No. 21-12355

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NETCHOICE, LLC, et al.,
Plaintiffs-Appellees,

v.

ATTORNEY GENERAL STATE OF FLORIDA, et al.,
Defendants-Appellants

On Appeal from the United States District Court for the Northern District of Florida No. 4:21-CV-220-RH-MAF

BRIEF OF IP JUSTICE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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November 15, 2021

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae certifies that, in addition to those persons listed in the first-filed brief's certificate of interested persons, the following is a complete supplemental list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

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As required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, *Amicus Curiae* IP Justice further certifies that it is not a publicly held corporation, nor a subsidiary or affiliate of any publicly-owned parent corporations, and has not issued any stock. Therefore, no publicly traded corporation owns ten percent or more of its stock. *Amicus Curiae* is not aware of any publicly-owned corporation that has a financial interest in the outcome of this litigation and has not cooperated with any such corporation.

None of the counsel for the parties in this litigation has authored this brief, in whole or in part. Furthermore, no party, party's counsel, or outside organization has funded the research, writing, preparation, or submission of this brief.

Counsel for all parties have consented to the filing of this brief. Thus, *Amicus Curiae* has authority to file this brief. *See* Fed. R. App. P. 29(a)(2).

Dated: November 15, 2021

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INTEREST OF AMICUS CURIAE

IP Justice is an international 501(c)(3) non-profit charitable organization based the United States. IP Justice has been operating as an international technology rights and civil liberties organization since 2002. It promotes Intellectual freedoms and advancement through Internet freedom, innovation policy, and a balance of intellectual property rights between content holders and users. IP Justice contends that a free and open Internet is a prerequisite for a robust democracy and the promotion of innovation, technological advancement, and economic growth.

Over the last two decades, IP Justice has selectively partnered with *Amici Curiae* in to provide courts with unbiased insights on important legal issues. Additionally, IP Justice participates in international policymaking fora including the United Nations World Intellectual Property Organization (WIPO), the United Nations Internet Governance Forum (IGF), and the Internet Corporation for Assigned Names and Numbers (ICANN). IP Justice has held an accredited consultative status with the Economic and Social Council of the United Nations (ECSOC) since 2003. The organization has been invited to testify before the U.S. Copyright Office as part of it's rulemaking procedures under the Digital Millennium Copyright Act (DMCA). IP Justice has authored numerous academic

works on the interplay of technology and law with a particular focus on global issues affecting digital rights and Internet governance.

I.

STATEMENT OF ISSUES

The Florida Appellants' appeal of the U.S. District Court's preliminary injunction presents two main issues for review:

1. Whether Florida's state law S.B. 7072 violates the freedom of expression guarantees of the First Amendment to the U.S. Constitution; and
2. Whether S.B. 7072 is inconsistent with and therefore preempted by 47 U.S.C. § 230.

II.

STATEMENT OF THE CASE

The factual and procedural underpinnings of this action are set forth adequately in the briefs of the parties herein. In order to provide the Court with context for the arguments presented, *Amicus Curiae* sets forth key provisions of Florida's S.B. 7072 (occasionally the "Act") that will be analyzed here.

A. Key Terms of S.B. 7072

The Act includes Florida Statute 501.2041(1)(j) which provides that "a social media platform may not take any action to censor[1], deplatform[2], or shadow ban[3] a journalistic enterprise based on the content of its publication or broadcast."

Florida Statute 106.072(2) states that a social media platform must not "willfully deplatform a candidate for office who is known by the social media platform to be a candidate, beginning on the date of qualification and ending on the date of the election or the date the candidate ceases to be a candidate."

Florida Statute 501.2041(2)(h) prohibits a social media platform from using "post-prioritization[4] or shadow banning algorithms" for content "posted by or

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[1] "'Censor' includes any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or post an addendum to any content or material posted by a user. The term also includes actions to inhibit the ability of a user to be viewable by or to interact with another user of the social media platform." Fla. Stat. § 501.2041(1)(b).

[2] "'Deplatform' means the action or practice by a social media platform to permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." *Id*. § 501.2041(1)(c).

[3] "'Shadow ban' means action by a social media platform, through any means, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform. This term includes acts of shadow banning by a social media platform which are not readily apparent to a user." *Id.* § 501.2041(1)(f).

