

NO. _____

IN THE COURT OF APPEALS FOR THE
FIRST OR FOURTEENTH DISTRICT OF TEXAS

***In re* FACEBOOK, INC. AND
FACEBOOK, INC. d/b/a INSTAGRAM**

Original proceeding from the 334TH District Court of
Harris County, Texas, Cause Nos. 2018-69816 and 2018-82214

PETITION FOR WRIT OF MANDAMUS

**GIBSON, DUNN &
CRUTCHER LLP**

Russell H. Falconer
State Bar No. 24069695
2100 McKinney Ave.
Suite 1100
Dallas, TX 75201-6912
Phone: (214) 698-3100
Fax: (214) 571-2936
RFalconer@gibsondunn.com

Kristin A. Linsley (*Pro Hac Vice*)
555 Mission Street
San Francisco, CA 94105-0921
Phone: (415) 393-8395
Fax: (415) 374-8471
KLinsley@gibsondunn.com

**YETTER COLEMAN
LLP**

Reagan Simpson
State Bar No. 18404700
April L. Farris
State Bar No. 24069702
Collin J. Cox
State Bar No. 24031977
Tracy N. LeRoy
State Bar No. 24062847
Jeffrey A. Andrews
State Bar No. 24050227
811 Main Street, Suite 4100
Houston, TX 77002
Phone: (713) 632-8000
Fax: (713) 632-8002
rsimpson@yettercoleman.com
afarris@yettercoleman.com
ccox@yettercoleman.com
tleroy@yettercoleman.com
jandrews@yettercoleman.com

**HUNTON ANDREWS
KURTH LLP**

Scott A. Brister
State Bar No. 00000024
500 W. 5th Street, Suite 1350
Austin, TX 78701
Phone: (512) 320-9220
sbrister@huntonak.com

Kelly Sandill
State Bar No. 24033094
Kathryn E. Boatman
State Bar No. 24062624
Ashley Kahn
State Bar No. 24087824
600 Travis, Suite 4200
Houston, TX 77002
Phone: (713) 220-4181
Fax: (713) 220-4285
ksandill@huntonak.com
kboatman@huntonak.com
akahn@huntonak.com

ATTORNEYS FOR RELATOR FACEBOOK, INC.

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Relator, Facebook, Inc.

Counsel

Scott A. Brister

HUNTON ANDREWS KURTH LLP

500 W. 5th Street, Suite 1350

Austin, TX 78701

Kelly Sandill

Kathryn E. Boatman

Ashley Kahn

HUNTON ANDREWS KURTH LLP

600 Travis Street, Suite 4200

Houston, TX 77002

Reagan Simpson

April L. Farris

Collin J. Cox

Tracy N. LeRoy

Jeffrey A. Andrews

YETTER COLEMAN LLP

811 Main Street, Suite 4100

Houston, TX 77002

Russell H. Falconer

Gibson, Dunn & Crutcher LLP

2100 McKinney Ave., Suite 1100

Dallas, TX 75201

Kristin A. Linsley (*Pro Hac Vice*)

Gibson, Dunn & Crutcher LLP

555 Mission Street

San Francisco, CA 94105

Real Parties in Interest, Jane Doe 1 and Jane Doe 2

Counsel

Annie McAdams
Matthew S. Parmet
ANNIE MCADAMS, PC
1150 Bissonnet
Houston, TX 77005

Michael T. Gallagher
Pamela McLemore
Boyd Smith
THE GALLAGHER LAW FIRM
2905 Sackett Street
Houston, TX 77098

David E. Harris
Louie J. Cook
SICO HOELSCHER HARRIS
802 N. Carancahua, Suite 900
Corpus Christi, TX 78401

Timothy F. Lee
Margaret E. Bryant
Michelle R. Meriam
WARE, JACKSON, LEE, O'NEILL, SMITH & BARROW, LLP
2929 Allen Parkway, 39th Floor
Houston, TX 77019

Respondent

Judge Steven Kirkland
334th Civil Court
Harris County Civil Courthouse
201 Caroline, 14th Floor
Houston, TX 77002

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF FACTS.....	1
ARGUMENT	6
I. Abuse of Discretion: Section 230 Bars Plaintiffs’ Claims.....	7
A. 47 U.S.C. § 230 grants immunity from suits that arise from content generated by third parties	7
B. All Texas cases on § 230 recognize this immunity	9
C. The trial court’s reasons for denying relief are incorrect.....	17
II. No Adequate Remedy: Mandamus Is the Remedy When a 91a Motion Is Improperly Denied.....	20
A. Benefits outweigh burdens of mandamus review here	21
B. The Legislature has weighed the benefits and burdens	23
CONCLUSION AND PRAYER.....	26

INDEX OF AUTHORITIES

Cases

<i>A.R.K. v. La Petite Acad.</i> , No. SA-18-CV-294-XR, 2018 WL 2059531 (W.D. Tex. May 2, 2018)	10
<i>Barnes v. Yahoo!, Inc.</i> , 570 F.3d 1096 (9th Cir. 2009).....	8
<i>Bennett v. Google, LLC</i> , 882 F.3d 1163 (D.C. Cir. 2018)	8
<i>In re Butt</i> , 495 S.W.3d 455 (Tex. App. – Corpus Christi 2016, no pet.)	25
<i>Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslis, Inc.</i> , 519 F.3d 666 (7th Cir. 2008).....	11
<i>Cisneros v. Sanchez</i> , 403 F. Supp. 2d 588 (S.D. Tex. 2005).....	10
<i>Crosby v. Twitter, Inc.</i> , 921 F.3d 617 (6th Cir. 2019).....	9
<i>Daniel v. Armslist, LLC</i> , 926 N.W.2d 710 (Wis. 2019)	11
<i>Davis v. Motiva Enters., L.L.C.</i> , No. 09-14-00434-CV, 2015 WL 1535694 (Tex. App. – Beaumont Apr. 2, 2015, pet. denied).....	10
<i>In re Dawson</i> , 550 S.W.3d 625 (Tex. 2018).....	7

<i>Doe v. Bates</i> , No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006)	10
<i>Doe v. Internet Brands, Inc.</i> , 824 F.3d 846 (9th Cir. 2016).....	18, 19
<i>Doe v. MySpace, Inc.</i> , 474 F. Supp. 2d 843 (W.D. Tex. 2007), <i>aff'd</i> , 528 F.3d 413 (5th Cir. 2008)	10
<i>Doe v. MySpace, Inc.</i> , 528 F.3d 413 (5th Cir. 2008).....	9, 10, 11, 16
<i>Doe v. MySpace, Inc.</i> , 629 F. Supp. 2d 663 (E.D. Tex. May 22, 2009)	10
<i>Dyroff v. Ultimate Software Group, Inc.</i> , 934 F.3d 1093 (9th Cir. 2019).....	11, 17
<i>Edwards v. Wyatt</i> , No. A-07-CA-1008 RP, 2009 WL 10669430 (W.D. Tex. July 6, 2009).....	10
<i>In re Essex Ins. Co.</i> , 450 S.W.3d 524 (Tex. 2014).....	6, 25
<i>Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC</i> , 521 F.3d 1157 (9th Cir. 2008).....	16
<i>Fed. Trade Comm'n v. LeadClick Media, LLC</i> , 838 F.3d 158 (2d Cir. 2016).....	11
<i>Force v. Facebook, Inc.</i> , 934 F.3d 53 (2d Cir. 2019).....	8, 9, 16
<i>Franklin v. X Gear 101, LLC</i> , No. 17 Civ. 6542 (GBD) (GWG), 2018 WL 4103492 (S.D.N.Y. Aug. 28, 2018).....	9

