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IN THE SUPREME COURT OF TEXAS

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

Relator.

Original Proceeding from Cause Nos. 2018-69816 & 2018-82214,
334th District Court, Harris County, Texas; and
Cause No. 2019-16262, 151st District Court, Harris County, Texas

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RELATOR

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INTEREST OF AMICUS CURIAE

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law.[1]

It is fundamental to the rule of law that only those at fault should incur liability, while those without fault should not. In the context of the online communications at issue here, Congress has set and revised the parameters of who should incur liability. In the Communications Decency Act of 1996, Congress created broad protection for providers of "interactive computer services," dictating that they generally cannot be held liable for third-party communications made through their services. 47 U.S.C. § 230(c)(1). Congress also weighed the costs of that broad protection and established specific exceptions—but no exception covers *state civil* claims. *See id.* § 230(e)(5). Plaintiffs here nevertheless raise state civil claims regarding third-party content on the interactive computer services provided by the defendant. Federal law squarely bars these claims.

[1] Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, amicus confirms that no person or entity other than amicus made a monetary contribution to the preparation or filing of this brief.

SUMMARY OF ARGUMENT

The courts below ignored Congress's clear statutory command in the Communications Decency Act of 1996 and its 2018 amendments. The 1996 Act granted providers of "interactive computer services" broad protection against claims regarding third-parties' communications using those services. 47 U.S.C. § 230(c)(1); *see id.* § 230(e)(3). After considering modern developments of the Internet, Congress amended the 1996 Act's protection in 2018 to exempt certain limited *federal civil* claims and *state criminal* prosecutions—where the underlying conduct violated certain *federal criminal* statutes. *See id.* § 230(e)(5). But no exception covers *state civil* claims like those raised against the defendant here. *See id.*

Congress has therefore evaluated the weighty policy considerations surrounding online communications as those considerations have evolved, and it has set nationwide parameters establishing when computer service providers can—and cannot—be held liable for third-parties' online communications. If the plaintiffs want another Communications Decency Act revision to expand potential liability for interactive computer service providers, then they should raise those concerns with Congress. But state trial courts have no power to use state civil law in a manner foreclosed by federal statutes.

This Court should grant the defendant's mandamus petition to restore the defendant's federal protection from plaintiffs' state civil claims.

ARGUMENT

This mandamus petition raises a straightforward issue of federal statutory interpretation: (1) The defendant undisputedly provides interactive computer services, (2) Congress's Communications Decency Act created broad protection for such service providers from claims regarding third-party content, and (3) plaintiffs' claims involve third-party content and do not fall within any of Congress's expressly enumerated exceptions. Federal law therefore bars plaintiffs' state civil claims against the defendant.

I. The Plaintiffs' State Civil Claims Are All Barred By 47 U.S.C. § 230(c)(1) And (e)(3) Because They Seek To Hold The Defendant Responsible For Third-Party Online Communications.

Section 230 of the Communications Decency Act generally protects "interactive computer service" providers from being held liable for what third parties say on their platforms:

> 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).

To make the plain scope of that protection unmistakable, the Act further clarifies that state causes of action may not be raised against service providers to hold them responsible for third-party content:

> 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.

Id. § 230(e)(3).

This express preemption clause overcomes any possible "presumption against preemption" that might apply. *See* Relator Br. 23-25; *see, e.g.*, *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018) ("legislative intent in the Act to preempt" is "clear" where the statute provides that a government "may not adopt" certain laws). *Cf.* Real Parties in Interest Br. 34-38.

The defendant undisputedly provides an "interactive computer service." 47 U.S.C. § 230(f)(2). And plaintiffs assert claims against the defendant based on "information provided by another information content provider," *id.* § 230(c)(1)—that is, the third-party predators who are the "publisher[s] or speaker[s]," *id.*, and who are "responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service," *id.* § 230(f)(3). Plaintiffs' claims therefore contradict Congress's "policy choice" to not "impos[e] tort

liability on companies that serve as intermediaries for other parties'" communications. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997).

