

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

GENEVIEVE MAHONEY,)	
a/k/a @genmahoney19,)	
an individual,)	
)	
Plaintiff,)	NO. 3:21-cv-00607
v.)	
)	Judge Campbell
)	Magistrate Judge Frensley
FACEBOOK, INC.,)	
a Delaware corporation,)	JURY DEMAND
)	
Defendant.)	

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT
FACEBOOK, INC.'S MOTION TO DISMISS THE COMPLAINT**

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INTRODUCTION

The plaintiff, Genevieve Mahoney, a Davidson County, Tennessee resident and Furman University student, known also by her Instagram handle and username, @genmahoney19, (“Genevieve”), hereby responds in opposition to the motion to dismiss the complaint and supporting memorandum of law [Doc. 19 and Doc. 20], filed by defendant Facebook, Inc. (“Facebook) pursuant to Fed. R. Civ. P. 12(b)(6).

Facebook is a global social media digital platform and interactive computer service provider, incorporated in Delaware with its principal place of business located in California. Facebook owns Instagram, a photo sharing digital platform and interactive computer service provider. Complaint, Doc. 1-1, Page ID ## 7-45.

The nature of the complaint is a libel and defamation claim(s) concerning allegations of false and defamatory written statements published to the general public from Facebook’s Newsroom, by its leadership team on January 6, 2021. Complaint, Doc. 1-1, Page ID ## 7-45. These statements were of and concerning video and photo content from the protestors at the Capitol events in Washington, D.C. on January 6, 2021, while Congress conducted the Certification Count of the 2020 Presidential Election that had just concluded. Complaint, Doc. 1-1, Page ID ## 7-45. Facebook’s leadership publicly declared that photo content from the protestors at the Capitol events, were such content that represents incitement or encouragement of violence and promotion of criminal activity. Complaint, Doc. 1-1, Page ID ## 7-45.

Prior to the Certification Count at the Capitol, nearby at the Ellipse in President’s Park a First Amendment Rally had commenced that morning, in which

then President Donald J. Trump delivered remarks. Complaint, Doc. 1-1, Page ID # 8. This First Amendment Rally was lawfully permitted and organized as a peaceful protest in response to alleged voting irregularities in the November 2020 Presidential Election. Complaint, Doc. 1-1, Page ID # 8.

Genevieve attended the First Amendment Rally that morning at the Ellipse, and she was one of the protestors posting photo content to Instagram that afternoon outside the Capitol on January 6, 2021. Complaint, Doc. 1-1, Page ID ## 7-45. On January 12, a few days after the Emergency News Statement, Instagram disabled Genevieve's account and deleted her "Our Capitol" communicative photo content. Complaint, Doc. 1-1, Page ID # 22.

Genevieve filed the lawsuit in order to vindicate her rights, and the complaint itself is protected speech under the First Amendment. Complaint, Doc. 1-1, Page ID # 15. Facebook is being sued for its own defamatory speech, not the speech of third parties, published by its leadership team concerning objectionable photo content from the protestors at the Capitol events. Facebook is not immune from civil liability for its own speech and for acting in "bad faith" by removing Genevieve's "Our Capitol" photo content. Complaint, Doc. 1-1, Page ID # 16.

In its motion to dismiss the complaint, Facebook submits that Genevieve has failed to establish necessary elements to support defamation and negligent infliction of emotional distress claims, and that Facebook is immune from civil liability under Section 230 of the Communications Decency Act. [See Doc. 19 and Doc. 20].

As set forth more fully in this response, Genevieve asserts Facebook’s motion to dismiss the complaint should be denied. Genevieve’s complaint properly states claims for defamation and negligent infliction of emotional distress in accordance with applicable law, and she argues: (A) injury to her reputation from the defamatory statement is readily perceived; (B) Facebook published the defamatory statement; (C) Facebook’s published statement is susceptible to defamatory meaning; and (D) Section 230 (c)(2)(A) is facially invalid and abridges speech protected by the First Amendment, by conferring a “heckler’s veto” upon computer service providers, to restrict online material “*the provider considers*” “*objectionable,*” “*whether or not such material is constitutionally protected;*” alternatively, the statute does not immunize Facebook from liability for its own speech and acting in “bad faith.”