<i>In re Geomet Recycling LLC</i> , 578 S.W.3d 82 (Tex. 2019).....	6, 7
<i>GoDaddy.com, LLC v. Toups</i> , 429 S.W.3d 752 (Tex. App. – Beaumont 2014, pet. denied)	8, 10
<i>Green v. Am. Online (AOL)</i> , 318 F.3d 465 (3d Cir. 2003).....	11
<i>GW Equity LLC v. Xcentric Ventures LLC</i> , No. 3:07-CV-976-0, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009)	10
<i>In re H.E.B. Grocery Co.</i> , 492 S.W.3d 300 (Tex. 2016).....	21
<i>Herrick v. Grindr LLC</i> , 765 F. App'x 586 (2d Cir. 2019)	19
<i>Houston Lighting & Power Co. v. Reynolds</i> , 765 S.W.2d 784 (Tex. 1988).....	14
<i>In re Houston Specialty Ins. Co.</i> , 569 S.W.3d 138 (Tex. 2019).....	xiv, 1, 6, 25
<i>Huon v. Denton</i> , 841 F.3d 733 (7th Cir. 2016).....	18
<i>Inge v. Walker</i> , No. 3:16-CV-0042-B, 2017 WL 4838981 (N.D. Tex. Oct. 26, 2017)	10
<i>Int'l Cotton Mktg., Inc. v. Commodity Credit Corp.</i> , No. 5:08-CV-159-C ECF, 2009 WL 10705346 (N.D. Tex. June 15, 2009)	10
<i>Jane Doe No. 1 v. Backpage.com, LLC</i> , 817 F.3d 12 (1st Cir. 2016)	11
<i>Jones v. Dirty World Entm't Recordings LLC</i> , 755 F.3d 398 (6th Cir. 2014).....	11, 16

<i>Kabbaj v. Google Inc.</i> , 592 F. App'x 74 (3d Cir. 2015)	9
<i>Klayman v. Zuckerberg</i> , 753 F.3d 1354 (D.C. Cir. 2014)	16
<i>La'Tiejira v. Facebook, Inc.</i> , 272 F. Supp. 3d 981 (S.D. Tex. 2017)	10
<i>Marshall's Locksmith Serv. Inc. v. Google, LLC</i> , 925 F.3d 1263 (D.C. Cir. 2019)	8
<i>In re McAllen Med. Ctr.</i> , 275 S.W.3d 458 (Tex. 2008).....	<i>passim</i>
<i>MCW, Inc. v. Badbusinessbureau.com, L.L.C.</i> , No. Civ.A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. Apr. 19, 2004)	10
<i>Milgram v. Orbitz Worldwide, Inc.</i> , 16 A.3d 1113 (N.J. Super. Ct. Law Div. 2010)	9
<i>Milo v. Martin</i> , 311 S.W.3d 210 (Tex. App. – Beaumont 2010, no pet.)	10
<i>O'Kroley v. Fastcase, Inc.</i> , 831 F.3d 352 (6th Cir. 2016).....	11
<i>Prickett v. InfoUSA, Inc.</i> , 561 F. Supp. 2d 646 (E.D. Tex. Mar. 30, 2006)	10
<i>R.L. Lackner, Inc. v. Sanchez</i> , No. Civ.A.B-05-264, 2005 WL 3359356 (S.D. Tex. Dec. 9, 2005)	10
<i>Takhvar v. Page</i> , No. 2:17-CV-00673-JRG-RSP, 2018 WL 4677808 (E.D. Tex. Feb. 25, 2018), <i>adopted</i> , 2018 WL 4677799 (E.D. Tex. Mar. 6, 2018).....	10

<i>Thapar v. Zezulka</i> , 994 S.W.2d 635 (Tex. 1999).....	19
<i>In re Wade</i> , 566 S.W.3d 375 (Tex. App. – Fort Worth 2018, no pet.).....	25
<i>Way v. Boy Scouts of Am.</i> , 856 S.W.2d 230 (Tex. App. – Dallas 1993, writ denied).....	14
<i>Wiswell v. VerticalScope, Inc.</i> , No. A-11-CA-737-SS, 2012 WL 13136295 (W.D. Tex. Aug. 1, 2012)	10
<i>Witkoff v. Topix, LLC</i> , No. B257656, 2015 WL 5297912 (Cal. Ct. App. Sept. 10, 2015)	11
<i>Zeran v. Am. Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997).....	11, 13, 15

Statutes

47 U.S.C. § 230	<i>passim</i>
47 U.S.C. § 230(a)(5)	26
47 U.S.C. § 230(c)(1)	8, 11, 16, 19
47 U.S.C. § 230(e)(3)	9, 21
47 U.S.C. § 230(e)(5)	20
TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7).....	6, 23
TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9)-(10)	24
TEX. CIV. PRAC. & REM. CODE § 51.014(d)	5
TEX. CIV. PRAC. & REM. CODE § 74.351	24
TEX. CIV. PRAC. & REM. CODE § 98.002	xiii

TEX. GOV'T CODE § 22.004(g)25

TEX. GOV'T CODE § 22.221(b)(1)xiv

Legislative Materials

Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.03, 2003 TEX.
 GEN. LAWS 847, 849 (currently TEX. CIV. PRAC. & REM.
 CODE § 74.351 & § 51.014(a)(9)-(10)).....24

Act of May 30, 2011, 82nd Leg., R.S., ch. 203, § 1.01, 2011
 TEX. GEN. LAWS 757, 75725

H.R. 1865, 115th Cong., § 3 (a)(2)(C) (1st Sess. Apr. 3, 2017).....20

Pub. L. No. 104-104, 110 Stat. 56 (1996)7

Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254 (2018)
 (codified at 47 U.S.C. § 230(e)(5)(A)).....17

Other Authorities

BLACK'S LAW DICTIONARY 342 (11th Ed. 2019)14

<https://www.fcc.gov/general/telecommunications-act-1996>7

TEX. R. APP. P. 52.8(d).....26

TEX. R. CIV. P.91a *passim*

TEX. R. CIV. P. 91a.64, 22

TEX. R. CIV. P. 91a.84

MANDAMUS RECORD

TABLE OF CONTENTS

Jane Doe 1 (Cause No. 2018-69816)

