VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

DEVIN G. NUNES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: CL19-1715-00
	)	
TWITTER, INC., *et al.*,	)	
	)	
Defendants.	)	

TWITTER'S MOTION TO DISMISS
BASED ON PREEMPTION AND IMMUNITY UNDER 47 U.S.C. § 230

Defendant Twitter, Inc. ("Twitter") moves the Court to dismiss Twitter from this action with prejudice on the ground that Plaintiff's claim against Twitter is preempted and barred by 47 U.S.C. § 230. Twitter states the following in support of this Motion:

1. Plaintiff Devin Nunes has sued Twitter and several individuals who use Twitter's online platform (Elizabeth Mair, "Devin Nunes' Mom," and "Devin Nunes' Cow") for injuries he claims he suffered as a result of allegedly defamatory online messages that those co-defendants posted on the Twitter platform. As this Court has recognized, and as Plaintiff himself has conceded, Plaintiff does not allege that Twitter authored any of these statements. *See* Letter Op. 3, 4 (Oct. 2, 2019) ("Letter Op."); Plaintiff's Supplemental Mem. In Opp. To Mots. To Dismiss 1 ("Supp. Opp."); Compl. ¶¶ 5, 9-12. Rather, the sole claim he asserts against Twitter—for negligence—rests entirely on the theory that Twitter did not prevent third parties from posting the statements on the Twitter platform and/or did not do enough to remove the statements after they were posted. *See* Letter Op. 3; Supp. Opp. 1, 3.

2. As summarized below, and as will be more thoroughly explained in Twitter's forthcoming brief in support of this Motion, Plaintiff's negligence claim against Twitter is the very paradigm of the type of claim preempted and barred by a federal statute, 47 U.S.C. § 230 ("Section

230"). In Section 230, Congress granted providers of online platforms like Twitter broad immunity from claims that seek to hold them liable for harms caused by defamatory or otherwise harmful content that appeared on the provider's platform but were created by third parties. As an immunity, Section 230 protects such providers not only from liability but also from being subjected to the burdens of discovery or other aspects of litigation. Accordingly, federal law requires that the Court grant Twitter's Motion and dismiss Twitter from this lawsuit at the very outset of this case.[1]

3. Section 230 states that "[n]o provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The statute further states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

4. The United States Court of Appeals for the Fourth Circuit, in its landmark *Zeran* decision, confirmed that Congress intended Section 230 to immunize providers of online services such as Twitter from lawsuits, like this one, that seek to hold them liable for third-party content. *See Zeran v. American Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997) (Wilkinson, C.J.), *cert. denied,* 524 U.S. 937 (1998). As Chief Judge Wilkinson explained, "[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Id.* at 330. Because Section 230

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[1] Twitter respectfully maintains that this Court lacks personal jurisdiction over Twitter and that the binding forum selection clause in Twitter's Terms of Service and forum non conveniens principles require that Plaintiff's claim against Twitter be brought, if anywhere, in California, where Twitter is headquartered and Plaintiff resides. By filing this Motion, Twitter does not waive its rights to continue to contest these jurisdictional and venue issues, either on reconsideration or on appeal.

prohibits claims that would treat providers of interactive computer services as the "publisher" of third-party content, it bars any lawsuit that turns on whether or to what extent a service provider exercised "a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" created by users of its service. *Id.* Plaintiff's negligence claim against Twitter falls squarely in this category. Indeed, the claim that the Fourth Circuit deemed preempted in *Zeran* was exactly like Plaintiff's here—it was a claim for negligence based on an online platform's alleged failure, despite notice, to block and remove a third-party user's repeated and persistent defamatory postings. *Id.* at 328, 332.

5. As Twitter's brief in support of this Motion will show, legions of federal and state courts across the country have uniformly followed *Zeran* in construing Section 230 as a broad immunity from suits exactly like this one.