[4] "Post-prioritization" means action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less

about a user" who is known by the platform to be a candidate for office. Thus it compels the publication of speech posted both by and about politicians on platforms. Florida Statute 501.2041(2)(d) contains additional measures tending to discourage removing or demoting other speech.[5]

The statue defines "journalistic enterprise" as those Florida businesses that meet high thresholds of popularity as measured by content consumption[6]. "Social media platform" is broadly defined to cover most types of Internet service providers, but expressly exempts those that operate a Florida "theme park or entertainment complex." Fla. Stat 501.2041(1)(g). The specific types of services that the Florida statute refers to as "social media platforms" are the same services that Section 230 describes as "interactive computer services", this brief will collectively refer to these as "Platforms."

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prominent position than others in a newsfeed, a feed, a view, or in search results." *Id.,* § 501.2041(1)(e).

[5] "A social media platform may not censor or shadow ban a user's content or material or deplatform a user from the social media platform: 1. Without notifying the user who posted or attempted to post the content or material; 2. In a way that violates this part." *Id.,* § 501.2041(2)(d).

[6] The business must publish "in excess of 100,0000 words" online with 50,0000 paid subscribers or 100,0000 active users, publish 100 hours of audio or video with "at least 100 million viewers annually", operate a cable channel (with certain thresholds), or operate under a Federal broadcast license. *Id.,* § 501.2041(1)(d)1-4.

S.B. 7072 bars Platforms from exercising their private editorial discretion to remove, demote, modify, or add content posted by certain privileged users, "candidates for office" (which are politicians) and "journalistic enterprises" (which are large media organizations). It creates a complex regulatory scheme for how ordinary users' content can be published and for the removal of users from the Platform. With the exception of content falling within Florida's obscenity statute (Fla. Stat. 847.001.), the bar applies irrespective of the Platform's purpose, be it disagreement with a particular viewpoint, violation of the terms-of-use agreement, a particular request by a user, or any reason. The bar on Platform editorial discretion does not apply to content originating from Florida businesses that do not meet the statutory popularity thresholds, from individuals, or from businesses outside of Florida.

III.

SUMMARY OF ARGUMENT

Amicus Curiae urges the Court to uphold the preliminary injunction against S.B. 7072 as an unconstitutional restraint on freedom of expression and as preempted by 47 U.S.C § 230 ("Section 230") of the Communications Decency Act ("CDA"). S.B. 7072 forces Platforms to publish certain speech, favor certain speakers, and removes the editorial discretion to refuse, limit, or modulate the

same. The purpose of enacting S.B. 7072 as described by the Chief Executive and legislators was to elevate one political ideology over another.

Despite having some attributes of a public service, Platforms are in fact private entities and thus have a constitutionally protected right to editorialize and associate only with those users they choose. Internet users have similar protected rights. S.B. 7072 removes individual discretion and choice from consumers as to which viewpoints they wish to consume and instead forces Platforms to accept all politicians and journalistic enterprises (as those terms are defined) as members and to publish their speech. In so doing, the regulation inserts the government as an "uber-moderator" trumping the otherwise agreed-upon standards contained in a Platform's terms-of-use, and replacing it with a government edict. S.B. 7072 violates the First Amendment, is unlawful under Section 230 and, will harm the growing Internet sector of the United States' economy, and permanently damage the free and open exchange of ideas on the Internet, unless enjoined.

IV.

ARGUMENT

The importance of safeguarding the constitutionally protected right to free speech is among the most zealously guarded of our national rights. It is viewed as indivisibly bound to our identity as a free and open society. As President Harry

Truman reported in a Special Message to Congress on the Internal Security of the United States (Aug. 8, 1950):

> "Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear."

Bailey v. Wheeler, 843 F.3d 473, 486 (11th Cir. 2016) (First Amendment prevents use of government power to chill or punish speech with which government actor disagrees.). So important is this fundamental right that Congress and Courts have created myriad protections as a moat protecting impingent on, or burdening of, this critical personal right. Among those is Section 230. That complex set of federal regulations was enacted in great measure to ensure that the then developing virtual arena of online speech would remain unfettered by government regulation. To fortify the protection it created, Congress expressly, and broadly, preempted state regulation in the arena of Internet content regulation.

A. S.B. 7072 Is A Violation of First Amendment Rights To Freedom of Expression and Association

It has been well-established for nearly a quarter of a century that the Internet is the most participatory form of mass speech yet developed and content posted in that medium is entitled to the highest protection from governmental intrusion. *ACLU v. Reno*, 521 U.S. 844, 863 (1997) ("Reno").

