole week, and they're not doing much better today. But having heard my questions, if you think there is additional information that you need to provide me with respect to those questions, feel free to do that. I don't typically like to leave decisions laying around; I find that I

have to remember everything if I wait too long. So I would encourage you to do it quickly rather than not quickly.

That said, I'm going to be out for most of next week, so you probably have that much time to play with, unless I get a wild burr and get busy this afternoon, and I have already left other people ahead of you on that. So perhaps that won't be a problem.

MR. LEE: Thank you very much.

MS. LINSLEY: Would it make sense to set a date, like next Friday, for either party to submit anything?

THE COURT: Counsel, you -- I'm not going to give you a date. If you get it to me before I decide, I will read it before I decide.

MS. LINSLEY: Good enough, Your Honor.

THE COURT: I've told you what my schedule looks like for the next week. So chances are you've got that long.

MS. LINSLEY: Good. Thank you, Your Honor.

THE COURT: Anything else we need to do today?

MS. MCADAMS: No. Thank you, Judge.

THE COURT: Are there any process or preliminary -- other non matters we need to be aware of? Everything else is rocking along fine?

MS. MCADAMS: Everything is good from here.

THE COURT: Go in peace. Have a great weekend.

(Hearing adjourned)

REPORTER'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF HARRIS)

I, Cynthia Berry, Official Court Reporter in and for the 334th District Court of Harris County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted, tendered in an offer of proof or offered into evidence.

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CAUSE NO. 2018-15356

JANIECE CHARLEZ, AS REPRESENTATIVE ON BEHALF OF THE ESTATE OF NATALIE IRENE FISHER, Plaintiff, v. PLAINFIELD INN A/K/A VIRANI & MANAV, LLC; RAJAN PATEL; DAHYABHAI PATEL; BACKPAGE.COM, LLC; CARL FERRER; MICHAEL LACEY; JAMES LARKIN; JOHN BRUNST; and SALESFORCE.COM, INC., Defendants.	§	IN THE DISTRICT COURT OF 190th Judicial District HARRIS COUNTY, TEXAS

MOTION OF DEFENDANT SALESFORCE.COM, INC.TO DISMISS PLAINTIFF'S SECOND AMENDED PETITION UNDER RULE 91A

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INTRODUCTION

In her Second Amended Petition ("SAP"), Plaintiff alleges, on behalf of the estate of her daughter, Natalie Fisher, that Fisher was forced into the commercial sex trade and exploited by unnamed traffickers through classified ads posted on the website Backpage.com ("Backpage"). (SAP ¶¶ 169–76, 221–22.) After suing various other defendants, Plaintiff now has sued salesforce.com, inc. ("Salesforce"), a company that sells subscriptions to cloud-based customer relationship management ("CRM") software and other business management tools. Plaintiff alleges that Salesforce provided its CRM software tool to Website Technologies, LLC, an affiliate of Backpage—as Salesforce did with tens of thousands of other companies—and that Backpage then used that CRM tool to grow its business and more effectively manage its customer data—including, Plaintiff alleges, by using it to set up a "trafficker and pimp database." (*Id.* ¶¶ 4–8, 180–81, 188.)

Plaintiff's attempt to hold Salesforce liable for third-party criminal acts is without any legal basis, and would create a troubling and unmanageable precedent for companies that, like Salesforce, sell legitimate business products to a wide range of companies. Plaintiff does not allege, nor could she allege, that Salesforce had any role whatsoever in forcing Fisher into the sex trade or in any acts by which Fisher allegedly was harmed. Nor does she allege that Salesforce helped design, manage, or implement Backpage's advertising and content policies that Plaintiff alleges facilitated the hosting of sex-trafficking ads. (SAP ¶¶ 77–129; 188.) Plaintiff's allegations against Salesforce focus entirely on its CRM tool, and Backpage's alleged use of that tool to manage its customer data. (*Id.* ¶ 188.) And although Plaintiff contends that Salesforce's CRM tool was "customized" (*id.* ¶ 7),[1] she admits that Backpage itself was the entity that "implemented Salesforce's tools and platforms" into its operations (*id.* ¶ 190).

[1] As noted in the text below, this "customization" allegation is unsupported by any specific facts and is inconsistent with the more specific allegations regarding Backpage's own implementation of Salesforce's software. For the record, the allegation also is incorrect. As Plaintiff's other allegations acknowledge, the CRM product to which Website Technologies subscribed was an off-the-shelf CRM tool into which the customer, or a third-party hired by the customer, would input its data. The CRM tool provided to Website Technologies was the same as that provided to thousands of other Salesforce customers. In any event, as shown below, Plaintiff's more specific allegations must be given precedence over more general, inconsistent allegations.

Plaintiff alleges causes of action for negligence and negligence per se, asserting that Salesforce had and breached a duty to monitor its customers to ensure that its products were not being used for sex trafficking (SAP ¶¶ 257–73), and a cause of action under the Texas anti-human trafficking statute, Chapter 98 of the Texas Civil Practice & Remedies Code ("Chapter 98") (*id.* ¶¶ 249–56).

None of these claims has a basis in law or fact. As a threshold matter, Plaintiff's claims are all barred under Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, because they necessarily derive from third-party content posted online—namely, the classified ads through which Plaintiff alleges that Fisher was trafficked. The negligence claims fail for the additional reason that Plaintiff does not, and cannot, allege that any act by Salesforce was the legal cause of Fisher's injuries, or that Salesforce had a legal duty to either to Fisher or to monitor its customers to ensure that its products were not used in a harmful way. And the Chapter 98 claim fails because Salesforce is not alleged to have trafficked Fisher for any purpose, much less with the intent to force her into the sex trade, nor to have knowingly participated in any sex-trafficking "venture" that trafficked Fisher within the meaning of the statute. The SAP should be dismissed pursuant to Rule 91a.

PLAINTIFF'S ALLEGATIONS

At the heart of the SAP is the assertion that Backpage was the "leading online marketplace for commercial sex and sex trafficking." (SAP ¶ 70.) The SAP alleges that Backpage's business depended on this type of online advertising, which is alleged to have "transformed the commercial sex trade." (*Id.* ¶¶ 68, 99.) Plaintiff alleges that Backpage provided a platform for sex traffickers to post advertisements for sex with trafficked individuals, and had a secret policy of stripping certain terms and images from ads that obviously referred to sex trafficking before allowing the ads to be posted, thus facilitating trafficking by allowing the ads to stay up and evade law enforcement detection. (*Id.* ¶¶ 77–129.) Plaintiff alleges that Fisher was a victim of online sex-trafficking at the hands of an unnamed third-party "trafficker," who allegedly used Backpage to advertise to unnamed third-party "pimps" who in turn exploited Fisher. (*Id.* ¶¶ 175–76, 222–23.) The SAP does not allege that Salesforce had any connection with the trafficker or pimps who allegedly committed these acts.

In addition to suing Backpage (the company that allegedly facilitated the ads through which Fisher was exploited), and Plainfield Inn (the hotel where Fisher allegedly was exploited), Plaintiff recently amended her petition to add Salesforce, which provides business software tools that she alleges Backpage—like tens of thousands of other companies—used to input and manage its customer data. (SAP ¶¶ 51, 62, 185.)

