UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

GENEVIEVE MAHONEY, a/k/a @genmahoney19, an individual, **Plaintiff,** **vs.** **FACEBOOK, INC.,** **Defendant.**	**Case No. 21-CV-00607** **Hon. William L. Campbell, Jr.**

RESPONSE TO PLAINTIFF'S REQUEST FOR COURT TO CONVENE THREE-JUDGE PANEL PURSUANT TO 28 U.S.C. § 2284

INTRODUCTION

The Court should summarily deny plaintiff Genevieve Mahoney's request to convene a three-judge panel to consider her arguments attacking the constitutionality of a statutory provision that is entirely irrelevant to the claims and defenses in this action. This Court unquestionably has the power to reject that request: A "judge to whom [a] request" is made to convene "a district court of three judges" may deny that request if "he determines that three judges are not required[.]" 28 U.S.C. § 2284(b)(1). A three-judge panel is unnecessary here for two reasons.

First, Congress has not authorized a three-judge district court for this action. "A district court of three judges shall be convened" only in very limited circumstances: (1) certain types of electoral challenges—which this case is not—or (2) "when otherwise required by Act of Congress." 28 U.S.C. § 2284(a). The "Act of Congress" that Ms. Mahoney invokes here is Section 561(a) of the Telecommunications Act of 1996, under which "any *civil action* challenging the constitutionality, *on its face*, of this title"—*i.e.*, the Communications Decency Act of 1996 ("CDA")—"shall be heard by a district court of 3 judges[.]" Pub. L. No. 104-104, § 561(a) 110 Stat. 56, 142-43 (1996) (codified at 47 U.S.C. § 223 note) (emphasis added). But this "civil action" does not "challeng[e] the constitutionality, on its face," of the CDA. Neither the complaint nor any pending motion raises a relevant constitutional question. Ms. Mahoney notes that when Facebook moved to dismiss her defamation claims because they are preempted under Section 230 of the CDA, Dkt. 20, she argued that Section 230(c)(2) is unconstitutional, Dkt. 31. But Section 230(c)**(2)** is irrelevant; Facebook's preemption defense invoked Section 230(c)**(1)**—a statutory provision that Ms. Mahoney does not challenge. This mismatch matters greatly: Ms. Mahoney lacks standing to challenge, and this Court therefore lacks jurisdiction to

consider, the constitutionality of the inapplicable Section 230(c)(2). "[T]hree judges are not required" to hear a constitutional challenge that the Court lacks jurisdiction to consider. 28 U.S.C. § 2284(b)(1).

Second, "three judges are not required" for the separate and independent reason that the parties agree that this action will not proceed in this Court and that another court instead will be deciding Facebook's motion to dismiss (and ruling on whatever arguments Ms. Mahoney might make in opposition). Specifically, Ms. Mahoney insists that the action was improperly removed from state court and has moved for remand. Dkt. 24. Those arguments are meritless under controlling precedent for the reasons explained in Facebook's opposition to that motion (Dkt. No. 38). Instead, Facebook has moved to transfer the case to the Northern District of California under a forum-selection clause that Ms. Mahoney has conceded is enforceable. Dkt. 14. Indeed, Ms. Mahoney's only ground for opposing transfer is that (according to her) the case must be remanded. She is wrong on that score—but the one thing the parties agree on is that this action may not proceed in this Court. "[T]hree judges are not required" (28 U.S.C. § 2284(b)(1)) to consider a constitutional challenge that the Court will never reach.

In sum, Ms. Mahoney's request to convene a three-judge district court should be denied.

ARGUMENT

I. A THREE-JUDGE PANEL IS NOT REQUIRED UNDER 28 U.S.C. § 2284.

Three-judge district courts are rare outside the context of redistricting litigation. "A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). "Upon the filing of a request for three judges, the judge to whom the request is presented shall, *unless he*

determines that three judges are not required, immediately notify the chief judge of the circuit," who will convene the three-judge court. *Id.* § 2284(b)(1) (emphasis added). The statute therefore makes clear that this Court can and should decide in the first instance whether a three-judge district court is required.

Here ,"three judges are not required" (*id.*) for two independent reasons. First, this case is neither a constitutional challenge to apportionment nor an action for which any other Act of Congress requires a three-judge district court. Second, it is undisputed that the constitutional challenge that Ms. Mahoney seeks to pursue will not be heard in this Court.