> "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."

Id., at 885.

Our Supreme Court has recognized that the "vast democratic forums of the Internet" present the "most important place[]… for the exchange of views." *Packingham v. North Carolina*, __ U.S.__, 137 S. Ct. 1730, 1735, (2017) ("*Packingham*"). "[S]ocial media in particular" is entitled to the same First Amendment protections as other forms of media. *Id.,* at 1735; *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (First Amendment prohibits government entities from abridging freedom of speech). These Constitutional safeguards apply to State governments through the Fourteenth Amendment. *Gitlow v. New York* 268 U.S. 652, 667-68 (1925).

1. The Act Constitutes Government Action Against Private Citizens in Violation of the First Amendment

"The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926, 204 L. Ed. 2d 405 (2019) ("*Manhattan*"). Thus, while the state may not act as the arbiter of speech, private citizens may. The former is an

impermissible government intrusion, while the latter is a zealously safeguarded right, critical to the orderly exchange of ideas in an open society.

Nor does it matter whether the private actor is an individual, organization, entity, or corporation; each has an equally important protected speech interest:

> "First Amendment protection extends to corporations. [citations] . . . . [citations] Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation." . . . The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons."

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010), citing *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster").

There can be instances where the line between private and public may be blurry. This is not one of them. *Manhattan* is instructive on this issue. There, the Supreme Court analyzed whether a "public access" cable provider was properly deemed a government actor (or government-like) and thus subject to First Amendment restrictions. In finding the entity was private, the High Court employed the state-action doctrine, which holds that a private entity will only be considered a state actor when it exercises a function "traditionally exclusively reserved to the State." *Manhattan* 139 S. Ct. at 1926. Justice Kavanaugh

explained that the "public access" cable provider failed the test. "Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed… Private property owners and private lessees often open their property for speech." *Id.,* at 1930. Agreeing with Judge Jacobs in *Hudgens v. NLRB*[7], *Manhattan* held that it "is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment." *Id.* Noting that different private entities have traditionally provided fora for public speech (including grocery stores putting up community billboards and comedy clubs hosting open mic nights), *Manhattan* reiterates the importance of protecting private editorial discretion:

> "In short, merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints. . . 'The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use.' *Hudgens*, 424 U.S. at 519, 96 S.Ct. 1029 (internal quotation marks omitted). Benjamin Franklin did not have to operate his newspaper as "a stagecoach, with seats for everyone." F. Mott, American Journalism 55 (3d ed. 1962). That principle still holds true. . . . to hold that private property owners providing a forum for speech are constrained by the First Amendment would be "to create a court-made law wholly disregarding the constitutional basis on which

[7] 424 U.S. 507 (1976).

> private ownership of property rests in this country." [citation].

Id., at 1930-31.

Thus, just as the "public access" providers in *Manhattan* had no duty to themselves refrain from content restrictions, so too the Platform owners do not. *See, Manhattan* 139 S. Ct. at 1930-1934 (Neither government regulations, use of government rights-of-way, nor other public communication infrastructure rendered cable operator a government actor.). To the contrary, consistent with *Reno, Packingham,* and *Citizens United,* the Platforms, as private citizens, enjoy their own First Amendment protections. This point is particularly important in light of the existence of contractual, private, terms of use agreements that Platforms enter into with their users. These private contracts dictate the rules for acceptable conduct and speech by anyone who wishes to join the Platforms. See *Fteja v. Facebook, Inc.*, 841 F.Supp.2d 829 (2012) (upholding enforceability of Facebook's website terms of service); *Babcock v. Neutron Holdings, Inc.*, No. 20-60372 (S.D. Fla. Apr. 13, 2020) (upholding enforceability of mobile terms of service). The result is a private marketplace of accepted norms, which include private content regulation agreed upon by user and Platform.