Plaintiff alleges that, in 2013, Backpage experienced reduced user levels and wanted to grow its business. (SAP ¶ 177.) As the SAP puts it, Salesforce "advertises itself as a company that can drive business growth through the use of customer relationship management, market, service, analytics, and other support applications and technology." (*Id.* ¶ 181.) According to the SAP, Backpage "needed operational support through a customer relationship management ('CRM') to help maximize not only customer acquisition and retention, but marketing strategies to those customers as well." (*Id.* ¶ 180.) Plaintiff alleges that, in December 2013, a Backpage affiliate, Website Technologies, purchased a subscription for Salesforce's CRM tool, and Backpage then implemented the tool into its operations. (*Id.* ¶¶ 178, 190.) The SAP alleges that Backpage used the CRM tool to perform a range of customer relationship management functionalities. (*Id.* ¶ 188.)

The SAP is inconsistent as to Salesforce's alleged role in Backpage's actual operational use of Salesforce's products. In its "Summary" section, the SAP asserts, without factual support, that Salesforce "designed, implemented, and helped manage" a "heavily customized" database tailored to Backpage's operations, rather than a "customer-ready" product. (SAP ¶ 7.) But when the SAP gets to the details of how Backpage actually implemented the Salesforce tool, it acknowledges that Backpage itself, not Salesforce, implemented the tool into Backpage's operations (*id.* ¶ 190), and that the tool's functionality—from creating customer-specific databases, to identifying and organizing sales opportunities with particular customers, to managing marketing campaigns (*id.* ¶ 188)—was the same as that provided to other companies (*id.* ¶¶ 177–87, 190). Contrary to the characterization in the "Summary" section, the SAP acknowledges in its specific allegations that Salesforce's role was providing Backpage with a software subscription for Salesforce's CRM product. (*Id.* ¶ 190.) Under

Texas law, these specific allegations must be given precedence over Plaintiff's inconsistent general allegations. *See Bos v. Smith*, 556 S.W.3d 293, 306 (Tex. 2018), reh'g denied (Oct. 19, 2018) ("When a pleader provides both general and specific allegations, the specific controls, and the pleader cannot rely on the general allegations to expand the scope of the claim.").

Even assuming Salesforce performed some unspecified form of customization or implementation for Backpage, the SAP alleges no facts to suggest that any such customization or implementation related to Backpage's alleged nefarious conduct that facilitated sex trafficking—*i.e.*, Backpage's content-editing policies that allegedly "sanitized" trafficking-related content and thereby permitted and encouraged sex traffickers to advertise victims on its website, allegedly leading to Fisher's injuries. (SAP ¶¶ 77–129, 169–76.)

The SAP also makes clear that Plaintiff seeks to hold Salesforce liable for the alleged harmful effects of third-party advertisements posted online—both in Salesforce's role as a provider of enabling tools and other software, and derivatively based on Backpage's status as an interactive computer service. As shown below, this brings Plaintiff's claims squarely within Section 230 of the Communications Decency Act, 47 U.S.C. § 230, which immunizes providers from liability for content posted online by third parties. Plaintiff alleges that Fisher's injuries resulted from the classified ads placed on Backpage's site by third-party traffickers. (SAP ¶¶ 169–76, 210–12.) She asserts that Salesforce should be liable for harms resulting from Backpage's policies that allowed such ads, because Salesforce's tools provided internet-based functionality to Backpage, including the organizing and filtering of information provided via the internet. 47 U.S.C. § 230(f)(4); (SAP ¶ 8, 179, 188). Identical claims brought by the same counsel on behalf of 90 plaintiffs were recently dismissed with prejudice under CDA Section 230 by the California Superior Court. *See Does #1–#90 v. Salesforce.com, Inc.*, CGC-19-574770 at 4–6 (Cal. Super. Ct. Oct. 3, 2019) (Ex. A hereto).

LEGAL STANDARD

Under Rule 91a of the Texas Rules of Civil Procedure, "a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact." Tex. R. Civ. P. 91a.1. Rule 91a states

that "[a] cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.*; *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied). A "cause of action has no basis in law under Rule 91a" where "the petition alleges … facts that, if true, bar recovery." *Guillory v. Seaton, LLC*, 470 S.W.3d 237, 240 (Tex. App—Houston [1st Dist.] 2015, pet. denied). Dismissal under Rule 91a is especially proper "when the plaintiff's own allegations, taken as true, trigger a clear legal bar to the plaintiff's claim." *Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 608 (Tex. App.—Corpus Christi 2017, no pet.).

ARGUMENT

Section 230 of the CDA, 47 U.S.C. § 230, bars all of Plaintiff's claims against Salesforce. Plaintiff alleges that Fisher's injuries resulted from online classified ads posted on Backpage's website by third-party traffickers, and seeks to hold Salesforce liable for this third-party content. This is just the type of claim for which Congress provided immunity to interactive computer service providers like Salesforce. *See, e.g.*, *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008). The claims should be dismissed with prejudice on this ground alone.

The claims against Salesforce also fail on the merits. Plaintiffs' core theory of injury is that Fisher was involuntarily posted for sex in classified ads run on the Backpage.com website, and, more generally, that Backpage allowed and encouraged sex traffickers to post ads for sex with trafficking victims. (SAP ¶¶ 172, 174–76.) None of these allegations supports a legal claim against Salesforce, which contracted with a Backpage affiliate for off-the-shelf business tools that Backpage then allegedly used to organize its customer data. There is no allegation that Salesforce had any role in developing or executing Backpage's challenged practices that allegedly allowed or encouraged illegal ads to run on the Backpage.com website. If Salesforce could be held liable on these facts, nothing would prevent similar claims against vendors of other common business tools or services—cellphone service providers, airlines, antivirus developers, payroll companies, and others—thus turning all such vendors into insurers against the wrongful conduct of third-party criminals who may use their products.

I. Section 230 of the CDA Bars Each of Plaintiff's Claims Against Salesforce

The Court need not reach the merits of Plaintiff's claims against Salesforce because, as a matter of law, Plaintiff's claims are barred by Section 230 of the CDA.

The gravamen of Plaintiff's case is that Salesforce is liable for harms to Fisher flowing from third-party ads posted on Backpage's website because Salesforce provided its CRM tool to a Backpage affiliate. Section 230 states 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). Section 230 extends immunity to "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action,[] as a publisher or speaker (3) of information provided by another information content provider." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009).

An "interactive computer service" includes "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). And "access software provider" means "a provider of software (including client or server software), or enabling tools" that perform functions such as filtering, screening, analyzing, and displaying content, among other functions. *Id.* § 230(f)(4).

Section 230 covers "causes of action of all kinds." *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019). Courts uniformly have held that Section 230 applies "without regard to the nature of the content at issue," *see GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 759 (Tex. App.—Beaumont 2014, pet. denied), and extends "broad immunity … to Web-based service providers for *all* claims stemming from their publication of information created by third parties." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *see also Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014) ("[C]ourts have construed the immunity provisions in § 230 broadly," and "close cases … must be resolved in favor of immunity." (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc))).