A	Plaintiff's Third Amended Petition (April 26, 2019)	MR001
B	Facebook's Amended Rule 91a Motion (March 27, 2019)	MR071
C	Plaintiff's Response to Facebook's Rule 91a Motion (April 26, 2019)	MR089
D	Facebook's Reply In Support of Rule 91a Motion (May 2, 2019)	MR132
E	Plaintiff's Post-Hearing Brief on Rule 91a Motion (May 10, 2019)	MR158
F	Supplemental Memorandum in Support of Facebook's 91a Motion (May 13, 2019)	MR189
G	Order Denying Facebook's Rule 91a Motion (May 23, 2019)	MR204
H	Facebook's Amended Motion for Reconsideration (August 1, 2019)	MR207
I	Facebook's Amended Motion for Permission to Appeal (August 1, 2019)	MR223
J	Plaintiff's Response to Amended Motion to Reconsider (September 11, 2019)	MR237
K	Order Denying Reconsideration (September 16, 2019)	MR243

L	Plaintiff’s Response to Amended Motion for Permissive Appeal (September 17, 2019)	MR244
M	Facebook’s Reply In Support of Amended Motion for Permission to Appeal (September 19, 2019)	MR251
N	Order Denying Permission to Appeal (October 7, 2019)	MR257
<i>Jane Doe 2 (Cause No. 2018-82214)</i>		
O	Plaintiff’s Second Amended Petition (April 26, 2019)	MR258
P	Facebook’s Amended Rule 91a Motion (March 27, 2019)	MR331
Q	Plaintiff’s Response to Facebook’s Rule 91a Motion (April 26, 2019)	MR349
R	Facebook’s Reply In Support of Rule 91a Motion (May 2, 2019)	MR392
S	Plaintiff’s Post-Hearing Brief on Rule 91a Motion (May 10, 2019)	MR418
T	Supplemental Memorandum in Support of Facebook’s 91a Motion (May 13, 2019)	MR449
U	Order Denying Facebook’s Rule 91a Motion (May 23, 2019)	MR464
V	Facebook’s Amended Motion for Reconsideration (August 1, 2019)	MR467
W	Facebook’s Amended Motion for Permission to Appeal (August 1, 2019)	MR483

X	Plaintiff’s Response to Amended Motion for Reconsideration (September 11, 2019)	MR497
Y	Order Denying Reconsideration (September 16, 2019)	MR503
Z	Plaintiff’s Response to Amended Motion for Permissive Appeal (September 17, 2019)	MR504
AA	Facebook’s Reply In Support of Amended Motion for Permission to Appeal (September 19, 2019)	MR511
BB	Order Denying Permission to Appeal (October 7, 2019)	MR517
<i>Both Cases</i>		
CC	Transcript of Joint Hearing on Rule 91a Motions (May 3, 2019)	MR518

STATEMENT OF THE CASE

Nature of case

The cases under review here allege tragic facts involving sex trafficking. But this mandamus petition involves only questions of law. Plaintiffs Jane Doe 1 and Jane Doe 2 have alleged that their traffickers contacted them through Facebook and Instagram, luring them into trafficking by promising a better life (*MR028, MR288-89*). Plaintiffs bring state-law claims against Facebook for negligence, gross negligence, violations of Texas Civil Practice and Remedies Code § 98.002, and products liability (*MR050-54, MR313-17*).

Facebook moved to dismiss all of Plaintiffs' claims under Rule 91a based on 47 U.S.C. § 230, which provides immunity to interactive computer services from claims that attempt to hold them responsible for content posted by third parties, and expressly preempts state-law causes of action that would do otherwise (*MR071-088, MR331-48*). Facebook cited unanimous Texas case law holding that state-law claims like those asserted here do not survive Section 230's immunity and preemption provisions (*id.*).

Trial court

Both cases were before the 334th District Court, the Hon. Steven Kirkland presiding, who denied the 91a motions after a joint oral hearing (*MR204-06, MR464-66, MR518-81*) and subsequently denied reconsideration (*MR243, MR503*) and permission to appeal (*MR257, MR517*).

STATEMENT OF JURISDICTION

Federal law grants online services like Facebook, Inc. immunity from claims arising out of content generated by third parties, and preempts all state laws or claims to the contrary. *See* 47 U.S.C. § 230. The trial court denied Facebook's motions to dismiss the underlying suits asserting such state law claims. *See* TEX. R. CIV. P. 91a. Denial of a Rule 91a motion to dismiss is reviewable by mandamus. *See In re Houston Specialty Ins. Co.*, 569 S.W.3d 138 (Tex. 2019). This Court has jurisdiction to issue a writ of mandamus to correct the trial court's error. *See* TEX. GOV'T CODE § 22.221(b)(1).

ISSUES PRESENTED

1. Did the trial court misapply the law, and thus abuse its discretion, by denying Relator's Rule 91a motions to dismiss, because 47 U.S.C. § 230 prohibits and preempts all of Plaintiffs' claims?
2. Is a final appeal after plenary trial an inadequate remedy for the error, because 47 U.S.C. § 230 provides for immunity from suit that would be defeated by delaying review until after trial?

INTRODUCTION

The claims here asserted against Facebook have no basis in law. Even when a plaintiff's injuries are tragic, the rule of law does not allow imposing damages on a defendant based on claims that have no basis in law. And when the law prescribes immunity from suit, the courts cannot require a defendant to suffer through months of litigation and a plenary trial before that immunity is respected.

Federal law grants interactive computer services immunity for claims arising out of content generated by third parties. *See* 47 U.S.C. § 230. State rules require that trial courts dismiss lawsuits barred by such laws. *See* TEX. R. CIV. P. 91a. The trial court refused to do so here, and that error is reviewable by mandamus. *See In re Houston Specialty Ins. Co.*, 569 S.W.3d 138 (Tex. 2019). This Court should review and reverse.

STATEMENT OF FACTS

Plaintiff Jane Doe 1

The following facts are taken entirely from the Third Amended Petition of Jane Doe 1 in Cause No. 2018-69816 (MR001-070). *See* TEX. R.

Civ. P. 91a. These are the only facts alleged about what happened to her; the remainder of her 69-page petition consists of allegations about Facebook's overall business, allegations against other defendants, and discussion of the evils of sex trafficking generally.

In 2012, when Jane Doe 1 was 15 years old, she accepted a "friend" request from a stranger with whom she shared several Facebook friends, and after accepting his friend request, exchanged messages with him on Facebook (*MR028* ¶¶224–25). This adult, whose name does not appear in the petition (*MR029* ¶241 *n.24*), told her she was "pretty enough to be a model," made false promises of financial security and a better life through modeling, and ultimately invited her to meet him off-line (*MR028* ¶¶227, 232). The petition alleges that she agreed to meet with him in person and that within hours of doing so she was raped, beaten, and forced into sex trafficking (*MR029* ¶235). She alleges that she was later "instructed by her trafficker to meet child molesters" at a hotel in Houston (*MR004* ¶29, *MR050* ¶¶305–06).