The ability for social media platforms to self-regulate the content that is shared on their environments is vital to the development of a free and open Internet. (See also Sect. IV.C.) Private content moderation, when used with

proper discretion, can protect Internet users from content those users agree is harmful. For example, Twitter, an online microblogging and social networking platform that allows users to post their own content and repost the content of others, has strict regulations against the posting of "hateful conduct". Twitter's published "Safety and Cybercrime" Rules and Policies details what constitutes "hateful conduct," the rationale behind the regulation, and the consequences for its violation.[8] Similarly, social media network Facebook, has posted community standards against any content that promotes or incites violence, criminal behavior, dangerous individuals or organizations, fraud, deception, and more.[9] The absence of a standardized set of rules across all Platforms (as the Act dictates) allows users to select whatever Platform and corresponding terms and standards most closely aligns with the particular user's beliefs and preferences. The differing community standards, shared values, and rules itself generates microcosms of speech-promoting habitats.

Just as traditional private businesses are entitled to post rules such as "No Shirt, No Shoes, No Service" that customers are required to follow if they wish to

[8] *Hateful Conduct Policy,* Twitter, https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (Retrieved 31 Oct. 2021).
[9] *Community Standards,* Facebook, https://m.facebook.com/communitystandards/violence_criminal_behavior/ (Retrieved 30 Oct. 2021).

patronize the business, Internet companies are free to post terms of service outlining their rules and policies for use including content moderation and deplatforming. *Charudattan v. Darnell*, 834 F. App'x 477, 481–82 (11th Cir. 2020). (Deplatforming and blocking plaintiff's comments from sheriff's re-election FaceBook page was private, not government action, and thus precluded First Amendment based 1983 claims).

To be clear, *Amicus Curiae* does not advocate that this Court (or any branch of government) should view any particular term of use policy as good or bad. Precisely the opposite: government should avoid the editorial process entirely. These forms of private content moderation allow the individual online Platforms to exercise their free speech rights to control the messaging on their Platforms in a fashion that they believe will protect the needs of their users. Internet users then enjoy the freedom to engage with online Platforms that comport to their own standards of behavior and acceptable speech, selecting which communities with which they wish to associate and which they do not. This balance aligns with the First Amendment and Congress' intention in creating Section 230 to encourage private content moderation. S.B. 7072 is a government action seeking to undo that Constitutionally protected form of private editorial discretion.

2. The Act Compels Speech in Violation of the First Amendment

It is well established that "compelling cognizable speech...is just as suspect as suppressing it, and typically subject to the same level of scrutiny." *Glickman v. Wileman Bros. & Elliott, Inc.,* 521 U.S. 457, 480-81 (1997). "[T]he First Amendment guarantees 'freedom of speech, a term necessarily comprising the decision of both what to say and what *not* to say." (*Riley v. National Federation of Blind of N.C., Inc.* 521 U.S. 457 (1988) (no constitutional significance to difference between compelled speech and prohibited speech); *accord, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 U.S. 557, 573 (1995).

In *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo,* the Supreme Court established that "compelling editors or publishers to publish that which reason tells them should not be published violates the First Amendment guarantee of a free press" *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo,* 418 U.S. 241, 256 (1974) ("*Tornillo"*). *Tornillo* analyzed Florida's "right of reply" statute that had granted a political candidate a right to equal space in a private newspaper to answer criticism and attacks on their record. The Supreme Court struck down the statute as an unconstitutional compulsion of speech.

The *Tornillo* Court explained that the intrusion into the function of the editors' selection of content violated the First Amendment.

> "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . . The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

Id., at 257-258.

Like the Platforms here, *Tornillo* involved private enterprises engaged in the communication and content republication business. By providing a private platform for public discourse, newspapers and social media sites provide similar press services and have similar press interests including the constitutional right to control what information and viewpoints are published on their social media publications. In fact, according to a 2021 Pew Research Center study, about half of Americans now get their news on social media, nearly a third of Americans regularly get news on Facebook, and 55% of Twitter users regularly get news on Twitter.[10] Social media sites have become an important source of news and a

[10] Pew Research Center. (21 September 2021) "*News Consumption Across Social Media in 2021*" [Report].

platform for public discourse in the Internet age. *Packingham,* 137 S.Ct. at 1737. The enhanced public discourse made possible by the Internet and social media, which provides an environment in which citizens engage in robust and open debate on public issues, provides an important democratic function. It adds mightily to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan* 376 U.S. 254, 270-279 (1964) (government-enforced discourse "dampens the vigor and limits the variety of public debate").

Despite the longstanding First Amendment prohibition on compelling private speakers to publish the unwanted speech of others, S.B. 7072 denies private Platform owners their right to moderate, censor, deplatform, or shadow ban certain government-selected users ("candidates for office" and "journalistic enterprises"), even when the Platform's owners might find those users' speech to be objectionable or in violation of their terms of use. Platforms are required to carry that speech, lose their editorial discretion, and become publishers for speech that the government mandates. Worse yet, this government prohibition on private editorial discretion discriminates between the government's preferred users and those not covered by the Act.