The SAP alleges that Salesforce's CRM tool provided Backpage with access to cloud-based

internet functionality that allowed it to filter, screen, analyze, and organize user data. (SAP ¶ 188.) As the California Superior Court already has held, this makes Salesforce an "access software provider" within the meaning of Section 230. *See Does #1–#90* (Ex. A). Salesforce also is a "provider" of an "interactive computer service" because it provided operational computer software tools to Backpage's affiliate. In *Zango, Inc. v. Kaspersky Lab, Inc.*, the Ninth Circuit held that a provider of antivirus software is an interactive computer service provider within the meaning of Section 230, rejecting the suggestion that the statute applies only if a computer service "enables people to access the Internet or access content found on the Internet." 568 F.3d 1169, 1175–76 (9th Cir. 2009).[2]

Plaintiff alleges that Fisher's injuries were the result of classified ads placed on the Backpage website. (SAP ¶¶ 169–76.) The only way to link those injuries to Salesforce would be to hold it liable for the effect of these ads—in other words, by treating Salesforce as a "publisher" of the ads by virtue of its alleged back-office support of Backpage's operations. That brings Plaintiff's claims squarely within Section 230 under a consistent line of federal and state cases from Texas and elsewhere. Section 230 precludes liability whenever "the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *Barnes*, 570 F.3d at 1102. Put another way, "Section 230(c)(1) is implicated not only by claims that explicitly point to third party content but also by claims which, though artfully pleaded to avoid direct reference, implicitly require recourse to that content to establish liability or implicate a defendant's role, broadly defined, in publishing or excluding third party [c]ommunications." *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 156 (E.D.N.Y. 2017), aff'd in part, dismissed in part sub nom. *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019). As the Beaumont Court of Appeals recognized, allowing a plaintiff "to assert any cause of action against [a platform] for publishing content created by a third party, or for refusing to remove content created by a third party[,] would be

[2] Moreover, the liability Plaintiff seeks to impose on Salesforce is entirely derivative of that of Backpage, which is unquestionably an "interactive service provider" under Section 230. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016). In *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014), the D.C. Circuit held that Mark Zuckerberg is a "provider" of an "interactive computer service" (Facebook) because the "complaint seeks to hold him accountable for his role in making that service available"—even though it was Facebook, not Mr. Zuckerberg personally, who provided the service. *Id.* at 1357–58. The same is true of Salesforce with respect to Backpage.

squarely inconsistent with [S]ection 230." *GoDaddy.com*, 429 S.W.3d at 758. It would "significantly diminish the protections" of Section 230 to "allow[] plaintiffs to escape the CDA by arguing that an interactive computer service provider intended its neutral tools to be used for unlawful purposes." *Daniel v. Armslist, LLC,* 386 Wis. 2d 449, 476 (Wis. 2019).

Plaintiff's causes of action against Salesforce all necessarily depend on the alleged posting of third-party trafficking ads on Backpage's website. Plaintiff alleges that Fisher was forced into sex trafficking "[t]hrough the Backpage website," which allowed her exploiters "to easily post advertisements of her." (SAP ¶¶ 172, 174, 252, 254.) To hold Salesforce liable on this theory would "implicitly require recourse to that content," *Cohen*, 252 F. Supp. 3d at 156, and is "based on the content of the [ads] that were posted" on Backpage. *Igbonwa v. Facebook, Inc.*, No. 18-CV-02027-JCS, 2018 WL 4907632, *7 (N.D. Cal., Oct. 9, 2018). Plaintiff's claims treat Salesforce as a "publisher" under Section 230 "because absent offending content, there would be no basis for even the frivolous causal connection that Plaintiffs have alleged." *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 889–90 (N.D. Cal. 2017).

The 2018 Amendments to Section 230 confirm that it bars Plaintiff's claims. In 2018, Congress enacted the Allow States And Victims To Fight Online Sex Trafficking Act of 2017 ("FOSTA"), Pub. L. 115-164, Apr. 11, 2018, 132 Stat. 1253, which enacted three specific and limited exemptions from the express preemption provisions of Section 230—namely for state criminal proceedings, state AG civil enforcement proceedings, and private civil claims under an expanded federal cause of action. None of those exemptions allows for private state law civil claims.[3] And as the U.S. Supreme Court has made clear, where Congress has chosen to enact limited and defined sets of exemptions, that means it intends to enact *only* those exemptions, and courts cannot create additional ones. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (express exemption "implies that there are no other[s]"); *Law v. Siegel*, 571 U.S. 415, 424 (2014) (the "meticulous … enumeration of

[3] The FOSTA exemptions exclude from preemption only: (1) private civil actions under an expanded federal cause of action, 18 U.S.C. §§ 1591 & 1595; (2) state law criminal prosecutions where the underlying conduct would violate §§ 1591 or 2421A; and (3) parens patriae civil enforcement actions by state AGs under § 1595(d).

exemptions … confirms that courts are not authorized to create additional" exemptions). That rule is especially true for a *preemption* provision, where reading non-textual exemptions into the statute "would transform [a] narrow exception into a general license for state law to override [federal law]." *Hillman v. Maretta*, 569 U.S. 483, 496 (2013); *accord U.S. v. Brockamp*, 519 U.S. 347, 352 (1997). As the California Superior Court recognized in its recent ruling dismissing nearly identical claims brought by the same plaintiffs' counsel, "FOSTA exempted only three categories of sex trafficking claims," and "[n]othing in the text of the statutes exempted private civil state law claims from immunity." *Does #1–#90* (Ex. A).

Because Plaintiff's claims against Salesforce "fall squarely within the CDA's immunity provision, as a matter of law, and cannot be cured by amendment," the SAP should be dismissed with prejudice as to Salesforce. *Igbonwa*, 2018 WL 4907632, at *7.

II. The SAP Does Not State a Claim for Negligence or Negligence Per Se

Plaintiffs' claims against Salesforce also fail as a matter of law on the merits, and should be dismissed on that independent ground as well. Negligence actions in Texas require "a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach." *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009). Negligence per se requires a showing that: "(1) the defendant's act or omission is in violation of a statute or ordinance; (2) the injured person was within the class of persons which the ordinance was designed to protect; and (3) the defendant's act or omission proximately caused the injury." *Ybarra v. Ameripro Funding, Inc.*, 01-17-00224-CV, 2018 WL 2976126, at *9 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

Plaintiff's negligence claims fail because the SAP does not allege causation or a legal duty owed by Salesforce. Plaintiff's negligence per se cause of action fails for the additional reason that, as discussed below, the statutory claim on which it rests (Chapter 98) has no basis in law or fact.

A. The SAP Fails to Plead Facts Establishing Causation

The facts alleged in the SAP make clear that Salesforce was not a proximate or factual cause of Plaintiff's alleged injuries.