STATEMENT OF THE CASE

I. Proceedings

On July 1, 2021, Genevieve filed her complaint against Facebook in the Davidson County, Tennessee Circuit Court, Twentieth Judicial District at Nashville, Case No. 21C1107. Complaint, Doc. 1-1, Page ID ## 7-45. On July 6, 2021, service of process was perfected upon Facebook’s Delaware registered agent. Affidavit of Service, Doc. 1-1, Page ID # 48. On August 4, 2021, Facebook filed a *Notice of Removal*, removing the case to the United States District Court for the Middle District of Tennessee, with the current case caption and Case No. 3:21-cv-00607. Notice of Removal, Doc. 1, Page ID ## 1-5. Genevieve’s claims include the following:

- Count I-Defamation (Libel)
- Count II-Defamation (Libel by Implication)
- Count III-Defamation (False Invasion of Privacy)
- Count IV-Negligent Infliction of Emotional Distress

See Complaint, Doc. 1-1, Page ID ## 38-43.

II. Facts

A. Genevieve was a protestor at the Capitol events on January 6, 2021, and she posted her “Our Capitol” photo content to Instagram, a Facebook-owned digital platform.

At approximately 2:00 pm Eastern while peacefully walking with family members from the First Amendment Rally at the Ellipse to the Certification Count at the Capitol as permitted, Genevieve posted to her Instagram account photo content of the Capitol in the distance, with the caption, “Our Capitol,” see content below:



“Our Capitol”

Complaint, Doc. 1-1, Page ID # 13.

B. Genevieve’s “Our Capitol” message she shared on Instagram represents communicative photo content protected by the First Amendment.

The 2020 Presidential Election

Having reached the minimum-required age to lawfully vote prior to the Capitol events, Genevieve had just voted for the first time in the 2020 Presidential Election as a Tennessee resident. Complaint, Doc. 1-1, Page ID # 11. Genevieve voted by absentee ballot via U.S. mail. *Id.*

The 2020 Presidential Election was a milestone event in the country’s history, particularly for Tennessee women legally eligible to vote, like Genevieve, because it had been 100 years since the passage of the Nineteenth Amendment to the Constitution, which granted women the right to vote in 1920. *Id.* Tennessee had been the pivotal and necessary 36th state to approve ratification of the Nineteenth Amendment to the Constitution. Nashville was at the epicenter that summer in 1920, as pro-suffrage and anti-suffrage activists from around the state and the country descended upon the city, intent on influencing the Tennessee General Assembly. *Id.*

On August 24, 1920, Governor Albert H. Roberts certified Tennessee’s ratification of the Nineteenth Amendment. Then, U. S. Secretary of State Bainbridge Colby issued a proclamation that officially declared the ratification of the Nineteenth Amendment and made it part of the United States Constitution, cementing the right of women to vote and securing Genevieve’s right to vote 100 years later in the 2020 Presidential Election. *Id.*

In the leadup to the 2020 Presidential Election, Facebook had launched the largest voting information center in United States' history in an effort to register 4 million people to vote and according to Facebook, to "make their voices heard" and to "hold our leaders accountable." *Id.* This unprecedented private voter registration drive by Facebook helped to register many Tennessee voters to vote in the 2020 Presidential Election, including those Tennessee voters voting absentee ballot via U.S. mail in Davidson County, Tennessee, like Genevieve. Complaint, Doc. 1-1, Page ID # 12.

Facebook co-founder and CEO, Mark Zuckerberg ("Zuckerberg"), and his wife, also donated over \$300 million to two organizations including the Center for Tech and Civic Life ("CTCL"), to "fix elections," including the 2020 Presidential Election. Zuckerberg's CTCL contributed money to Davidson County, Tennessee election officials to oversee and assist with the 2020 Presidential Election. *Id.*

After the 2020 Presidential Election, Genevieve was home from college in Nashville over the Christmas break, and she made the decision to travel to D.C. to attend the First Amendment Rally and Certification Count, in order to exercise her First Amendment rights and to "save our democracy." *Id.* Genevieve attended the First Amendment Rally and Certification Count with various family members. *Id.*

Based on reported information and numerous formal and informal challenges being raised across the county regarding the results of the 2020 Presidential Election, Genevieve believed there were voting irregularities in the Election. Complaint, Doc. 1-1, Page ID # 13. She also felt it was her duty to peacefully and lawfully exercise

her First Amendment advocacy rights as an American citizen, in protest of the 2020 Presidential Election and Certification Count, that didn't represent her voice and the voices of many other Americans. *Id.*

1. Her "Our Capitol" message is symbolic of the statement, "We the People," that is embodied in the Preamble to the Constitution.