A. This Case Is Not A "Civil Action Challenging The Constitutionality" Of Section 230(c)(2).

In contending that a three-judge district court is required to consider her First Amendment arguments attacking Section 230(c)(2) of the CDA, Ms. Mahoney refers to Section 561(a) of the Telecommunications Act of 1996, which provides that a three-judge district court shall be convened under 28 U.S.C. § 2284 when a "*civil action* challeng[es] the constitutionality, *on its face*, of this title or any amendment made by this title, or any provision thereof[.]" 47 U.S.C. § 223 note (emphasis added).[1] "[T]his title" refers to title 5 of the Act, which is otherwise known as the CDA, and includes Section 230 of the CDA. *See* Pub. L. No. 104-104, § 501, 110 Stat. 133 (title 5 "may be cited as the 'Communications Decency Act of 1996'"); *id.* § 509, 110 Stat. 137 (adding Section 230 of the CDA, 47 U.S.C. § 230). But this lawsuit is not a "civil action challenging the constitutionality, on its face" of that title.

[1] Ms. Mahoney miscites this statute as 47 U.S.C. § 555(c)(1). Dkt. 44 at 12. That provision calls for a three-judge panel to decide constitutional challenges to "section 534 or 535 of this title." 47 U.S.C. § 555(c)(1). Sections 534 and 535 pertain to broadcast of "local commercial television," *id.* § 534, and "noncommercial educational television," *id.* § 535.

To begin with, Ms. Mahoney's complaint, which raises defamation and related claims under state law, does not "challeng[e] the constitutionality" of Section 230(c)(2). The complaint does not mention the Telecommunications Act or the CDA at all, much less seek a declaration that any part of them are unconstitutional—nor does it seek an injunction against their enforcement. *See* Dkt. 1-1. The complaint also does not seek any relief that would implicate Section 230(c)(2) in any way. Ms. Mahoney is seeking damages from Facebook for alleged defamation, invasion of privacy, and the negligent infliction of emotional distress. Dkt. 1-1, at ¶¶ 84-109.[2] But Section 230(c)(2) has nothing to do with those types of claims. Instead, it immunizes online providers from liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]" 47 U.S.C. § 230. In other words, Section 230(c)(2) protects content moderation activities by online providers—but Ms. Mahoney is not suing Facebook over content moderation. Although her complaint notes in passing that her account was eventually "disabled and deleted," Dkt. 1-1 at ¶ 62, she neither alleges that the removal of her account or posts was improper nor asserts a claim challenging their removal, *see id*. ¶¶ 84-109. To the contrary, her claims rest on her allegations that she was harmed by content that was left up—Instagram posts by other users who identify her as a participant in the January 6, 2021 protest at the U.S. Capitol—not by the removal of any content.

Courts reject requests for a three-judge district court when, as here, the complaint itself does not assert any constitutional claims. *See Rural W. Tennessee African-Am. Affairs Council v. Sundquist*, 209 F.3d 835, 838 (6th Cir. 2000) (noting that a three-judge panel dissolved after

[2] Facebook has moved to dismiss these claims because they fail as a matter of law. Dkt. 20.

plaintiff "amended its complaint to challenge the House Plan on the sole ground that it violated [Section] 2 of the Voting Rights Act" "[b]ecause the amended complaint [no longer] contained constitutional claims"); *Thomas v. Bryant*, 2019 WL 454598, at *2 (S.D. Miss. Feb. 5, 2019) *appeal dismissed as moot*, 961 F.3d 800 (5th Cir. 2020) (finding section 2284(a) does not apply because "the plaintiffs have not asserted any constitutional claims").

Moreover, Facebook never even *raised* a defense based on Section 230(c)(2). As Facebook has explained, an entirely different subsection of the statute—Section 230(c)**(1)**, not Section 230(c)**(2)**—preempts Ms. Mahoney's claims. Dkt. 41, at 6-7. Section 230(c)(1) precludes "treat[ing]" an online provider "as the publisher or speaker" of third parties' statements. 47 U.S.C. § 230(c)(1). As Facebook's motion to dismiss explained, Ms. Mahoney's defamation and other claims seek to do just that: impose liability on Facebook because of the speech of third-party Instagram users—namely, those third-party users' posts identifying Ms. Mahoney as a participant in the January 6, 2021 protest at the U.S. Capitol. Dkt. 20, at 14-16. In response, Ms. Mahoney *ignored* the provision that Facebook had invoked, Section 230(c)(1), and instead argued inexplicably that Section 230(c)(2) violates the First Amendment. Dkt. 31 at 20-26.[3]

Ms. Mahoney cannot convert this action into a "civil action challenging the constitutionality" of Section 230(c)(2), 47 U.S.C. § 223 note, by asserting an irrelevant constitutional challenge to that inapplicable statutory provision. Adjudicating the claims and defenses in the action does not require consideration of Ms. Mahoney's frolic and detour.