As to proximate causation, for an actor to be liable for another's harm, the "plaintiff must plead and prove that the defendant's negligence is the proximate cause of his injury." *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996). "Proximate cause has two elements—cause in fact (or substantial factor) and foreseeability. … These elements cannot be satisfied by mere conjecture, guess, or speculation." *MEMC Pasadena, Inc. v. Riddle Power, LLC*, 472 S.W.3d 379, 398 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Here, there is an insurmountable chasm between the circumstances that caused Fisher's injuries and the alleged acts of Salesforce. The SAP alleges that Fisher was injured by being forced into sex trafficking, and then being offered for sale through ads posted on Backpage. (SAP ¶¶ 169–76.) The SAP describes at length how Backpage, through its advertising and content policies, facilitated these wrongful acts by allowing and encouraging sex trafficking ads on its site, by sanitizing ads to prevent detection by law enforcement, and by allowing traffickers to communicate with each other on the site. (*Id.* ¶¶ 77–129.) But the SAP is devoid of factual allegations linking Salesforce or its products to Fisher's injuries or even to any of Backpage's alleged acts. Salesforce is alleged to have provided to the Backpage affiliate its CRM tool, which it marketed generally to businesses across the globe seeking to improve and streamline the way they manage their customer data. (SAP ¶¶ 181–83, 185.) There is no allegation that Salesforce had any role in abducting Fisher, assisting traffickers or johns in sexually exploiting her, or designing and/or managing either the advertising and content policies by which Backpage allegedly allowed and encouraged the offending ads, or Backpage's customer messaging function. (*Id.* ¶¶ 169–76.) Rather, the alleged chain of causation between Salesforce's actions and Fisher's injuries goes something like this: (1) Salesforce sold generally available CRM business tools to Backpage, (2) Backpage used those tools to manage its customer data, (3) Backpage developed and implemented advertising and content policies that allowed and encouraged sex traffickers to post ads on its website, (4) sex traffickers abducted Fisher and advertised her using Backpage classified ads, and (5) Fisher was injured when she was sexually exploited by individuals who answered those ads.

Such a disjointed series of allegations does not establish proximate causation against Salesforce. Proximate causation "requires more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury." *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995). A provider of computer networks, phone systems, antivirus software, or spreadsheet programs, does not legally "cause" harm to third parties when a customer allegedly uses those products to operate a business that engages in harmful conduct. Indeed, even that connection is not present here—the SAP does not allege that Salesforce's CRM software was used to create or post sex trafficking ads. Plaintiff alleges that Salesforce's systems were used to manage customer data, but she never states how managing such data creates liability for unlawful conduct by Backpage, much less any specific acts that caused Fisher's injuries.

Courts have reached similar conclusions where plaintiffs seek to hold internet companies liable because their platforms were used by terrorists. In *Crosby v. Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019), the Sixth Circuit affirmed the dismissal of claims under the federal Anti-Terrorism Act ("ATA"), as well as state law negligence and wrongful death claims—all premised on allegations that Twitter, Google, and Facebook "allow[ed] ISIS to reach a global audience, attracting new recruits and inspiring 'lone actor attacks,'" and that ISIS's use of those platforms in turn led to the Orlando nightclub shooting. *Id.* at 620–21. The *Crosby* plaintiffs further alleged that these internet companies knew that ISIS was using their platforms, and "ignore[d] requests to block ISIS and fail[ed] to prevent ISIS from using [their] services." *Id.* at 620. The Sixth Circuit held that all of these claims failed for lack of proximate causation. *Id.* at 624–27. In so holding, the court noted that "the content did not compel [the shooter's] actions" and that a contrary holding would subject internet platforms to liability for "seemingly endless acts of modern violence." *Id.* at 625.

The Ninth Circuit reached the same conclusion in *Fields v. Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018), which involved similar ATA claims based on allegations that Twitter knowingly provided ISIS with an open forum and a secure direct messaging service that allowed it to engage in recruitment, propagandizing, and fundraising, which in turn allowed ISIS to plan, execute, and advocate for

terrorist attacks across the globe. *Id.* at 742. The plaintiffs alleged that Twitter was fully aware that ISIS was using its site for these purposes, yet refused to change its content rules to prevent threats of violence on the site. *Id.* at 742–43. The Ninth Circuit held that the plaintiffs failed to allege proximate causation between the provision of internet services to ISIS that facilitated its growth, and plaintiffs' injuries caused by terrorist attacks. *Id.* at 749–50.

As in *Crosby* and *Fields*, Plaintiff's allegations against Salesforce reduce to two theories, neither of which gives rise to a cognizable legal claim, and either of which would open up potentially endless liability to providers of internet-based tools like Salesforce's CRM software. Plaintiff first alleges that the CRM subscriptions that Salesforce provided were designed to allow businesses to manage their customer data, so that in Backpage's hands, that *necessarily* must mean that the CRM tool would be used to organize data relating to pimps and traffickers, who were among Backpage's customers. (SAP ¶¶ 10, 175, 187.) But the SAP admits that Backpage itself "implemented" the CRM tools (*id.* ¶ 190), and Plaintiff does not allege any link between Salesforce's provision of tools to manage customer-related data and the harm to Fisher when the company to which those tools were provided allowed its website to be used by sex traffickers to post classified ads for illegal activity.

Plaintiff's second theory is that Salesforce helped Backpage "grow" by providing it with business tools, and that, by virtue of this growth, Backpage was able to gain additional sex-trafficking market share. (SAP ¶¶ 177–93, 270.) But even if Plaintiff could show that knowledge of Backpage's role in sex trafficking was widespread, and that Backpage had no legitimate business beyond sex trafficking, that *still* does not mean that Salesforce can be said to have "caused" specific illegal conduct by sex traffickers, johns, or Backpage, simply because Salesforce provided Backpage with services that helped it expand its operations. Indeed, allegations that online platforms helped ISIS grow and reach a global audience were held insufficient to establish proximate causation in both *Crosby* and *Fields*. 921 F.3d at 624–27; 881 F.3d at 749–50.

Plaintiff cannot even allege that Salesforce was a factual, or "but for" cause of Fisher's injuries. In Texas, "[t]he test for cause in fact is whether the act or omission was a substantial factor in bringing

about the injury *without which the harm would not have occurred*." *Douglas v. Hardy*, 12-18-00035-CV, 2019 WL 2119670, at *5 (Tex. App.—Tyler May 15, 2019, no pet.) (emphasis added). Here, "there is no evidence beyond mere conjecture, guess, or speculation" that had Salesforce not provided Backpage with CRM tools to organize its customer data, Backpage somehow would have changed its advertising and content policies or messaging functionality that allegedly facilitated sex trafficking—much less that the third-party traffickers would not still have sexually exploited Fisher. *Williams v. Colthurst*, 253 S.W.3d 353, 365 (Tex. App.-Eastland 2008, no pet.). And even if CRM tools were essential to the posting of ads or the functionality of Backpage's messaging service—and there is no credible basis for suggesting that they were—there is no indication that, had Salesforce not provided its CRM software, Backpage would not have been able to purchase such software from another vendor. This by itself is a fatal deficiency. *See Douglas*, 2019 WL 2119670, at *5 ("Cause in fact is not shown if the defendant's act did no more than furnish a condition which made the injury possible.").

Finally, the doctrine of superseding cause independently defeats any showing of causation as to Plaintiff's negligence causes of action. "Generally, third-party criminal conduct is a superseding cause," severing the chain of causation, "unless the conduct is a foreseeable consequence of [the defendant's] negligence." *Doe v. Messina*, 349 S.W.3d 797, 800 (Tex. App.—Houston [14th Dist.] 2011, pet. filed); *Dyess v. Harris*, 321 S.W.3d 9, 14 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Here, the criminal conduct of third-party traffickers, johns, and/or Backpage cut off any possible chain of causation between Salesforce's actions and Fisher's injuries.