Genevieve's message by her post on Instagram of the phrase "Our Capitol," along with her posted photo content of the U.S. Capitol in the distance beyond the temporary spectator scaffolding, is symbolic of the statement, "We the People," that is embodied in the Preamble to the Constitution. Complaint, Doc. 1-1, Page ID # 14. Genevieve lawfully attended the First Amendment Rally and Certification Count and posted her "Our Capitol" photo content, because she felt it was her civic obligation to demonstrate to members of Congress that there were many Americans who felt disenfranchised. *Id.* Genevieve further felt her lawful presence and advocacy at the Capitol events to peacefully protest the 2020 Presidential Election, and her "Our Capitol" message, were important and representative of the great number of citizens who felt wronged and overlooked by the reported voting irregularities of the 2020 Presidential Election. *Id.*

Genevieve loves her country and everything it stands for, and she wanted to remind Congressional representatives by her lawful and peaceful presence at the First Amendment Rally and her "Our Capitol" photo content, to keep their promise and covenant to represent the people faithfully, because members of Congress receive their powers from the American citizens, as embodied in the Constitution.

Complaint, Doc. 1-1, Page ID # 20. Genevieve supports the founding principles and ideals of this country enshrined in the Constitution, namely that elected representatives derive their legitimacy from the people, as opposed to the unconstitutional notion that members of Congress benevolently bestow rights and privileges upon the people. *Id.*

That afternoon during the Capitol events on January 6, 2021, Genevieve did not go onto the premises of the U.S. Capitol, nor did she enter the Capitol building itself, and she remained positioned well behind the temporary spectator scaffolding as depicted by her vantage point in her “Our Capitol” photo content she posted to her Instagram account. Complaint, Doc. 1-1, Page ID # 14. Law enforcement have never charged Genevieve with violating a state or federal criminal statute for inciting or encouraging violence and promoting criminal activity arising out of her “Our Capitol” photo content she posted to Instagram on January 6, 2021. *Id.*

2. Instagram’s digital platform provided a public forum and audience to receive her “Our Capitol” message.

Genevieve was a frequent interactive user of Instagram, where she posted, shared, and curated photo content to her account on a regular basis. Genevieve was also a regular interactive member of the Instagram group, @fur.meme, a popular and well-followed group and community, comprised of Furman University students, faculty, school officials, and alumni.

Genevieve’s frequent interactive use of Instagram was indicative of many Americans. Indeed, as provided in the Congressional “findings” upon the enactment of 47 U.S.C. § 230, for which Facebook relies upon in support of its motion to dismiss,

Congress noted the rapidly developing array of Internet and other interactive computer services available to individual Americans, which represent an extraordinary advance in the availability of educational and informational resources to citizens. 47 U.S.C. § 230 (a)(1). These services offer interactive users a great degree of control over the information they receive, as well as the potential for even greater control in the future as technology develops. § 230 (a)(2). 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. § 230 (a)(3). The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation. § 230 (a)(4). Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services. § 230 (a)(5).

C. Facebook published an Emergency News Statement.

A few hours following Genevieve’s “Our Capitol” post, Facebook’s leadership published an Emergency News Statement, declaring that photo content from the protestors at the Capitol events, were such content that represents: (1) “incitement of violence;” (2) “encouragement of violence;” and (3) “promotion of criminal activity.” Complaint, Doc. 1-1, Page ID # 16. Facebook’s leadership further stated that photo content from the protestors were such content that violated its policies. Complaint, Doc. 1-1, Page ID # 21.