Plaintiff Jane Doe 2

The following facts are taken entirely from the Second Amended Petition of Jane Doe 2 in Cause No. 2018-82214 (MR258-330). *See* TEX. R. CIV. P. 91a. Again, these are the only facts alleged about what happened to her; the remainder of the 72-page petition focuses on allegations against other defendants and discussion of sex trafficking and social media use generally.

In 2017, when Jane Doe 2 was 14 years old, she became a “friend” with an adult on Instagram who provided “false promises of love and a better future” to lure her into sex trafficking (MR287 ¶¶237–39). She does not disclose the name or number of her trafficker(s).¹ She alleges that, through Instagram, they posted her for sale, arranged dates, and posted partially nude photographs of her (MR289 ¶¶242-43), and in 2018 she was instructed to meet child molesters at a hotel in Houston, where she was exploited (MR312 ¶315). After she was rescued from trafficking,

¹ It is difficult to tell how many perpetrators were involved, because Plaintiff references a “trafficker” (MR288 ¶237, MR312 ¶¶315-16) and “traffickers” (MR289 ¶¶242, 243, 245) alternately in her petition.

she alleges that her traffickers continued using her profile to traffic others (MR289 ¶245).

Trial court proceedings

On March 27, 2019, Facebook filed parallel motions to dismiss each case under Rule 91a of the Texas Rules of Civil Procedure (MR071-088, MR331-48). As set forth below, federal law grants Facebook immunity from claims that treat it as a publisher of content generated by third parties. *See* 47 U.S.C. § 230. Citing that law, Facebook argued that neither case had any basis in law.

The 91a motions were expressly made subject to previous special appearances filed contesting personal jurisdiction in each case (MR076, MR336). The Texas rules allow a party to proceed on a 91a motion without waiving a special appearance. *See* TEX. R. CIV. P. 91a.8. Since 91a motions address only the Plaintiffs' pleadings and require neither discovery nor evidence, *id.* at 91a.6, Facebook opted to proceed first on the 91a motions and hold the special appearances in abeyance.

On May 3, 2019, the 334th District Court, the Hon. Steven Kirkland presiding, conducted an oral hearing on both 91a motions

(MR518-80). Both parties filed further briefing after the hearing, and on May 23, 2019, Judge Kirkland signed orders denying both motions (MR204-06, MR464-66).

Facebook responded with two motions on August 1, 2019 (after previously scheduled attorney vacations): a motion for reconsideration of the 91a motions (MR207-22, MR467-82), and an alternative motion requesting a permissive interlocutory appeal on this controlling question of law (MR223-36, MR483-96). *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d). Per the trial court's procedures, the motion for reconsideration was set for submission on September 16, 2019, and the trial court denied it that same day (MR243, MR503).

The first available oral hearing in the trial court for the permissive appeal motions was on September 20th, and to avoid further delay and unnecessary or piecemeal appeals, Facebook set both those motions and its special appearances for that date. Tropical Storm Imelda intervened, forcing the trial court to postpone the hearing to Friday, October 4, 2019. Three days after the hearing, the trial court denied both the motions for

permissive interlocutory appeal and the special appearances (*MR257, MR517*).

This petition for mandamus challenges the denial of the 91a motions, as provided by Texas law. *See In re Houston Specialty Ins. Co.*, 569 S.W.3d 138, 142 (Tex. 2019) (conditionally granting mandamus relief for failure to grant Rule 91a dismissal); *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (same). By notices of interlocutory appeal filed concurrently with this petition, Facebook has also challenged the denial of the special appearances. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7).

ARGUMENT

Mandamus relief is appropriate to correct a trial court order (1) that reflects a clear abuse of discretion, (2) for which the relator has no adequate remedy by appeal. *See In re Geomet Recycling LLC*, 578 S.W.3d 82, 91 (Tex. 2019). The order here meets both requirements: the trial court failed to dismiss these cases despite federal law granting Facebook immunity from Plaintiffs' claims (*part I below*), and postponing review until a post-trial final judgment is not an adequate

remedy for immunity from suit (*part II below*).

I. Abuse of Discretion: Section 230 Bars Plaintiffs' Claims

“A trial court has no ‘discretion’ in determining what the law is or applying the law to the facts.” *In re Geomet*, 578 S.W.3d at 91 (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)). Thus, a trial court abuses its discretion if it fails to analyze or apply the law correctly. *See id.*; *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018).

A. 47 U.S.C. § 230 grants immunity from suits that arise from content generated by third parties

Congress enacted and President Clinton signed the Telecommunications Act of 1996 “to promote competition and reduce regulation” and “encourage the rapid deployment of new telecommunications technologies.” *See* Pub. L. No. 104-104, 110 Stat. 56 (1996). The Act was the first major overhaul of telecommunications law in over 60 years,² and established a federal policy “to promote the

² *See* <https://www.fcc.gov/general/telecommunications-act-1996>.

continued development of the Internet” as a “vibrant and competitive free market ... unfettered by Federal or State regulation.”³

The Act adopted 47 U.S.C. § 230, a provision that grants *immunity*⁴ to interactive computer services from claims that treat them as publishers of content generated by third parties:⁵

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.

This rule of federal immunity applies to search engines like Google and Yahoo!,⁶ social networking sites like Facebook, Instagram, MySpace,

³ *Force v. Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019) (quoting 47 U.S.C. § 230(b)(1)-(2)); *Bennett v. Google, LLC*, 882 F.3d 1163, 1165 (D.C. Cir. 2018) (same); *GoDaddy.com, LLC v. Touns*, 429 S.W.3d 752, 759 (Tex. App. – Beaumont 2014, pet. denied) (same).

⁴ Section 230 contains some exceptions to this blanket immunity, such as for copyright infringement claims. However, such exceptions are inapplicable here.

⁵ 47 U.S.C. § 230(c)(1).

⁶ *See, e.g., Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1268 (D.C. Cir. 2019); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102–03 (9th Cir. 2009).

and Twitter,⁷ and e-commerce sites like Amazon and Orbitz.⁸

To ensure this federal law is not frustrated by state or local laws, Section 230 expressly preempts and precludes all state or local causes of action providing otherwise:⁹

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.