Among the factors to be considered in assessing whether a superseding cause will negate causation is whether the intervening force was "extraordinary rather than normal in view of the circumstances existing at the time," and whether it was "due to an act of a third person" that was "wrongful toward the [victim] and as such subjects the third person to liability [to the victim]." *Doe v. Messina*, 349 S.W.3d 797, 800–01 (Tex. App.—Houston [14th Dist.] 2011, pet. filed). In *Doe v. Messina*, the plaintiff was sexually assaulted when she was 16 by a fellow houseguest, who was 19, at a house party they both attended. 349 S.W.3d at 799. The plaintiff sought to hold the adult homeowners

liable for failing to "supervise and control" the teenage guests when they "knew or should have known the teenagers were consuming alcohol and drugs." *Id.* at 802. The Houston Court of Appeals found that "[a]lthough allowing the teenagers to consume alcohol without adult supervision might have had various foreseeable consequences (such as arguments, promiscuity, horseplay, etc.), the egregious, felonious crime of sexual assault was an *extraordinary* consequence." *Id.* at 803. The court further found that the assaulter's criminal act was a superseding cause of Doe's injury because: "(1) [the assaulter] committed the sexual assault; (2) this action subjected [the assaulter] to civil liability to Doe as well as a felony indictment; and (3) [the assaulter] … was highly culpable for committing the sexual assault." *Id.* at 804; *see also Spears v. Coffee*, 153 S.W.3d 103, 107–08 (Tex. App.—San Antonio 2004, no pet.) (alleged negligent supervision by adult homeowners was not the proximate cause of injuries one teenager suffered in an assault by another, because the assault was "extraordinary in nature" and "clearly wrongful," and the assaulter had been "found criminally liable").

Plaintiff's negligence causes of action fail for the same reasons. Fisher's injuries were caused by the "extraordinary" and felonious conduct of unnamed third-party traffickers, as well as Backpage and its principals (who were indicted for this exact conduct). (SAP ¶¶ 198, 221–22.) The criminal conduct alleged here is far from a "normal" or "ordinary" result of a company using Salesforce's CRM tools, and Plaintiff does not allege otherwise. Accordingly, the unforeseeable criminal acts of multiple third parties broke—as a matter of law—any slight causal connection that could have existed between Salesforce's alleged acts and Fisher's injuries.

B. The SAP Fails to Plead a Legal Duty

Plaintiff's negligence claims fail for the additional reason that she does not allege that Salesforce had a legal duty. "Whether a duty exists is a threshold inquiry and a question of law; liability cannot be imposed if no duty exists." *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006). "Under Texas law, in the absence of a relationship between the parties giving rise to the right of control, one person is under no legal duty to control the conduct of another, even if there exists the practical ability to do so." *Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993) (citations omitted). Examples of "special

relationship[s]" providing a right to control include "master/servant or parent/child." *Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 720 (Tex. 1995) (citations omitted).

As the Texas Supreme Court has explained, "the common law's focus should remain on the [third party] as the person primarily responsible for his own behavior and best able to avoid the foreseeable risks of that behavior." *Graff*, 858 S.W. 2d at 922. For example, the Texas Supreme Court in *Graff* held that a social host was not negligent when he served alcohol to an intoxicated guest who the host knew would be driving, and who later collided with a motorcyclist. *Id.* at 918; 921–22. The Texas Supreme Court held that the host did not have control over the guest, and also did not have any duty based on the host's "'exclusive control' of the alcohol supply." *Id.* at 920.

Carter v. Abbyad confirms the absence of any duty to prevent harm caused by a third party, absent a right to control that third party. 299 S.W.3d 892 (Tex. App.—Austin 2009). In *Carter*, the plaintiffs were stabbed by an individual, Dustin McManus, whom the defendants had driven to a party. *Id.* The plaintiffs alleged that the defendants (1) had "provided and/or observed McManus consume an excessive amount of illegal drugs, including marijuana and more than three times the normal dose of hallucinogenic mushrooms," (2) "knew McManus had a knife," (3) saw him exhibit bizarre and "threatening" behavior before they went to the party, and (4) took McManus to the party despite knowing that strangers would "ridicule him." *Id.* at 895, 899–900. According to the plaintiffs, this exposed him "to a situation that would certainly result in danger to … McManus or those to [whom] … McManus was exposed." *Id.* The court affirmed dismissal of the petition, stating: "appellants have not alleged facts sufficient to demonstrate that appellees owed them a duty to have attempted to control McManus's behavior or not transport him to the party under Texas law." *Id.* at 901. The court explained that "Texas common law is fundamentally premised on individuals' responsibility for their own actions," and the exceptions to that rule all involved the legal obligation or right to control another person's conduct. *Id.*; *see also Rocha v. Faltys*, 69 S.W.3d 315, 321 (Tex. App. 2002) (defendant who knew plaintiff was intoxicated and could not swim, who drove plaintiff to the top of a cliff, and

who encouraged plaintiff to jump into the swimming hole did not create a dangerous situation from which he had a duty to protect plaintiff).

Here, there is no allegation—nor could there be any allegation—that Salesforce had any control over the third-party sex trafficker or the "johns" who allegedly exploited Fisher. Plaintiff's negligence theory—that Salesforce had a duty to prevent sexual exploitation by these third parties who may have purchased and/or responded to ad placements on a website operated by yet another party (Backpage), simply because a Backpage affiliate purchased a subscription to use Salesforce's CRM software to manage its customer database—is directly contrary to Texas law on legal duties, and would stretch liability beyond all recognizable limits. Plaintiff's allegations make clear that Fisher's injuries were caused by unnamed traffickers, pimps, and johns—possibly with the assistance of or encouragement from Backpage. (SAP ¶¶ 169–76, 211, 221–223.) Indeed, that is *all* that is alleged about Fisher's injuries. Although Plaintiff alleges in a conclusory fashion that Salesforce "kn[ew] what Backpage was being used for" (*id.* ¶ 197), that vague allegation is insufficient as a matter of law to create a legal duty to prevent Fisher's injury at the hands of third parties.

Texas courts have made clear that selling ordinary, non-defective products does not create a peril to others—even if the purchaser eventually uses those products to injure third parties. *See, e.g.*, *Gann v. Anheuser-Busch, Inc.*, 394 S.W.3d 83, 89 (Tex. App.—El Paso 2012, no pet.) ("While we agree … it is reasonably foreseeable that a longneck [beer] bottle might be used as a weapon, [the plaintiff] has failed to show why the general principle that no person has a legal duty to protect another from the criminal acts of a third person is inapplicable in this case."). As a federal court in Texas stated:

> Consider the Postal Service or Federal Express, which sell transportation services that could be used to carry harmful articles. As far as we can discover, no court has held such a carrier liable for failure to detect and remove harmful items from shipments … Similarly, telephone companies are free to sell phone lines to entities …, without endeavoring to find out what use the customers make of the service.

Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 851 (W.D. Tex. 2007), aff'd, 528 F.3d 413 (5th Cir. 2008) (quoting *Doe v. GTE Corp.*, 347 F.3d 655, 661 (7th Cir. 2003)). These cases foreclose the duty Plaintiff seeks to impose on Salesforce here. Salesforce's CRM tools are not inherently dangerous, have many

socially beneficial uses, and do not have any specialized utility for sex trafficking. There is not even any allegation in the SAP that Salesforce's CRM tools were used in connection with sex-trafficking ads listed on Backpage's website, Backpage's advertising and content policies, or Backpage's messaging function—which are the *only* Backpage functionalities to which Plaintiff has tried to link Fisher's injuries. (SAP ¶¶ 169–76, 210–12, 221–23.) But even if any such use *were* alleged, the mere provision of such software still would be too remote from the alleged crimes committed by unnamed and unknown third parties. Salesforce has no duty to investigate the business practices of its customers, or to speculate about whether a customer might use its inherently benign and generally available CRM software tools for an unconventional or illegal purpose. *See Bryant v. Winn-Dixie Stores, Inc.*, 786 S.W.2d 547, 550 (Tex. App.—Fort Worth 1990, writ denied) (ammunition seller had no duty to investigate whether a purchaser was a convicted felon or was mentally unstable). Plaintiff's negligence causes of action should be dismissed with prejudice.