Facebook's leadership team directed by Vice President of Global Policy Management, Monika Bickert ("Bickert"), and Vice President of Integrity, Guy Rosen ("Rosen"), declared in the Emergency News Statement in relevant part as follows:

Let us speak for the leadership team in saying what so many of us are feeling. We are appalled by the violence at the Capitol today. We are treating these events as an emergency. Our Elections Operations Center has already been active in anticipation of the Georgia elections and the vote by Congress to certify the election, and we are monitoring activity on our platform in real time. For those of you who are wondering, here are the actions we're taking:

First, we have been searching for and removing the following content:

- Incitement or encouragement of the events at the Capitol, including videos and photos from the protestors. At this point they represent promotion of criminal activity which violates our policies.

Complaint, Doc. 1-1, Page ID # 21. Instagram disabled Genevieve's account and deleted her "Our Capitol" photo content on January 12. Complaint, Doc. 1-1, Page ID # 22.

LEGAL STANDARD

As a general rule, in considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must take "all well-pleaded material allegations of the pleadings" as true. *Battle v. A & E Television Networks, LLC*, 837 F. Supp. 2d 767, 769 (M.D. Tenn. July 27, 2011) (cleaned up) (denying Rule 12 motion on defamation and false light claims and further recognizing the Tennessee Supreme Court has determined that "the differences between the two torts warrant their separate recognition" at 770).

ARGUMENT

“The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.”

- John Stuart Mill, *On Liberty* 76 (1859)

I. Genevieve’s complaint properly states claims for defamation.

Under Tennessee law, the tort of defamation encompasses both libel and slander. *Brown v. Christian Brothers Univ.*, 428 S.W. 3d 38, 50 (Tenn. Ct. App. 2013). Slander is spoken defamation and libel is written defamation. *Id.*; *Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc.*, 876 S.W. 2d 818, 820 (Tenn. 1994).

The basis for an action for defamation is that the defamation has resulted in an injury to the person's character and reputation. *Id.* To establish a *prima facie* case of defamation, a person must prove that: (1) a party published a statement; (2) with knowledge that the statement was false and defaming to the other; or (3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement. *Brown*, 428 S.W. 3d at 50.

Publication means the communication of the defamatory matter to a third person. *Id.* To be actionable, the alleged defamatory statement must constitute a serious threat to the plaintiff's reputation. *Id.* It is reputation, which is defamed, reputation which is injured, and reputation which is protected by the law of defamation. *Id.*

First, regarding Facebook’s contention that the Emergency News Statement is not “of and concerning” Genevieve, the Emergency News Statement, while not

expressly designating Genevieve by name, referred to Genevieve by reasonable implication. *See Yow v. National Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1187 (E.D. Cal. 2008) (cleaned up) (applying California law). Further, the complaint cannot reasonably be read to infer that Genevieve is claiming her defamation claims are supported because she was one of *thousands of protestors* at the Capitol events. *See* Facebook’s memorandum, Doc. 20, Page ID # 271. Rather, the complaint clearly articulates Genevieve’s theory, in that she was one of two member on the Furman @fur.meme Instagram group, of *protestors at the Capitol events posting photo content*. Which was the precise group to whom the Emergency News Statement was directed.

Following Facebook’s publication of its Emergency News Statement, @fur.meme identified Genevieve as a member of a small class of two (2) on Instagram’s @fur.meme group, of protestors posting photo content at the Capitol events, evidencing injury to Genevieve’s reputation from the Emergency News Statement is readily perceived within the @fur.meme group and Furman community. Complaint, Doc. 1-1, Page ID # 15.

Second, regarding Facebook’s contention that the complaint fails to establish the publication element, in that Emergency News Statement was not “published” by Facebook, the complaint clearly pleads facts to support that the Emergency News Statement was published to a “third party,” i.e. the general public, and members of the @fur.meme Instagram group, based on the response by @fur.meme and other members of the @fur.meme group, recognizing Genevieve was a “protestor at the

Capitol events posting photo content,” which were the words and message conveyed in the Emergency News Statement.