B. All Texas cases on § 230 recognize this immunity

Westlaw[®] reports almost 500 cases citing Section 230's immunity or preemption clauses (§§ 230(c)(1), 230(e)(3)): 418 federal cases and 81 state cases. No brief can address all of them. But of the 19 cases from state appellate and federal courts in Texas (one from the Fifth Circuit, 15 from U.S. district courts, and three from state appellate courts), **not**

⁷ See, e.g., *Force v. Facebook, Inc.*, 934 F.3d at 68; *Franklin v. X Gear 101, LLC*, No. 17 Civ. 6542 (GBD) (GWG), 2018 WL 4103492, at *7 (S.D.N.Y. Aug. 28, 2018) (Instagram); *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008); *Crosby v. Twitter, Inc.*, 921 F.3d 617, 627 n.7 (6th Cir. 2019).

⁸ See, e.g., *Kabbaj v. Google Inc.*, 592 F. App'x 74 (3d Cir. 2015) (Amazon); *Milgram v. Orbitz Worldwide, Inc.*, 16 A.3d 1113, 1127 (N.J. Super. Ct. Law Div. 2010).

⁹ 47 U.S.C. § 230(e)(3).

one holds that a state law claim based on third-party content survives Section 230's immunity and preemption provisions.¹⁰ This Court would be the **first** to do so by denying Facebook's petition here. Doing so would also place this Court in direct conflict with courts across the United States that have found interactive computer service companies

¹⁰ See *Doe v. MySpace, Inc.*, 528 F.3d at 420; *Takhvar v. Page*, No. 2:17-CV-00673-JRG-RSP, 2018 WL 4677808, at *2 (E.D. Tex. Feb. 25, 2018), *adopted*, 2018 WL 4677799 (E.D. Tex. Mar. 6, 2018); *Inge v. Walker*, No. 3:16-CV-0042-B, 2017 WL 4838981, at *4 (N.D. Tex. Oct. 26, 2017); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 995 (S.D. Tex. 2017); *Wiswell v. VerticalScope, Inc.*, No. A-11-CA-737-SS, 2012 WL 13136295, at *5 n.7 (W.D. Tex. Aug. 1, 2012); *Int'l Cotton Mktg., Inc. v. Commodity Credit Corp.*, No. 5:08-CV-159-C ECF, 2009 WL 10705346, at *5 (N.D. Tex. June 15, 2009); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 664-65 (E.D. Tex. May 22, 2009); *GW Equity LLC v. Xcentric Ventures LLC*, No. 3:07-CV-976-0, 2009 WL 62173, at *13 (N.D. Tex. Jan. 9, 2009); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849-50 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008); *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at **4-5 (E.D. Tex. Dec. 27, 2006); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646, 652 (E.D. Tex. Mar. 30, 2006); *Cisneros v. Sanchez*, 403 F. Supp. 2d 588, 593 (S.D. Tex. 2005) (holding Section 230 inapplicable to immunize defendant's own statements); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004) (same); *Davis v. Motiva Enters., L.L.C.*, No. 09-14-00434-CV, 2015 WL 1535694, at *5 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (affirming 91a dismissal based on Section 230); *GoDaddy.com, LLC*, 429 S.W.3d at 760-61; *Milo v. Martin*, 311 S.W.3d 210, 215-16 (Tex. App.—Beaumont 2010, no pet.). Some of the Texas cases address procedural issues rather than the merits. See, e.g., *A.R.K. v. La Petite Acad.*, No. SA-18-CV-294-XR, 2018 WL 2059531, at **2-3 (W.D. Tex. May 2, 2018) (holding federal defenses like Section 230 are insufficient for removal as federal question); *R.L. Lackner, Inc. v. Sanchez*, No. Civ.A.B-05-264, 2005 WL 3359356, at *3 (S.D. Tex. Dec. 9, 2005) (same); *Edwards v. Wyatt*, No. A-07-CA-1008 RP, 2009 WL 10669430, at **6-7 (W.D. Tex. July 6, 2009) (holding Section 230 defense waived because untimely raised).

immune from state claims based on a third party's online drug trafficking,¹¹ online arms trafficking,¹² and online sex trafficking.¹³

Section 230 does not bar all lawsuits against internet companies; only claims that “treat” them as “the publisher or speaker” of content generated by third parties. 47 U.S.C. § 230(c)(1). As the Fourth Circuit concluded over twenty years ago, this means that claims against an internet company for exercising “a publisher’s traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content – are barred.”¹⁴ Over 150 cases have cited the Fourth Circuit’s analysis.¹⁵

¹¹ See, e.g., *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1099 (9th Cir. 2019); *Witkoff v. Topix, LLC*, No. B257656, 2015 WL 5297912, at *8 (Cal. Ct. App. Sept. 10, 2015).

¹² See, e.g., *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 722 (Wis. 2019).

¹³ See, e.g., *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016); *Doe v. MySpace, Inc.*, 528 F.3d at 420.

¹⁴ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

¹⁵ See, e.g., *Fed. Trade Comm’n v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016); *O’Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d at 18; *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008); *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003).

A simple question shows why Section 230 applies to all of Plaintiffs' claims here:

Why does this case name Facebook as a defendant?

The answer is obvious: all of Plaintiffs' claims against Facebook arise from messages sent across Facebook's interactive computer service by the men who ultimately exploited Plaintiffs. Specifically, Plaintiffs claim that Facebook should have monitored such messages and prevented the subsequent criminal conduct. But these messages were all generated by third parties, not Facebook. Holding Facebook responsible for what third parties post treats it as the "publisher or speaker," and Section 230 preempts precisely those claims.

Negligence/failure to warn. Plaintiffs plead that Facebook owed a duty to warn them "of the known dangers of grooming and recruitment on Facebook by sex traffickers," was negligent in failing to warn them through campaigns, safeguards, or procedures, and failed "to publish self-produced warnings" (MR050-51; MR314-15). But from where did this alleged duty arise, if not from messages generated by third parties

on Facebook’s interactive computer service? Each of these negligence claims is based on a theory that Facebook allows users to send messages on its service, so therefore it must implement safeguards or publish warnings about how those messages could be misused. That asserts a standard of negligent publication—one that no interactive computer service could ever fully meet, and that Congress rejected. Treating Facebook as a publisher of those messages is barred by Section 230.

Negligent undertaking. Plaintiffs plead that Facebook “undertook to warn users about and to screen for illegal conduct,” but “failed to exercise reasonable care” in doing so (*MR053; MR315-16*). Here again, Plaintiffs focus on Facebook because it was the medium their exploiters allegedly used as a platform to communicate with them. Allowing claims for failing to monitor content adequately would discourage interactive computer services from using blocking or filtering technologies *at all* unless they were guaranteed to be completely failsafe. That is exactly what Congress intended to prevent.¹⁶

¹⁶ See *Zeran*, 129 F.3d at 331.

Product liability. Plaintiffs plead that Facebook was an unreasonably dangerous “product” because of “warning and marketing defects” consisting of inadequate “warnings and/or instructions regarding the dangers of ‘grooming’ and human trafficking” (MR054; MR316-17). Even if Texas law treated services as a “product” for tort purposes (which it does not¹⁷), Plaintiffs suffered no alleged harm from using Facebook until their exploiters sent online messages that allegedly led to Plaintiffs’ off-line harm. A suit arising from those actions would inherently treat Facebook as a publisher of the messages, contrary to the immunity provided by Section 230.