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https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021/

Our Nation has a strong tradition of eschewing government mandated viewpoint control. In *W. Virginia State Board of Education v. Barnette* 319 U.S. 624 (1943) the Supreme Court ruled that even statutory compulsion of patriotic acts (there are requirement to salute the flag) violates the First Amendment. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id*., at 642, *accord Wooley v. Maynard* 430 U.S. 705, 715 (1977) (Government may not use private license plates "as a 'mobile billboard' for the State's ideological message" or prohibit individuals from holding or expressing a different view from the majority).

An Internet that fosters a free and robust exchange of information from differing viewpoints serves a strong democratic interest that is harmed by the government's regulation of speech with S.B. 7072. As the *Tornillo* Court warned, governmental regulation of the crucial private editorial process cannot be consistent with First Amendment guarantees. *Tornillo* 418 U.S. 241, 257-258.

3. The Act Prevents Private Choice of Association in Violation of The First Amendment

The guaranteed right to associate freely is closely connected to the right to free expression. In *Boy Scouts of America v. Dale* 530 U.S. 640 (2000), the Supreme Court upheld the right to exclude others from private associations as a

right afforded by the First Amendment's guarantee of Freedom of Association. In *Boy Scouts*, the Boy Scouts revoked the membership of an assistant scoutmaster for conduct not in accordance with its membership policies. The scoutmaster sued under a state accommodations law, claiming that the Boy Scouts could not exclude him from the association. The Supreme Court disagreed, holding that the member could be excluded. The Court explained the state regulation would significantly burden the organization's right to oppose certain conduct, holding that "the state interests … do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement". *Id*., at 659. In *NAACP v. Alabama ex rel. Patterson* 357 U.S. 449 (1958) the Supreme Court ruled that "it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id*., at 460.

Online communities cultivated by private Platforms are no less of an association than private clubs, or educational organizations. Florida Statutes 106.072(2), which does not allow politicians to be deplatformed, and 501.2041(2)(j), which does not allow large journalistic enterprises to be deplatformed, infringe on the right to associate in the same manner ruled

unconstitutional in *BoyScouts* and *NAACP* because it prevents the right to exclude certain participants and thus precludes the Platforms and their users from their right to oppose certain viewpoints or expressions. The Platforms have a right to host, and the users have a right to join, on-line communities with viewpoints, standards, and beliefs of which they approve[11]. The First Amendment precludes the State of Florida from mandating those associations.

4. The Act Mandates Content, Speaker, and Viewpoint Discrimination in Violation of the First Amendment

Viewpoint discrimination is presumptively unconstitutional. As the Supreme Court explained in *Rosenberger v. Rector and Visitors of the University of Virginia* 515 U.S. 819 (1995):

> "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. [Citations]. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. [Citations]. Discrimination against speech because of its message is presumed to be unconstitutional. [Citations] … Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the

[11] Nor is the ability for users to block individual speakers any remedy. That remedy does not allow the online community to self-select its organizational membership. Just as a private club cannot be prohibited from excluding members under the theory that members could simply ignore the unwanted persons, so too individualized online blocking does not remedy the harm here.

> rationale for the restriction. See *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)."

Id., at 828-829 (1995).

Thus, the government "is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 347 (2010).

The Supreme Court explained in *Ward v. Rock Against Racism* 491 U.S. 781 (1989) "the principal inquiry in determining content neutrality, in speech cases generally . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.,* at 791. Content discrimination is often apparent from the face of the regulation, but Courts may also consider the stated purpose of legislation where the same demonstrates an intention to suppress expression. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 646 (1994), *accord. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564, (2011) (statements of proponent legislators relevant in confirming content discriminatory nature of regulation).

The Act expressly targets political speech (speech by or about a candidate for office) and specific speakers (certain journalistic enterprises and candidates for office) providing that type and author of content with audience preferences that are not afforded to other users or other types of content that the government has chosen *not* to favor. (See Sect. II.A.) A speech regulation targeted at specific

subject matter is content-based even if it does not discriminate among viewpoints within that subject matter. *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.* 447 U.S. 530, 537 (1980). Similarly, "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United v. Federal Election Comm'n* 558 U. S. 310, 340 (2010). Thus, the Act's terms are content-based.