Nothing in the Act's text limits its protection to claims based on "defamation law," as the judicial consensus confirms. *See* Relator Br. 15-16 (collecting cases); *cf.* Real Parties in Interest Br. 32-34 (erroneously suggesting that the phrase "publisher or speaker" implicitly covers only "defamation law"). Rather, "[c]ourts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content." *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (collecting cases). Consequently, the statute provides immunity to interactive computer service providers for the full scope of liability that attaches to third-parties' speech under law—which *includes*, but is not limited to, defamation law. *See, e.g.*, Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 Notre Dame L. Rev. Reflection 33, 36-37 (2019) ("Despite defamation's centrality to Section 230's creation, defamation is only a small piece of Section 230's scope. Section 230 covers many doctrines beyond defamation. Indeed, courts routinely interpret Section 230 to immunize all claims based on third-party content (other than

those references in Section 230's statutory exclusions), regardless of what causes of action the plaintiff actually alleges.") (footnotes omitted).

No matter how plaintiffs style their claims, at bottom they concern the speech of third parties made on the defendant's website. Accordingly, they "are barred by the CDA, notwithstanding [the plaintiffs'] assertion that they only seek to hold [the defendant] liable for its failure to implement measures" to mitigate the harms presented by third parties. *MySpace*, 528 F.3d at 420; *see* Relator Br. 17-22 (discussing additional cases).

II. The 2018 Amendments' Exceptions In 47 U.S.C. § 230(e)(5) Cover Only Certain *Federal Civil* Claims And *State Criminal* Prosecutions—Not State Civil Claims.

Congress left no doubt about the exceptions it created from this broad Section 230 protection, as Congress expressly codified exceptions in the statute. For example, the original Act exempted enforcement of any "Federal criminal statute." 47 U.S.C. § 230(e)(1).

In 2018, Congress also exempted three additional classes of lawsuits from Section 230 protection—certain limited *federal* civil actions and two sets of certain state *criminal* prosecutions:

> (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.

Id. § 230(e)(5); *see* Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254 (2018).

None of these 2018 exceptions covers *state civil* claims. In fact, the state-law exceptions include federal statutory cross-references that confirm that the exceptions all depend on violations of *federal* law:

- Section 230(e)(5)(A) exempts the federal civil remedy at 18 U.S.C. § 1595 if the underlying conduct violates the federal sex trafficking statute, 18 U.S.C. § 1591. This federal civil remedy can be invoked by either the "victim" or "the attorney general of the State, as parens patriae"—but any such civil actions still must be brought "in an appropriate district court of the United States." 18 U.S.C. § 1595(a), (d).

- Section 230(e)(5)(B) exempts state criminal prosecutions if the underlying conduct would violate the federal sex trafficking statute, 18 U.S.C. § 1591.

- Section 230(e)(5)(C) exempts state criminal prosecutions if the underlying conduct would violate the federal prostitution statute, 18 U.S.C. § 2421A (where state law also prohibits prostitution).

III. The Plaintiffs' Arguments Ignore Section 230's Plain Operative Text.

Relevant here, plaintiffs assert four state civil claims against the defendant—each falling plainly within the scope of Section 230's broad preemption. *See* Relator Br. 9 (citing MR32-36; MR499-503; MR882-87); Real Parties in Interest Br. 10-12 (citing MR499-503). And none of plaintiffs' claims avoids preemption under Congress's exceptions.

So the plaintiffs ask this Court to ignore Section 230's plain meaning through a series of arguments that circumvent the statute's operative text.

First, plaintiffs wrongly suggest that their state civil claims seeking to hold the defendant responsible for predators' third-party communications are "not inconsistent" with Section 230 by arguing that their claims are "not inconsistent" with "exempted claims under the federal sex trafficking statute, 18 U.S.C. § 1595." Real Parties in Interest Br. 21-22. This argument misstates the analysis. Section 230(e)(3) provides that state-law claims "inconsistent *with this section*"—the entirety of Section 230—are preempted. 47 U.S.C. § 230(e)(3). And Section 230(c)(1) and Section 230(e)(5)(A) make it crystal clear that providers of an "interactive computer service" cannot be held responsible for third-party communications through a private civil claim unless that claim is brought under the federal trafficking statute, 18 U.S.C. § 1595. *See* 47 U.S.C. § 230(c)(1), (e)(5)(A); *see* Relator Br. 34-35. So

plaintiffs' state civil claims to hold the defendant responsible for third-party communications are "inconsistent" with Section 230 and thus preempted. 47 U.S.C. § 230(e)(3).

Second, plaintiffs incorrectly assert that the 2018 amendments "repeatedly confirm[] that Congress intended to remove *all* obstacles in the [Communications Decency Act] to fighting human trafficking," by which plaintiffs mean *their* state civil claims. Real Parties in Interest Br. 23. Congress *did* ensure that federal and state officials can strongly combat human trafficking through the express exceptions Congress created to that end. But those exceptions do not include plaintiffs' state civil claims. If Congress had wanted to expand potential state civil liability for interactive computer service providers based on the conduct of malicious third parties, it could have drafted another simple exception covering state civil claims. Its policy decision not to do so controls here.