Gross negligence. Plaintiffs plead generally that Facebook’s actions constituted gross negligence (MR052; MR317). But since all the underlying claims inherently treat Facebook as a publisher of third-

¹⁷ See *Houston Lighting & Power Co. v. Reynolds*, 765 S.W.2d 784, 785 (Tex. 1988) (defining “product” as a “commodity, which like other goods, can be manufactured, transported and sold”); BLACK’S LAW DICTIONARY 342 (11th Ed. 2019) (“commodity ... embraces only tangible goods.”); see also *Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 238–39 (Tex. App. – Dallas 1993, writ denied) (holding alleged harmful message in children’s magazine could not support products liability claim against publisher).

party content, Plaintiffs' efforts to punish the same content with punitive damages are barred by Section 230 as well.

The sex trafficking statute. Finally, Plaintiffs fault Facebook for allegedly allowing and not preventing Plaintiffs' traffickers' communications with them. They accuse Facebook of "knowingly facilitating the sex trafficking" of Plaintiffs by failing to publish "public service announcements for those who sign up for Facebook regarding the dangers of entrapment and grooming used by sex traffickers," by not hiring experts to conduct such a campaign, by "not implementing safeguards" to verify users' identity, and by "creating a breeding ground for sex traffickers" (MR052-53; MR313-14). Section 230 preempts such claims because screening authors, content, and access by users to third-party content is what publishers traditionally do.¹⁸ The warnings and safeguards Plaintiffs propose relate to their traffickers' third-party content, liability for which federal law declares Facebook

¹⁸ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("[L]awsuits seeking to hold a service provider liable for its exercise of a *publisher's traditional editorial functions*—such as deciding whether to publish, withdraw, postpone or alter content—are barred." (emphasis added)).

immune. Suing providers like Facebook for failing to warn about third-party content would simply impose liability on them for that content. Federal law preempts Texas courts from rendering Section 230 useless like this.

The federal circuit courts “are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity.” *Force v. Facebook, Inc.*, 934 F.3d at 64 (citing opinions from the First, Second, Fourth, Fifth, Sixth, Ninth, Eleventh, and D.C. Circuits). As the Fifth Circuit held in *Doe v. MySpace, Inc.*, claims that a provider failed to *prevent* predators from contacting a minor “are merely another way of claiming that MySpace was *liable for publishing* the communications.” 528 F.3d at 420 (emphasis added). And as the 9th, 6th, and D.C. circuits have stated, “any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.”¹⁹ “No website could function if a duty of

¹⁹ *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008), quoted with approval in *Jones*, 755 F.3d at 411; *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014).

care was created when a website facilitates communication, in a content-neutral fashion, of its users' content." *Dyroff*, 934 F.3d at 1101.

C. The trial court's reasons for denying relief are incorrect

In his order denying dismissal, Judge Kirkland found Facebook is an "interactive computer service" to which Section 230 applies; the only question was whether Plaintiffs' claims "treat Facebook as the publisher or speaker of information provided by another" (*MR204-06*, *MR464-66*). Despite the clear import of the statutory text and the overwhelming weight of authority noted above, Judge Kirkland denied Facebook's motion to dismiss because "both parties have cited cases that support their positions," and Facebook's cases did not address Plaintiffs' failure-to-warn claims, the Texas statutory sex trafficking statute, or the 2018 amendments to Section 230 known as the Fight Online Sex Trafficking Act of 2017 ("FOSTA")²⁰ (*MR205*, *MR465*). But Facebook did brief these issues, and not one of them cancels the federal immunity provided by Section 230.

²⁰ See Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254 (2018) (codified at 47 U.S.C. § 230(e)(5)(A)).

Plaintiffs' two cases. Judge Kirkland cited two cases he thought supported Plaintiffs' position. Ironically, his description of one specifically shows why it does not: "*Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016) (ISP not immune to defamation in content *it generated*)."²¹ Plaintiffs do not allege Facebook generated any of the messages that led to their harm. While Section 230 does not protect information generated by an internet company itself, it expressly provides immunity for "information provided by *another* content provider." *Huon*, 841 F.3d at 741-42 (citing 47 U.S.C. § 230(c)(1)) (emphasis added). That is all Plaintiffs allege.

In the other case cited in the trial court's orders, the plaintiff was an aspiring model who posted a profile online, and then was contacted off-line by two predators who lured her into a fake modeling audition and assaulted her. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 848 (9th Cir. 2016). The Ninth Circuit held Section 230 did not apply for reasons that do not apply here: (1) the plaintiff was not lured by anything her

²¹ *MR205*, 465 (emphasis added).

assailants posted online, so the claim did not seek to hold the platform liable for any online third-party content;²² (2) California law imposes a duty to warn on persons with a “special relationship” to a potential victim;²³ (3) her claim would not affect how the defendant published or monitored content;²⁴ and (4) the defendant allegedly knew about the specific predators from independent outside information.²⁵

²² *Id.* at 851 (“Jane Doe does not claim to have been lured by any posting that Internet Brands failed to remove.”); *see also Herrick v. Grindr LLC*, 765 F. App’x 586, 591 (2d Cir. 2019) (“But in *Internet Brands*, there was no allegation that the defendant’s website transmitted potentially harmful content; the defendant was therefore not an ‘intermediary’ shielded from liability under § 230.”). Plaintiffs allege they were lured by online messages viewed on Facebook.

²³ *Id.* at 850 (citing *Tarasoff v. Regents of Univ. of Calif.*, 551 P.2d 334 (1976)). Texas has declined to adopt this California duty to warn. *See Thapar v. Zezulka*, 994 S.W.2d 635, 638 (Tex. 1999) (declining to follow *Tarasoff*).

²⁴ *Id.* (“The duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes or monitors such content.”). By contrast, Plaintiffs seek to impose substantial damages on Facebook for the way it monitors and publishes third-party messages.

²⁵ *Id.* at 849, 850–51 (“[T]he case turns on whether it would be inconsistent with section 230(c)(1) for the State of California to require an interactive computer service provider to warn its users about the threat of a *known* sexual predator.” (emphasis added)). There is no allegation that Facebook at any relevant time knew the identities—indeed, in Jane Doe 2’s case, Facebook still does not know because Plaintiff has declined to identify that person.