Third, Facebook’s declarations in the Emergency News Statement were clearly on its face, capable and susceptible to defamatory meaning. The Emergency News Statement was an “emergency” in “real time” and clearly conveyed to the general public that photo content from the protestors at the Capitol events, were such content that represents: (1) “incitement of violence;” (2) “encouragement of violence;” and (3) “promotion of criminal activity.” Complaint, Doc. 1-1, Page ID # 16. Facebook’s leadership team further stated that photo content from the protestors were such content that violated its policies. Complaint, Doc. 1-1, Page ID # 21.

A. Injury to Genevieve’s reputation is readily perceived.

@fur.meme specifically identified Genevieve by her Instagram username as a member of this small class of two on Instagram’s @fur.meme group: (1) attending the “violent” event; (2) sharing “pictures” on “Instagram;” (3) putting “Furman students at risk.” (4) by “participating in an attempted coup” in “protest;” (5) disrupting the “democratic process;” and (6) committing “an act of terrorism.” These two posts by @fur.meme, and additional posts from the group’s members, are set forth in the complaint. Complaint, Doc. 1-1, Page ID ## 15-16, 23-34.

Likewise, the circumstances make it reasonable to conclude that within the Instagram @fur.meme group, Facebook’s Emergency News Statement is reasonably understood and readily perceived to refer to Genevieve, @genmahoney19, and her “Our Capitol” photo content, because other members of the @fur.meme group

recognized that Genevieve posted photo content to Instagram while she attended the events at the Capitol on January 6, 2021, as indicated by a series of posts from other members of @fur.meme. Complaint, Doc. 1-1, Page ID ## 16, 23-34.

At Furman, Genevieve serves as a Board Member for the Furman Conservative Society, a group that focuses on discussing and advancing conservative viewpoints and values. Complaint, Doc. 1-1, Page ID # 10. Following her “Our Capitol” photo content she shared on Instagram and Facebook’s subsequent Emergency News Statement, the Furman Conservative Society asked Genevieve to delete her “Our Capitol” photo content, because it feared for Genevieve’s safety and well-being, as well as the club’s image. Complaint, Doc. 1-1, Page ID # 22. A school newspaper article recognized that Genevieve and another Furman student on the @fur.meme group were protestors at the Capitol events on January 6, 2021. Complaint, Doc. 1-1, Page ID # 35.

B. Facebook published the Emergency News Statement.

Facebook concedes in its memorandum that Genevieve pled facts that the Emergency News Statement was published to a third party, i.e., the public and members of @fur.meme. *See* memorandum, Doc. 20, Page ID # 272. Facebook does not cite to any case law that “the general public” is insufficient in a defamation complaint such that it does not mean a third party. Based on the immediate and harsh reactions toward Genevieve and flurry of Instagram posts identifying Genevieve, it is reasonable to infer from the complaint the members of the @fur.meme group concluded the Emergency News Statement referred to Genevieve as set forth

above, and that they were aware Facebook published it to the general public. The complaint has properly satisfied the publication element of a defamation claim.

C. The Emergency News Statement is susceptible to defamatory meaning.

The further context as set forth in the complaint that Facebook purposely published the Emergency News Statement to avert criminal liability and suspicion away from Facebook and onto the protestors, adds an additional element of malice. The clear context of an emergency and the message from Facebook's leadership was: *photo content from the protestors at the Capitol events are inciting and encouraging violence and promoting criminal activity*. These were statements that are provably false as set forth in the complaint.¹

D. Section 230 (c)(2)(A) is facially invalid and abridges speech protected by the First Amendment, by conferring a “heckler’s veto” upon computer service providers, to restrict online material “the provider considers” “objectionable,” “whether or not such material is constitutionally protected.”

47 U.S.C. § 230 (c)(2)(A), like another provision of the Communications Decency Act of 1996 (“CDA”), the U.S. Supreme Court unanimously struck down and declared unconstitutional shortly after Congress enacted the CDA, is facially invalid and abridges speech protected by the First Amendment and is unconstitutional. *See generally Reno, et al. v. American Civil Liberties Union, et al.*, 521 U.S. 844 (1997).

¹ In its motion to dismiss, Facebook has not argued the Emergency News Statement is true or substantially true, nor has it argued that Genevieve has failed to adequately plead allegations of malice, assuming she will be viewed as a public figure or limited public figure in this lawsuit in the context of the Capitol events on January 6, 2021.