III. The SAP Does Not Allege a Violation of the Texas Anti-Trafficking Statute

Civil liability under Chapter 98 is limited to persons who "intentionally or knowingly benefit[ed] from participating in a venture that traffick[ed] another person." Tex. Civ. Prac. & Rem. Code § 98.002(a). The claim against Salesforce fails because the SAP does not allege that Salesforce intentionally or knowingly participated in, much less intentionally or knowingly benefited from participation in, any "venture" that trafficked Fisher (or any other person). Plaintiff's conclusory recitations of language from Chapter 98 (*see, e.g.*, SAP ¶¶ 210–12) are legal contentions unsupported by facts, and are irrelevant to assessing whether Plaintiff's claim has a plausible basis in fact. *Guzder v. Haynes & Boone, LLP*, 01-13-00985-CV, 2015 WL 3423731, at *3 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (Texas courts "accept as true the *factual* allegations in the pleadings" (emphasis added)). The facts that are alleged would establish, at most, that Salesforce provided its CRM software to an affiliate of a company that in turn sold ads to unnamed third parties, and that some of those third parties committed criminal acts involving sex trafficking that injured Fisher. *See* SAP ¶¶ 251–54. As shown below, even if true, these facts would not come close to establishing against Salesforce any of

the elements of a Chapter 98 claim, all of which must be established to overcome a motion to dismiss.

A. The SAP Does Not Allege A "Venture" Between Salesforce and Backpage

Although Texas courts have yet to interpret Chapter 98, some of its elements are similar to the federal Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (as amended, the "TVPA"), codified at 18 U.S.C. 1581 *et seq*. Like Chapter 98, the TVPA provides a private right of action against a person who "knowingly benefit[ed] … from participation in a venture which that person knew or should have known has engaged in" human trafficking. 18 U.S.C. § 1595(a). And like Chapter 98, the TVPA was enacted "to combat trafficking of persons, especially into the sex trade, slavery, and slavery-like conditions … through prevention, through prosecution and enforcement against traffickers, and through protection and assistance to victims of trafficking." *Johns v. Daniel*, No. H-13-2666, 2014 WL 1882760, at *1, 3 (S.D. Tex. May 12, 2014) (quoting H.R. Conf. Rep. 106-939, at 1 (2000)). Given the similar language on these points, this Court may look to federal appellate authorities construing the TVPA for interpretive guidance. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360–65 (Tex. 2000); *Johnson v. Lynaugh*, 766 S.W.2d 393, 394 (Tex. App.—Tyler 1989), *writ denied*, 796 S.W.2d 705 (Tex. 1990).

In *United States v. Afyare*, 632 F. App'x 272 (6th Cir. 2016)), the Sixth Circuit found that the term "venture," as used in the TVPA, means a "sex-trafficking venture," and exists only where "[t]wo or more people [] engage in sex trafficking together." *Id.* at 286; *Noble v. Weinstein*, 335 F. Supp. 3d 504, 523 (S.D.N.Y. 2018) (applying *Afyare* to civil claims under the TVPA). "The participation giving rise to the benefit must be participation in a *sex-trafficking* venture, not participation in other activities." *Geiss v. Weinstein Co. Holdings LLC*, No. 17 CIV. 9554 (AKH), 2019 WL 1746009, at *7 (S.D.N.Y. Apr. 18, 2019) (emphasis in original). In a related context, courts have held that "simply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to subject an individual to RICO liability." *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 728 (7th Cir. 1998), *holding modified by Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961 (7th Cir. 2000). Even if Plaintiff could allege that the activities of Fisher's trafficker and/or the "johns" who exploited her

constituted a sex-trafficking venture, Plaintiff does not and cannot allege that Salesforce had any involvement with these perpetrators. And although Plaintiff tries to allege a sex trafficking "venture" between Salesforce and Backpage, she does not (and could not) allege that Salesforce engaged with Backpage in any sex-trafficking activities—rather, she alleges only that Backpage purchased and employed a subscription to Salesforce's CRM software, as tens of thousands of other companies have done. (*See* SAP ¶¶ 187, 190, 251.) This fact does not create a sex trafficking "venture" under Chapter 98.

The ordinary meaning of the term also supports this conclusion. A "venture" is "[a]n undertaking that involves risk; esp., a speculative commercial enterprise." Black's Law Dictionary (10th ed. 2014); *Gilbert v. United States Olympic Comm.*, No. 18-CV-00981-CMA-MEH, 2019 WL 1058194, at *12 (D. Colo. Mar. 6, 2019) (adopting this definition of "venture" in construing the TVPA), report and recommendation adopted in part, rejected in part, 18-CV-00981-CMA-MEH, 2019 WL 4727636 (D. Colo. Sept. 27, 2019). As this definition implies, a crucial attribute of a "venture" is some form of profit sharing, *i.e.*, sharing of the risk involved in the transaction. *See Louisiana Mun. Police Employees' Ret. Sys. v. Hershey Co.*, No. CV 7996-ML, 2013 WL 6120439, at *1, 9 (Del. Ch. Nov. 8, 2013) (Report) (defendant did not participate in a "venture" for TVPA purposes where plaintiff "offers no allegation that [defendant] is engaged in profit-sharing or any other economic association with any [alleged traffickers], other than a simple buy-sell agreement"). Here, there is no allegation that Salesforce was engaged in any sex trafficking-related activity, much less that it engaged with anyone in profit-sharing or "a speculative commercial enterprise" in connection with sex-trafficking. Because a "venture" requires something more than a commercial transaction for lawful, multi-purpose business software—which is all that Plaintiff alleges occurred here, (SAP ¶¶ 190, 251)—Plaintiff has failed to allege facts supporting this element of her Chapter 98 cause of action.

B. The SAP Does Not Allege That Salesforce "Participated" in a Sex-Trafficking Venture

Although the SAP tries to paint an image of a sex-trafficking venture between Backpage and various unnamed third-party sex traffickers, those allegations are insufficient to impose liability on

Salesforce, because Plaintiff does not (and cannot) allege that Salesforce "participated" in any such venture. In interpreting the "participation" requirement in the TVPA, one court recently noted:

> Because guilt, or in this case liability, cannot be established by association alone, Plaintiff must allege specific conduct that furthered the sex trafficking venture. Such conduct must have been undertaken with the knowledge, or in reckless disregard of the fact, that it was furthering the alleged sex trafficking venture. In other words, some participation in the sex trafficking act itself must be shown.