FOSTA. FOSTA amended Section 230 in several ways, none of which have anything to do with Plaintiffs' claims. The 2018 amendments (1) expanded and exempted from Section 230 a federal civil action for facilitating sex trafficking (which Plaintiffs have not alleged); and (2) exempted *criminal* prosecutions and state attorney general *enforcement* actions from Section 230 (which Plaintiffs could not allege). *See* 47 U.S.C. § 230(e)(5). While the original version of the bill also would have exempted certain private civil actions, that proposal was not adopted because Congress wanted to ensure a uniform national standard in this area rather than a patchwork of state laws. *See* H.R. 1865, 115th Cong., § 3 (a)(2)(C) (1st Sess. Apr. 3, 2017). Because FOSTA did not amend Section 230 in any way relevant to Plaintiffs' claims (all of which are state law civil claims), it does not change the relevance of the hundreds of pre-2018 cases holding that Section 230 bars them.

II. No Adequate Remedy: Mandamus Is the Remedy When a 91a Motion Is Improperly Denied

“Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of

interlocutory review.” *In re McAllen Med. Ctr.*, 275 S.W.3d 458, 464 (Tex. 2008); *accord*, *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 304 (Tex. 2016). As the Texas Supreme Court wrote in *In re McAllen*:

Appellate courts cannot afford to grant interlocutory review of every claim that a trial court has made a pre-trial mistake. But [they] cannot afford to ignore them all either. Like “instant replay” review now so common in major sports, some calls are so important—and so likely to change a contest’s outcome—that the inevitable delay of interim review is nevertheless worth the wait.

In re McAllen Med. Ctr., 275 S.W.3d at 461.

A. Benefits outweigh burdens of mandamus review here

Section 230 does not say suits contrary to its provisions cannot be *won*; it says they cannot be *brought*: “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). Every day these cases remain pending in the trial court violates that law.

As the Texas Supreme Court noted in *McAllen*, “[t]he most frequent use we have made of mandamus relief involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved.” 275 S.W.3d at 465. For example,

an appeal after a final plenary trial is not an adequate remedy if all the proceedings and the trial itself are improper due to an arbitration clause, appraisal clause, jury waiver, or forum selection clause that indicates they should never have taken place. *Id.* (listing cases).

Relegating parties to an improper trial harms the courts as well as the parties: “[I]nsisting on a wasted trial simply so that it can be reversed and tried all over again creates the appearance not that the courts are doing justice, but that they don’t know what they are doing.” *Id.* at 466.

The burdens involved in mandamus review here are minimal. Rule 91a dismissal is based solely on the plaintiff’s pleadings; no depositions, discovery responses, or other evidence can be considered. *See* TEX. R. CIV. P. 91a.6. This Court is not even required to read Facebook’s pleadings or briefs in the trial court; a review of Plaintiffs’ petitions is all that is required. And as already noted, appellate review can be condensed to the single question: Why is Facebook a defendant in this suit? The answer will inevitably show that it is merely because Facebook is the interactive computer service on which the third parties

who committed these heinous crimes wrote and published their communications.

A grant of mandamus would render unnecessary this Court's consideration of the appeal of the special appearances. The Legislature requires the Texas courts of appeals to review denial of a special appearance by interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7). That involves a fact-intensive review. Immunity under Section 230 involves a narrower review of a single pleading; though the pleadings here are lengthy, they mostly address general background rather than what happened to either Plaintiff. Since the Court must review Facebook's special appearances regardless, this may be the unusual case in which mandamus review will actually *lighten* the burden on the Court rather than increasing it.

B. The Legislature has weighed the benefits and burdens

Mandamus review is generally a discretionary matter. But as the Supreme Court stated in *McAllen*, "our place in a government of separated powers requires us to consider also the priorities of the other branches of Texas government." *McAllen*, 275 S.W.3d at 461. In *McAllen*,

the 2003 Legislature enacted rules for medical malpractice cases that required early expert reports, early dismissal if not filed, and early review by interlocutory appeal.²⁶ But the Legislature said nothing about interlocutory appeal for cases arising *before* enactment, and the question in *McAllen* was whether the Legislature’s silence indicated it opposed review by mandamus of the pending cases.

The Supreme Court concluded it did not, because in weighing the costs and benefits of mandamus, “the Legislature has already balanced most of the relevant costs and benefits for us.” *Id.* at 466. “After extensive study, research, and hearings, the Legislature found that the cost of conducting plenary trials of claims as to which no supporting expert could be found was affecting the availability and affordability of health care – driving physicians from Texas and patients from medical care they need. Given our role among the coordinate branches of Texas government, we are in no position to contradict this statutory finding.”

Id.

²⁶ See Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.03, 2003 TEX. GEN. LAWS 847, 849 (currently TEX. CIV. PRAC. & REM. CODE § 74.351 & § 51.014(a)(9)-(10)).

The Legislature did the same thing here. In 2011, the Legislature ordered the Supreme Court to “adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence,” and set a firm 45-day deadline for action.²⁷ Rule 91a was the result of that mandate. Since adoption of Rule 91a, the Texas Supreme Court and other Texas courts have granted mandamus relief when a trial court fails to dismiss a lawsuit that has no basis in law or fact.²⁸ With respect to mandamus and Rule 91a: “In laying the groundwork for a rule mandating the early dismissal of baseless causes of action, the Legislature has effectively already balanced most of the relevant costs and benefits of an appellate remedy.”²⁹

Of course, not all Rule 91a motions deserve mandamus review. From this Court’s perspective, the advantage of mandamus review is that the petitioner does not have a right to review or a written opinion,

²⁷ See TEX. GOV’T CODE § 22.004(g); Act of May 30, 2011, 82nd Leg., R.S., ch. 203, § 1.01, 2011 TEX. GEN. LAWS 757, 757.

²⁸ See, e.g., *In re Houston Specialty Ins. Co.*, 569 S.W.3d at 142; *In re Essex Ins. Co.*, 450 S.W.3d at 528; *In re Wade*, 566 S.W.3d 375, 385 (Tex. App. – Fort Worth 2018, no pet.); *In re Butt*, 495 S.W.3d 455, 460 (Tex. App. – Corpus Christi 2016, no pet.).

²⁹ *In re Butt*, 495 S.W.3d at 460.

as is true in interlocutory appeals. *See* TEX. R. APP. P. 52.8(d). Perhaps if Texas courts had been more willing to grant mandamus review of medical malpractice cases with no expert support, or special appearances with no minimum contacts, or suits against citizens for exercising free speech, the Legislature might never have imposed the burden of reviewing all of them by interlocutory appeal. That the Legislature has not yet ordered the courts to review every denial of a 91a motion does not mean it opposes mandamus review; “the Legislature’s decision to forego interlocutory review of *all* pending cases in no way suggests it intended interlocutory review of *none* of them.” *McAllen*, 275 S.W.3d at 466.

CONCLUSION AND PRAYER

As Congress stated in Section 230, “[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.” 47 U.S.C. § 230(a)(5). The internet provides opportunities for communication, education, and commerce that previous generations could not have imagined. But like any other medium, it may be used by bad actors to harm others. In Section 230,

Congress mandated that damage suits related to harmful content posted by other users must be brought against the authors, not the intermediary. Because the trial court failed to comply with that federal law, this Court should grant mandamus review and reverse.