6. Congress underscored this immunity with "preemptive bite," *Klayman v. Zuckerberg*, 753 F.3d 1354, 1356 (D.C. Cir. 2014), expressly displacing "any State or local law that is inconsistent with" Section 230's protections, 47 U.S.C. § 230(e)(3). *E.g.*, *Zeran*, 129 F.3d at 334 (Congress made "plain" that Section 230 "supersede[s]" conflicting state law claims); *Webb v. Hansen*, 85 Va. Cir. 6 (Va. Cir. Ct. 2011). Section 230 thus "preempts state law that is contrary to" its broad immunity. *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006).

7. Section 230 mandates dismissal of a claim whenever (1) the defendant is a "provider ... of an interactive computer service"; (2) the allegedly tortious or harmful content at issue was "provided by another information content provider," and not the defendant; and (3) the claim seeks to hold the defendant liable as a "publisher or speaker" of that content. 47 U.S.C. § 230(c)(1); *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 564 F. Supp. 2d 544,

548 (E.D. Va. 2008), *aff'd,* 591 F.3d at 250 (4th Cir. 2009). Each of these prerequisites is easily satisfied here.[2]

8. *First*, as multiple courts have held, Twitter's platform qualifies as an "interactive computer service" because users around the world access Twitter's servers in order to send messages and share information with others. *See* 47 U.S.C. § 230(f)(2) (defining "interactive computer service"); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016) (finding that Twitter provides an interactive computer service); *Mezey v. Twitter, Inc.*, No. 1:18-CV-21069-KMM, 2018 WL 5306769, at *1 (S.D. Fla. July 19, 2018) ("Twitter—as a platform that transmits, receives, displays, organizes, and hosts content—is an interactive computer service."); Compl. ¶ 6 (Twitter is a "global platform for public self-expression and conversation in real time").

9. *Second*, all of the allegedly tortious or harmful content at issue was "provided by another information content provider" because third parties (*i.e.*, Mair, @DevinCow, @DevinNunesMom, and other users of the Twitter platform), and not Twitter itself, "create[d]" and "develop[ed]" all of the content from which Congressman Nunes's claims against Twitter purportedly arise. *Nemet Chevrolet*, 591 F.3d at 254.

10. *Third*, Plaintiff's negligence claim attempts to hold Twitter liable as the "publisher or speaker" of that third-party content. 47 U.S.C. § 230(c)(1). The theory underlying Plaintiff's negligence claim is that Twitter "fail[ed] to remove the alleged defamatory comments" of the user Defendants. Letter Op. 4; *see* Compl. ¶¶ 1-2, 9, 12, 27, 37. Such conduct—"failing to detect and remove" allegedly tortious content—is "precisely the kind of activity for which Congress intended

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[2] While Plaintiff's Complaint includes a lengthy footnote that attempts to anticipate Twitter's Section 230 preemption defense, Compl. ¶ 1 n.1, none of the rationales Plaintiff suggests for circumventing the defense holds water, as Twitter will elaborate in its forthcoming brief supporting this motion.

to grant absolution with the passage of section 230." *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1171-1172 (9th Cir. 2008) (en banc); *Zeran*, 129 F.3d at 330 (Section 230 applies to a claim that "seek[s] 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").

11. Because Plaintiff's claim against Twitter is barred by Section 230, and because Section 230 creates immunity for online platforms from claims exactly like this one, the claim must be dismissed with prejudice *now*, without subjecting Twitter to any further burdens of litigation. Courts have recognized that Section 230 "protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.'" *Nemet Chevrolet*, 591 F.3d at 254 (quoting *Roommates.com*, 521 F.3d at 1175). That immunity would be "effectively lost if a case is erroneously permitted to go to trial," so Section 230 must be given effect "at the earliest possible stage of the case." *Id.* at 255; *see also id.* at 254 (Section 230 should be "accorded effect at the first logical point in the litigation process").

12. Twitter will submit a brief in support of this Motion.

WHEREFORE, for the reasons set forth above, Twitter respectfully requests that the Court grant this Motion, dismiss this action and all claims against Twitter with prejudice, and grant such other relief as the Court deems appropriate.

Dated: January 22, 2020

Respectfully submitted,

TWITTER, INC.

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of January, 2020, I caused a true and accurate copy of the foregoing to be served by First Class United States Mail, postage prepaid, on the following:

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