Section 230 (c)(2)(A) violates the Constitution by conferring a “heckler’s veto” upon interactive computer service providers, such as Facebook, to restrict online material “*the provider considers*” “*objectionable,*” “*whether or not such material is constitutionally protected.*” See 47 U.S.C. 230 (c)(2)(A).

This provision of Section 230 states as follows:

47 U.S.C. § 230 Protection for private blocking and screening of offensive material

(c) PROTECTION FOR “GOOD SAMARITAN” BLOCKING AND SCREENING OF OFFENSIVE MATERIAL

(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;

The statute on its face violates the First Amendment’s prohibition that Congress may not enact a law “abridging the freedom of speech.” The First Amendment to the United States Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. am. 1.

Within a body of First Amendment law, a “heckler’s veto” is a label and idea critical for any claim, made in defense of the government’s suppression, that speech

inciting hostile reactions may be restrained. Patrick Schmidt, *Heckler's Veto*, The First Amendment Encyclopedia, 2009, available at <https://mtsu.edu/first-amendment/article/968/heckler-s-veto> (last visited September 25, 2021).

A heckler's veto occurs when the government accepts restrictions on speech because of the anticipated or actual reactions of opponents of the speech. The Supreme Court first recognized the term in *Brown, et al v. Louisiana*, 383 U.S. 131 (1966), citing the work of First Amendment scholar Harry Kalven, Jr., who coined the phrase. *Id.* The term is also used in general conversation to refer to any incident in which opponents block speech by direct action or by "shouting down" a speaker through protest. *Id.* A heckler's veto "doctrine" has sometimes been articulated as the principle that the Constitution requires the government to control the crowd in order to defend the communication of ideas, rather than to suppress the speech. Yet the larger the opposition grows and the more difficult it is for the government to protect the speaker, the more compelling become the practical considerations in restricting or removing the speaker from the scene. *Id.*

The landmark heckler's veto case is *Terminiello v. Chicago*, 337 U.S. 1 (1949), in which a riot took place outside an auditorium before, during, and after a controversial speech. Justice William O. Douglas, writing for a 5-4 majority, held unconstitutional Arthur Terminiello's conviction for causing a breach of the peace, noting that speech fulfills "its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.*

In general, the core concern with the heckler's veto is that allowing the suppression of speech because of the discontent of the opponents provides the perverse incentive for opponents to threaten violence rather than to meet ideas with more speech. Therefore, the Supreme Court has tended to protect the rights of speakers against such opposition in these cases, effectively finding hecklers' vetoes inconsistent with the First Amendment. *Id.*

Here, Section 230 (c)(2)(A) codifies a heckler's veto in violation of the First Amendment and confers upon Facebook, and other interactive computer service providers, the right to regulate and restrict online material "*the provider considers*" "*objectionable,*" "*whether or not such material is constitutionally protected,*" while further shielding such computer service providers from civil liability with the cloak of immunity. *See Bible Believers v. Wayne County, Michigan*, 805 F. 3d 228, 255 (6th Cir. 2015) (*en banc*) (police did not protect speakers at festival from being shouted down by hecklers, and police effectuated a heckler's veto by accusing speakers of being disorderly, removing them from the festival, and cutting off their right to speak, in violation of speakers' First Amendment rights); *see also* 47 U.S.C. 230 (c)(2)(A).

- 1. It is a content-based restriction of online speech and under exacting strict scrutiny analysis, abridges the freedom of speech under the First Amendment.**

This statutory provision is a content-based restriction of online speech, and it lacks the precision that the First Amendment requires when a statute regulates the content of speech. *See Reno*, 521 U.S. at 871, 874.

2. It is void for vagueness by restricting online material that is “objectionable.”

The vagueness of Section 230 (c)(2)(A) “is a matter of special concern because it is a content-based regulation of speech, and the vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.” *See id.* at 871-872. For example, the term “objectionable” is not defined, and the average person would have no reasonable basis to know or understand what “objectionable” online “material” means. *See id.* at 871.

3. It is overbroad and prohibits more speech than is necessary to achieve a compelling government interest and sweeps far beyond regulating unprotected speech, since it restricts material that “is constitutionally protected.”