Noble, 335 F. Supp. 3d, at 524 (citing *Afyare*, 632 F. App'x, at 285). A lawful transaction unrelated to sex trafficking, such as Salesforce's provision of generally available commercial software, cannot give rise to Chapter 98 liability, because such an action does not constitute participation "in the sex trafficking itself." *See Afyare*, 632 Fed. App'x at 286. There is no allegation that Salesforce had any role in trafficking Fisher, or more generally that it either was involved in sex trafficking activities through Backpage's website or knowingly engaged in specific conduct to further a sex-trafficking venture. To the extent Plaintiff alleges that Salesforce's software tools were used at all to further sex trafficking, she admits that Backpage, not Salesforce, implemented its own data into the CRM tools, organized that data, and employed it for Backpage's own purposes. (SAP ¶¶ 188–190, 197.)

C. The SAP Does Not Allege That Salesforce "Intentionally or Knowingly" "Benefited" From Participation in a Sex-Trafficking Venture

Finally, Plaintiff's does not and cannot allege that Salesforce "intentionally or knowingly" "benefitted" from sex trafficking. Courts interpreting this requirement under the TVPA have held that the "benefit" must derive from "participation in the sex trafficking act itself." N*oble*, 335 F. Supp. 3d, at 524. Here, the only "benefit" allegedly received by Salesforce is the purchase price of its software—a benefit that Salesforce derives from every one of its customers, regardless of their identity or specific business model. This "benefit" is derived from Salesforce's ordinary, lawful business of producing and selling its software, not from its customers' specific subsequent use of that software. And even if that benefit somehow could be construed as deriving from the subsequent *use* of that software, Plaintiff's claim still fails because she does not allege any facts suggesting that Salesforce knew that it was somehow benefiting from sex-trafficking committed against Fisher by unnamed third parties, much less that Salesforce had the *intent* to benefit from any such criminality.

CONCLUSION

For the foregoing reasons, the Court should dismiss the SAP pursuant to Rule 91a without leave to amend.

DATED: November 4, 2019

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

On November 4, 2019, Defendant's counsel Kristin Linsley conferred with Plaintiff's counsel Annie McAdams via e-mail regarding Defendant's requested relief, and Ms. McAdams confirmed that Plaintiff opposes the relief sought herein.

/s/ Collin D. Ray
Collin D. Ray

Attorney for Defendant salesforce.com, inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November, 2019, the foregoing document was filed and served on all counsel of record by electronic case filing in accordance with the Texas Rules of Civil Procedure.

/s/ Collin D. Ray
Collin D. Ray

Attorney for Defendant salesforce.com, inc.

EXHIBIT A

FILED
San Francisco County Superior Court

OCT 03 2019

CLERK OF THE COURT

BY: _____ Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

DOES #1 through #90, sex trafficking survivors,

Plaintiffs,

vs.

SALESFORCE.COM, INC.,

Defendant.

CASE NO. CGC-19-574770

ORDER SUSTAINING DEFENDANT'S DEMURRER TO THE SECOND AMENDED COMPLAINT AND DISMISSING ACTION WITH PREJUDICE

On September 23, 2019, Defendant Salesforce.com, Inc.'s demurrer to plaintiffs' Second Amended Complaint came on regularly for hearing before the Court. Sharon Arkin appeared on behalf of plaintiffs; Kristin A. Linsley and Matthew S. Kahn appeared for defendant. Having considered the pleadings and arguments of counsel, the Court rules as follows:

At the threshold, the Court must decide whether to rule on the demurrer, based on the following facts. On Friday afternoon, September 20, the Court issued its tentative ruling sustaining defendant's demurrer without leave to amend.[1] The same afternoon, pursuant to the Rules of Court and the Court's local rules, plaintiffs' counsel notified the Court and defendant's counsel that they intended to appear on Monday, September 23, to contest the tentative ruling. However, late on the evening of Sunday, September 22, plaintiffs electronically served and filed a request for dismissal of the entire action without prejudice. In light of this background, plaintiffs contend that the demurrer is moot; defendant, on the other hand, contends that plaintiffs' purported voluntary dismissal is ineffective. The Court permitted the parties to file supplemental briefs addressing this issue, and now agrees with defendants' position.

In general, a plaintiff may voluntarily dismiss an action at any time before the "actual commencement of trial." (Code Civ. Proc. § 581(c).) Although the right to dismiss is sometimes referred to loosely as "absolute," it is not: "Code of Civil Procedure section 581 recognizes exceptions to the right; other limitations have evolved through the court's construction of the term 'commencement of trial.'" (*Cravens v. State Board of Equalization* (1997) 52 Cal.App.4th 253, 256.) The meaning of the term "trial" is not restricted to jury or court trials on the merits, but includes other procedures, such as an order sustaining a defendant's general demurrer without leave to amend, that "effectively dispose of the case." (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 785, citing *Goldtree v. Spreckels* (1902) 135 Cal. 666, 672-673.) "The 'purpose' in cutting off the plaintiff's absolute right to dismissal upon commencement of trial is to avoid abuse by plaintiffs who,

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[1] Plaintiffs' "objection" to the Court's tentative ruling on the ground that it was emailed to only one of plaintiffs' multiple attorneys is groundless. The tentative ruling sustaining the demurrer without leave to amend was posted on the Court's website, as contemplated by Cal. R. Ct. 3.1308 and the Court's Local Rules; the Court emailed the full tentative to counsel as a courtesy. And plaintiffs' counsel unquestionably received it, as shown by their email the same afternoon stating their intention to appear to contest the tentative.

when led to suppose a decision would be adverse, would prevent such decision by dismissing without prejudice and refiling, thus subjecting the defendant and the courts to wasteful proceedings and continuous litigation.'" (*Mesa Shopping Center-East, LLC v. Hill* (2014) 232 Cal.App.4th 890, 904, quoting *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 909.)

The issue presented here is whether a plaintiff's right to dismiss without prejudice is cut off before the court actually rules on a demurrer or motion for summary judgment, but after it issues a tentative ruling granting such a dispositive motion. While our Supreme Court has not decided the issue, and the Courts of Appeal have reached varying conclusions on the issue, the weight of recent authority holds that after an adverse tentative ruling on a dispositive motion has been announced, the plaintiff may not thereafter voluntarily dismiss the action without prejudice to avoid the anticipated ruling. (E.g., *Franklin Capital Corp.* (2007) 148 Cal.App.4th 187, 200-203 [summarizing rule as follows: voluntary dismissal is ineffective if taken "in the light of a public and formal indication by the trial court of the legal merits of the case"] [collecting authority]; *Mid-Century Ins. Co. v. Superior Court* (2006) 138 Cal.App.4th 769, 776 ["a tentative ruling sustaining a demurrer without leave to amend bars a voluntary dismissal"]; *Groth Bros. Oldsmobile, Inc. v. Gallagher* (2002) 97 Cal.App.4th 60, 70.) The rationale for this rule has been articulated as follows:

> Not only does allowing a plaintiff to file a voluntary dismissal without prejudice in the face of a tentative ruling that the court will sustain the demurrer without leave to amend waste the time and resources of the court and other parties and promote annoying and continuous litigation, but we are persuaded that allowing such dismissal in the circumstances of this case undermines . . . the tentative ruling system.