Third, plaintiffs take the 2018 amendments' savings clause out of context by ignoring that this generic clause saved only those claims "not limited or preempted by section 230" *before the 2018 amendments*. *See* Relator Br. 29-30 (discussing FOSTA § 7, 132 Stat. at 1255). *Cf.* Real Parties in Interest Br. 25-26. This savings clause is not a source of additional, unenumerated exceptions from Section 230. Nor does the savings clause

provide that there are, in fact, non-preempted state civil claims *or* that the claims at issue here are such claims.

Fourth, though the text is unambiguous, plaintiffs resort to legislative history, which shows that Congress *rejected* a proposal to impose the kind of broad liability plaintiffs assert. *See* Relator Br. 30-31 (quoting H.R. 1865 § 3(a)(2)(C), 115th Cong.); *cf.* Real Parties in Interest Br. 26-30. Instead, Congress carefully crafted three targeted exceptions—each tethered to federal criminal statutory cross-references—and said nothing about exempting any forms of state civil claims. *See* 47 U.S.C. § 230(e)(5). Even the legislative history about state law quoted by plaintiffs shows that Congress in 2018 was addressing "state *criminal* law." Real Parties in Interest Br. 28 (emphasis added; quoting H.R. Rep. 115-572, at 9-10).

Fifth, because neither the 2018 amendments' operative statutory text nor their legislative history would exempt plaintiffs' claims, plaintiffs refer to the 2018 act's "preamble." Real Parties in Interest Br. 23-24 (quoting FOSTA, 132 Stat. at 1253). As an initial matter, "[a] preamble . . . is not an operative part of the statute." *Ass'n of Am. R.R. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (citing *Yazoo R.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889)).

In all events, the preamble does not conflict with the 2018 amendments' operative statutory text. The preamble summarizes that the

exceptions added by the 2018 amendments cover some "Federal and State criminal and civil law" claims. FOSTA, 132 Stat. at 1253. That summary is accurate: The 2018 exceptions cover certain *federal civil* claims where the underlying conduct violates federal criminal law, as well as certain *state criminal* prosecutions where the underlying conduct violates federal criminal law. *See* 47 U.S.C. § 230(e)(5). Especially "where the preamble and operative portion of the statute may reasonably be read consistently with each other, the preamble may not properly support a reading of the operative portion which would plainly be at odds with what otherwise would be its clear meaning." *United States v. Emerson*, 270 F.3d 203, 233 n.32 (5th Cir. 2001) (Garwood, J.).

Finally, without the operative text, legislative history, or preamble supporting their interpretation, the only thing plaintiffs have left is the 2018 amendments' statutory section headings. *See* Real Parties in Interest Br. 24-25. But just like preambles, section headings cannot override a statute's operative text. *See* Relator Br. 27-29. And just like the preamble here, the Public Law version's shorthand reference to "Federal and State criminal and civil law relating to sex-trafficking" is an accurate summary: The 2018 amendments exempted certain *federal civil* claims where the underlying conduct violates federal criminal law, as well as certain *state criminal*

prosecutions where the underlying conduct violates federal criminal law. FOSTA § 4, 132 Stat. at 1254. And the Section 230(e)(5) heading's reference to "No effect on sex trafficking law" refers to the *federal* laws expressly cross-referenced in each of that subsection's three exceptions. *See* 47 U.S.C. § 230(e)(5). *Cf.* Real Parties in Interest Br. 19.

* * *

Years ago, Congress made considered policy decisions about the interactive computer services made possible by the Internet. Recently, Congress updated the laws in this area to carefully balance the wide array of profound policy interests inherent in assessing liability in our modern Internet age. The Internet has been a significant force for good throughout our world in many different ways, but bad actors also can unfortunately use it to commit egregious, tragic acts. Congress has recognized that mere providers of interactive computer services are generally not bad actors, and it created broad protections for them—while creating limited exceptions from that protection where Congress deemed it necessary. If plaintiffs want to alter the careful balance Congress struck in the Communications Decency Act of 1996 and its 2018 amendments, the proper forum to raise those concerns is with Congress—not through state civil claims in state trial courts.

Respectfully submitted,

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