The sweeping breadth of coverage is “wholly unprecedented” and extends beyond achieving a compelling government interest, since it restricts online material that “is constitutionally protected.” *See id.* at 877.

4. It is a prior restraint restricting online speech.

The well- settled rule is that a system of prior restraint “avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.” *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (citing *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)).

In *Conrad*, the Supreme Court reaffirmed *Freedman*’s obligations to provide procedural safeguards to avoid a system of censorship. First, the burden of instituting judicial proceedings, and of proving that the objectionable material is unprotected, must rest on the censor. Second, any restraint prior to judicial review

can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured. *Id.* at 560.

Here, the Emergency News Statement claimed online video and photo content from the protestors at the Capitol events were such content that violated Facebook's policies. However, Facebook has provided no procedural safeguards designed to obviate the dangers of a censorship system, and its policies do not take place under judicial review in order to avoid constitutional infirmity. See *Conrad*, 420 U.S. at 556-557; see also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969).

5. Facebook functioned as a state actor under the “public function” test.

Under the “public function” test, when private actors are endowed by the government, they become instrumentalities of the government and are subject to constitutional limitations. See generally *Lee v. Katz*, 276 F. 3d 550 (9th Cir. 2002) (private party held to be a state actor under “public function” test when regulating speech of “street preachers” on commons area leased from city, when private party has its own speech code of conduct); see also *Marsh v. Alabama*, 326 U.S. 501 (1946) (private “company town” held to be state actor when regulating speech on public areas). In accordance with Section 230 (c)(2)(A), Congress endowed computer service providers, such as Facebook, with powers to regulate speech online, and therefore, Facebook is a state actor when it regulates speech on its platform.

6. Alternatively, the statute does not immunize Facebook from liability.

Facebook does not have immunity under the statute for defamatory statements in the Emergency News Statement because it was an information content provider as defined in the statute. Further, Facebook may not claim immunity under Section 230 for its “bad faith” removal of Genevieve’s “Our Capitol” photo content.

II. Negligent infliction of emotional distress claim survives.

As the proximate cause of the defamatory statements published, Genevieve has sustained serious emotional stress, melancholy and fatigue, for which she has received treatment. Complaint, Doc. 1-1, Page ID # 43.

III. Facebook’s motion should be denied.

Facebook’s motion to dismiss the complaint should be denied in its entirety. Genevieve has properly pled all factual allegations to support her claims as set forth in her complaint in accordance with the Federal Rules of Civil Procedure.

CONCLUSION

Genevieve prays this Court denies Facebook’s motion to dismiss the complaint.

Respectfully submitted this 27th day of September 2021.

**DUNCAN, HATCHER,
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CERTIFICATE OF SERVICE
UNITED STATES ATTORNEY GENERAL
CONSTITUTIONAL CHALLENGE - 47 U.S.C. § 230 (c)(2)(A)

I hereby certify that a copy of the foregoing *Plaintiff's Response in Opposition to Defendant Facebook, Inc.'s Motion to Dismiss the Complaint* will be promptly served via Certified Mail upon the United States Attorney General, as indicated below. Pursuant to Fed. R. Civ. P. 5.1 (a), Plaintiff's counsel certifies he will promptly file the requisite *Notice*, identifying this *Response* that calls into question the constitutionality of 47 U.S.C. § 230 (c)(2)(A), and serve such *Notice* upon the U.S. Attorney General in accordance with Rule 5.1.

Merrick B. Garland, U.S. Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

/s/ M. E. Buck Dougherty III
M. E. Buck Dougherty III BPR #022474

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to LR 5.01, I hereby certify that on September 27, 2021, a copy of the foregoing *Plaintiff's Response in Opposition to Defendant Facebook, Inc.'s Motion to Dismiss the Complaint* was filed electronically via the court's CM/ECF filing system. Notice of this filing will be sent by operation of the court to all parties indicated on the electronic filing receipt, including counsel of record below. Pursuant to LR 7.01 (a)(2) and LR 7.03 (a), I certify that this *Response* complies with the twenty-five-page limitation, exclusive of case caption, signature line, and this certificate of service.

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