[3] Ms. Mahoney concedes that she "has never asserted that Section 230(c)(1) is unconstitutional." Dkt. 44 ¶ 36. But that is exactly the point: the *only* provision that Facebook relied upon in its motion to dismiss was Section 230(c)(1), *not* Section 230(c)(2). And plaintiff's complaint did not even *mention* this statutory provision. Indeed, plaintiff's commentary on the constitutionality of Section 230(c)(2) came out of the blue.

Moreover, because Facebook has not argued that Section 230(c)(2) preempts her claims, Ms. Mahoney lacks standing to challenge its constitutionality. *See Jones v. Caruso*, 569 F.3d 258, 276 (6th Cir. 2009) (parties "lack[] standing to challenge [a law] on the basis that it is unconstitutional as applied to others"). This Court therefore lacks jurisdiction to decide the merits of her constitutional challenge and render the advisory opinion that she requests. *Id.*

It is settled that "a three-judge court is not required where the district court itself lacks jurisdiction [over] the complaint or the complaint is not justiciable in the federal courts." *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015) (quoting *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 100 (1974)). "[L]ack of standing" to assert a constitutional challenge is a valid 'ground upon which a single judge" may "decline[] to convene a three-judge court[[.]" *Gonzalez*, 419 U.S. at 100 (internal quotation marks omitted). Here, Ms. Mahoney lacks standing to challenge Section 230(c)(2) because it is inapplicable to her, and accordingly the Court can and should refuse to appoint a three-judge panel.

B. The Parties Agree That The Middle District Of Tennessee Is The Wrong Jurisdiction For Resolution Of This Action.

Three judges are not required to hear Ms. Mahoney's constitutional challenge to Section 230(c)(2) for another reason: *both* parties agree that the Middle District of Tennessee is the wrong jurisdiction for resolution of this litigation. Facebook has moved to transfer venue based on a forum-selection clause in Instagram's Terms of Use, requiring resolution of the action in the Northern District of California. Dkt. 14. Ms. Mahoney concedes that the forum-selection clause is enforceable here. Dkt. 28 at 26. Her only objection to transfer is that she thinks the forum-selection clause should be enforced by remanding to state court in Tennessee. *See* Dkt. 32 ¶ 3. She is wrong about remand, but the important point for present purposes is that all parties agree

that the litigation shouldn't proceed in this Court. "[T]hree judges are not required," 47 U.S.C. § 233 note, to hear a constitutional challenge that this Court will never reach.

Ms. Mahoney argues irrelevantly that Facebook's pending motion to transfer should not impede convening a three-judge court under 28 U.S.C. § 2284 because that statute has "mandatory language" whereas the "venue transfer statute" contains "discretionary language." Dkt. 45, at 8. But Ms. Mahoney overlooks the critical and undisputed fact that no party believes that *this* Court should hear Ms. Mahoney's constitutional challenge. In any event, where, as here, the parties agree that a forum-selection clause is applicable and enforceable, it is "prima facie valid and should be enforced." *The Bremen v. Zapata Off-Shore*, 408 U.S. 1, 10 (1972).

There is no need to waste judicial resources to convene a three-judge panel in this Court. To the contrary, the Supreme Court has "long held that congressional enactments providing for the convening of three-judge courts must be strictly construed. Convening a three-judge court places a burden on the federal court system, and may often result in a delay in a matter needing swift initial adjudication. Also, a direct appeal may be taken from a three-judge court to this Court, thus depriving us of the wise and often crucial adjudications of the courts of appeals." *Allen v. State Bd. Of Elections*, 393 U.S. 544, 561-62 (1969); *see also* 28 U.S.C. § 1253 (providing for direct appeal to Supreme Court from three-judge district court).

This case does not justify the imposition of the burden of the three-judge-panel procedure on the federal court system. Indeed, this case is entirely unlike the case that Ms. Mahoney cites—*Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)—in which a three-judge panel was appointed to consider a constitutional challenge to provisions of the CDA. In that case, the ACLU had sued the Attorney General seeking to enjoin enforcement of provisions of the CDA that would have criminalized publishing certain material on the Internet. *Id.* at 861 That

case fit comfortably within Section 561(a) of the Telecommunications Act's authorization of a three-judge panel. *Id.* at 862 & n.29; *see also United States v. Playboy Entm't Grp., Inc.*., 529 U.S. 803, 809 (2000) ("three-judge District Court" convened to hear Playboy's lawsuit against United States to "enjoin[] the enforcement" of CDA provision requiring scrambling of sexually explicit content during certain hours). By contrast, this case is not a facial constitutional challenge seeking to enjoin enforcement of a federal statute, and this Court should therefore reject the request for a three-judge panel out of hand.

CONCLUSION

The Court should deny plaintiff's request for the Court to convene a three-judge district court.

Dated: October 29, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2021, the foregoing was electronically filed with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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