(*Groth Bros. Oldsmobile, Inc.*, 97 Cal.App.4th at 70; see also *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 919 [such "conduct smacks of gamesmanship, undercuts the tentative ruling system, and wastes the resources of the court and opposing parties"]; *California Practice Guide: Civil Procedure Before Trial* ¶ 11:25.3, at 11-14 (The Rutter Group 2018) [observing that rule precluding dismissal following adverse tentative ruling "seems correct from a policy standpoint"].) This Court agrees. Accordingly, plaintiffs' request for dismissal is denied, and the Court will proceed to decide the demurrer.

Defendant Salesforce.com, Inc.'s demurrer to plaintiffs' Second Amended Complaint is sustained without leave to amend. Section 230 of the federal Communications Decency Act ("CDA"), 47 U.S.C. § 230, bars the instant claims.

"There are three essential elements that a defendant must establish in order to claim section 230 immunity. They are '(1) the defendant [is] a provider or user of an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of information; and (3) the information at issue [is] provided by another information content provider.'" (*Delfino v. Agilent Techs., Inc.* (2006) 145 Cal.App.4th 790, 804-805.)

The CDA provides that the provider of an "interactive computer service" is immune from liability for third-party information (like the advertisements on Backpage) unless the provider "is responsible, in whole or in part, for the creation or development of [the] information." (47 U.S.C. §§ 230(c)(1) and (f)(3).) The term "interactive computer service" is broadly defined and applies to software providers such as defendant. (47 U.S.C. 230(f)(2),(4) [defining "interactive computer service" to include "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server" and "access software provider" as "a provider of software (including client or server software), or enabling tools" that "(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."]; see *Zango, Inc. v. Kaspersky Lab, Inc.* (9th Cir. 2009) 568 F.3d 1169, 1173-1176 [holding that antivirus software company is a provider of an "interactive computer service" entitled to immunity under section 230]; *Delfino v. Agilent Techs., Inc.* (2006) 145 Cal.App.4th 790, 805 ["Courts have broadly interpreted the term 'interactive computer service' under the CDA."]; see also, e.g., *Gonzalez v. Google, Inc.* (N.D. Cal. 2017) 282 F.Supp.3d 1150, 1164-166 [holding that plaintiffs sought to treat Google as a publisher of ISIS's content where they alleged that it knowingly provided ISIS followers with material support including "expert assistance, communications equipment, and personnel"].) Here, although plaintiffs strenuously argue that defendant Salesforce is outside these broad statutory definitions, their argument is belied by their own allegations in the second amended complaint, which expressly allege that defendant's customer relationship management (CRM) software provides

"operational support" to Backpage by supplying "tools" that enabled it, among other things, to create platforms for Backpage to contact and procure customers, manage customer histories, provide and manage Backpage's customer database, and provide and manage a secure cloud storage database for Backpage to store and secure the details of its business. (Second Amended Complaint, ¶¶ 147, 150, 152.) Further, as they concede, defendant is not responsible, in whole or in part, for the advertisements placed by third parties on Backpage.com. Defendant therefore meets prong one of the above test.

Plaintiffs' claims also treat defendant as the publisher of the information. Plaintiffs allege that Backpage's third-party classified advertisements caused them to be exploited. (Second Amended Complaint, ¶¶131, 138.) Defendant can only be liable if it is linked to these advertisements and therefore, plaintiff is treating defendant as a publisher, since its "platform and CRM" enabled Backpage to publish and disseminate content. "Section 230(c)(1) is implicated not only by claims that explicitly point to third party content but also by claims which, though artfully pleaded to avoid direct reference, implicitly require recourse to that content to establish liability or implicate a defendant's role, broadly defined, in publishing or excluding third party [c]ommunications." (*Cohen v. Facebook, Inc.* (E.D.N.Y. 2017) 252 F.Supp.3d 140, 156.) Plaintiffs' argument that the CDA applies only to "defamation-type" claims is erroneous as a matter of law. (See *Doe II v. MySpace Inc.* (2009) 175 Cal.App.4th 561, 568 ["The express language of the statute indicates Congress did not intend to limit its grant of immunity to defamation claims. Instead, the legislative history demonstrates Congress intended to extend immunity to all civil claims..."].) Defendant meets prong two.[2]

Backpage's advertisements caused the harm. (Second Amended Complaint, ¶¶131, 138.) There is no allegation that defendant created the specific content at issue (i.e. Backpage's

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[2] Significantly, Backpage itself has been held to be protected by section 230. (See, e.g., *Jane Doe No. 1 v. Backpage.Com, LLC* (1st Cir. 2016) 817 F.3d 12, 19-21 [affirming dismissal of claims against Backpage for engaging in sex trafficking of minors, finding that claims treat Backpage as the publisher or speaker of the content of the challenged advertisements].) If Backpage itself is immune under section 230, it is difficult to fathom why a third-party software provider such as defendant Salesforce, whose connection to the offending advertisements is far more attenuated, would not be entitled to the same protection.

advertisements), and indeed plaintiffs concede it did not. Plaintiffs' claim is that Backpage misused defendant's CRM tools. (Second Amended Complaint, ¶150 [listing defendant's services]; ¶152 ["Backpage implemented Salesforce's tools and platforms"].) Defendant meets prong three.

The court rejects plaintiffs' argument that recent amendments to the CDA allow their state law claims to proceed. These amendments, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 or "FOSTA," Pub. L. No. 115-164, 132 Stat. 1253 (2018), were signed into law on April 11, 2018. (*Woodhull Freedom Foundation v. United States* (D.D.C. 2018) 334 F.Supp.3d 185, 190 [upholding constitutionality of FOSTA].) FOSTA exempted only three categories of sex trafficking claims: (1) private federal civil claims brought in federal court under 18 U.S.C. § 1595; (2) state criminal prosecutions; and (3) state attorney general civil actions. (47 U.S.C. § 230(e)(5); 18 U.S.C. § 1595(d); see *Woodhull Freedom Foundation*, 334 F.Supp.3d at 191-192.) Nothing in the text of the statutes exempted private civil state law claims from immunity. The Court is not persuaded by plaintiffs' argument that the general language in the preamble to the amendments overrides the plain language of the amendments themselves. (See *Kingdomware Technologies, Inc. v. United States* (2016) 136 S. Ct. 1969, 1978 [prefatory clause to legislation "announces an objective that Congress hoped that the Department would achieve . . . , but it does not change the plain meaning of the operative clause"]; *Gonzalez v. Google, Inc.*, 282 F.Supp.3d at 1160-1161 ["It is well settled that prefatory clauses or statements of purpose do not change the plain meaning of an operative clause"].)

Finally, the Court declines plaintiffs' request for leave to amend. Plaintiffs had an opportunity to amend their complaint after defendant filed a prior demurrer on the same grounds, although the Court did not rule on that demurrer because plaintiffs submitted their second amended complaint for filing before it could be heard. Further, amendment of the complaint would be futile because plaintiffs' claims "fall squarely within the CDA's immunity provision, as a matter of law, and cannot be cured by amendment." (*Igbonwa v. Facebook, Inc.* (N.D. Cal. 2018) 2018 WL 4907632, at *7; see also, e.g., *Sikhs for Justice v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1095-1096 [dismissing claims against Facebook without leave to amend on the basis that they were barred under section 230(c) as a matter of law].)

Accordingly, defendant's demurrer to the second amended complaint is sustained without leave to amend, and the action is dismissed with prejudice.

IT IS SO ORDERED.

Dated: October 22, 2019

HON. ETHAN P. SCHULMAN