Respectfully submitted,

HUNTON ANDREWS KURTH LLP

By: /s/ Scott A. Brister

Scott A. Brister - SBN 00000024

sbrister@huntonak.com

IBC Bank Plaza

500 West 5th Street, Suite 1350

Austin, TX 78701

Phone: 512.320.9200

Kelly Sandill - SBN 24033094

ksandill@huntonak.com

Kathryn E. Boatman-SBN 24062624

kboatman@huntonak.com

Ashley Kahn - SBN 24087824

akahn@huntonak.com

HUNTON ANDREWS KURTH LLP

600 Travis, Suite 4200

Houston, TX 77002

Phone: 713.220.4200

Fax: 713.220.4285

YETTER COLEMAN LLP

Reagan Simpson – SBN 18404700

rsimpson@yettercoleman.com

April L. Farris – SBN 24069702

afarris@yettercoleman.com

Collin J. Cox – SBN 24031977

ccox@yettercoleman.com

Tracy N. LeRoy – SBN 24062847

tleroy@yettercoleman.com

Jeffrey A. Andrews – SBN 24050227

jandrews@yettercoleman.com

YETTER COLEMAN LLP

811 Main Street, Suite 4100

Houston, TX 77002

Phone: 713.632.8000

Fax: 713.632.8002

**GIBSON, DUNN & CRUTCHER
LLP**

Kristin A. Linsley

(Admitted *Pro Hac Vice*)

Klinsley@gibsondunn.com

GIBSON, DUNN & CRUTCHER LLP

555 Mission Street

San Francisco, CA 94105-0921

Phone: 415.393.8395

Fax: 415.374.8471

Russell H. Falconer – SBN 24069695
Rfalconer@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Ave., Suite 1100
Dallas, TX 75201-6912
Phone: 214.698.3100
Fax: 214.571.2936

**ATTORNEYS FOR RELATOR
FACEBOOK, INC.**

CERTIFICATE OF COMPLIANCE

I certify that this Petition for Mandamus contains 5,310 words as calculated per Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

/s/ Scott A. Brister
Scott A. Brister

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following counsel of record for Real Parties in Interest, Jane Doe 1 and Jane Doe 2, via electronic transmission on October 24, 2019:

Annie McAdams
annie@mcadamspc.com
Matthew S. Parmet
matt@mcadamspc.com
ANNIE MCADAMS, PC
1150 Bissonnet
Houston, TX 77005

Michael T. Gallagher
mike@gld-law.com
Pamela McLemore
pamm@gld-law.com
Boyd Smith
THE GALLAGHER LAW FIRM
2905 Sackett Street
Houston, TX 77098

David E. Harris
dharris@shhlaw.com
Louie J. Cook
lcook@shhlaw.com
SICO HOELSCHER HARRIS
802 N. Carancahua, Suite 900
Corpus Christi, TX 78401

Timothy F. Lee
timlee@warejackson.com
Margaret E. Bryant
margaretbryant@warejackson.com
Michelle R. Meriam
michellemeriam@warejackson.com
WARE, JACKSON, LEE, O'NEILL, SMITH & BARROW, LLP
2929 Allen Parkway, 39th Floor
Houston, TX 77019

Additionally, Respondent was served by hand delivery, at the following address:

Judge Steven Kirkland
334th Civil Court
Harris County Civil Courthouse
201 Caroline, 14th Floor
Houston, TX 77002

/s/ Scott A. Brister
Scott A. Brister

VERIFICATION

STATE OF TEXAS §
 §
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Russell Falconer, a person whose identity is known to me, and after being duly sworn and upon oath stated as follows:

1. “My name is Russell H. Falconer. I am above the age of twenty-one (21) years, I am fully competent to testify to the matters stated herein, and I have personal knowledge of the facts stated herein. I am one of counsel for Relator in the above-captioned cause.
2. I have read Relator’s Petition for Writ of Mandamus (the ‘Petition’). All of the factual statements in the Petition are within my personal knowledge obtained from review of the underlying record and are true and correct.
3. Appendix 1 attached hereto is a true and correct copy of Order Denying Facebook’s Rule 91a Motion, dated May 23, 2019, in Cause No. 2018-69816.
4. Appendix 2 attached hereto is a true and correct copy of Order Denying Facebook’s Rule 91a Motion, dated May 23, 2019, in Cause No. 2018-82214.
5. Appendix 3 attached hereto is a true and correct copy of the text of 47 U.S.C. § 230, as provided by Westlaw®.”

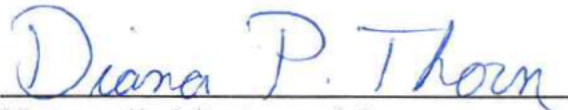
Further Affiant Sayeth Not.

SIGNED this the 18th day of October, 2019.

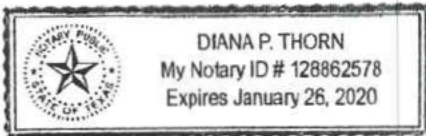


Russell H. Falconer

SWORN TO and SUBSCRIBED before me by Russell H. Falconer, this 18th day of October, 2019, to certify which witness my hand and seal of office.



Notary Public in and for
The State of Texas



APPENDIX

Tab	Description
1	Order Denying Facebook's Rule 91a Motion, dated May 23, 2019, in Cause No. 2018-69816
2	Order Denying Facebook's Rule 91a Motion, dated May 23, 2019, in Cause No. 2018-82214
3.	Text of 47 U.S.C. 230

1

NO. 2018-69816*

Pgs-3
DISMY

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

NO. 2018-82214

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

FILED
Marilyn Burgess
District Clerk
MAY 22 2019

Time: _____
Harris County, Texas
By _____
Deputy

2

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

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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

A handwritten signature in black ink, appearing to read "Steven Kirkland".

STEVEN KIRKLAND
Judge Presiding

FILED
Marilyn Burgess
District Clerk

MAY 22 2019

Time: _____ Harris County, Texas
By _____ Deputy

3

United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter II. Common Carriers (Refs & Annos)
Part I. Common Carrier Regulation

47 U.S.C.A. § 230

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

Effective: April 11, 2018

Currentness

(a) Findings

The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
- (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

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

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

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

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

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

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

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

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

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

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

(2) No effect on intellectual property law

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

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

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

(2) Interactive computer service

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

(3) Information content provider

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

(4) Access software provider

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

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

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

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

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 230, as added Pub.L. 104-104, Title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub.L. 105-277, Div. C, Title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681-739; Pub.L. 115-164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)

Notes of Decisions (171)

Footnotes

1 So in original. Probably should be “subparagraph (A)”.

47 U.S.C.A. § 230, 47 USCA § 230

Current through P.L. 116-65.