That conclusion is readily buttressed by the stated intentions of the proponents of S.B. 7072, which evince the worst of constitutional violations: viewpoint discrimination. As the District Court below noted, the Florida Governor and Legislature explained that S.B. 7072 was targeted at "leftist" speech with which they disagree, and that the Act was intended to elevate "conservative" speech. *Netchoice, LLC, v. Moody* 2021 U.S. Dist. Lexis 121951 (N.D. Fla. June 30, 2021), at pp.24-25. Florida Governor DeSantis' press release on S.B. 7072 explained the Act was intended to counter viewpoints that "favor . . .the dominant Silicon Valley ideology."[12] Legislative Representative Blaise Ingoglia, identified the Act as necessary because of his views that "our freedom of speech as conservatives is under attack by the 'big tech' oligarchs in Silicon Valley. But in

[12] Press Release, *Ron DeSantis, Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech, (24 May 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/*

Florida, [this] … will not be tolerated."[13] *Id.* Whether the legislators' and Governor's views were correct or not, the intention behind S.B. 7072 was unquestionably government promotion of a particular viewpoint.

Government regulations of speech that are content-based or speaker-targeted are subject to the highest, strict scrutiny standard. *Turner Broadcasting System, Inc. v. FCC* 512 U.S. 622, 658 (1994) ("laws favoring some speakers over others demand strict scrutiny."), *Reed v. Town of Gilbert, Arizona* 576 U.S. 155 (2015), *Chicago Police Dept. v. Mosley* 408 U.S. 92 (1972). The State Appellants, here, cannot meet their burden of showing "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest," *Arizona Free Enterprise Club PAC v. Bennett* 564 U.S. 721 (2011) quoting *Citizens United* 558 U.S. at 340.

The stated interest of furthering conservative ideology, or undermining perceived "silicon valley ideology" is not a legitimate state interest. Moreover even that interest is not necessarily served by the Act, so it cannot be said to be narrowly tailored. Promoting speech on one side of an issue or restricting speech on the other, is not a legitimate state interest. *Arizona Free Enter. Club v. Barnett* 564 U.S. 721, 749-750 (2011).

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[13] Press Release, Ron DeSantis, *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, (24 May 2021), https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/

Assuming, for arguments sake, that Florida has identified a viewpoint in need of greater public attention, the answer, is already provided by private competition. For every MSNBC, there is a Fox News. For every Facebook or Twitter, whose agreed upon terms of use limit discourse in certain ways, there is a 4chan, 8kun, 8chan[14] and the like. Some Platform restrict content in some ways, some restrict it in other ways, still others do not restrict it at all. This is the beauty of free enterprise married with strongly enforced rights of Free Expression.

In this Country, governments do not belong in the political speech moderation business, helping one ideological side or hampering another by government fiat. That is behavior of authoritarian regimes, not free states protected by the First Amendment. Because the Act does just that, it must remain enjoined.

B. S.B. 7072 Is A Violation of The Communications Decency Act

1. Congress Enacted Section 230 To Protect Platforms Against State Laws That Regulate Content Moderation

Section 230 expressly encourages Platforms to moderate content on their online environments. The Act states "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information

[14] https://www.cnet.com/news/8chan-8kun-4chan-endchan-what-you-need-to-know-internet-forums/

provided by another information content provider" 47 U.S.C. § 230(c)(1). And further:

> "No provider or user of an interactive computer service shall be held liable on account of— 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(c)(2)(A).

These two statutory provisions give broad federal immunity to Platforms from being held liable for objectionable content shared to their website and encourages Platforms to moderate content using their own discretion as a form of protection against users consuming harmful information. S.B. 7072 takes this editorial right away from Platforms and removes the consumer protection element intended by Section 230.

Section 230 was enacted to overrule the decision in *Stratton Oakmont, Inc. v. Prodigy Services Co.,* 23 Media L. Rep. 1794, 199 1995 WL 323710 (N.Y.Sup.Ct 1995), which held an Internet provider *could* be held liable for defamatory statements of users. *Medytox Solutions Inc., v. Investorshub.com, Inc.,* 152 So. 3d 727, 730 (2014). Congress enacted Section 230 to overrule this decision and remove the disincentives to self-regulation. *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 331 (4th Cir. 1997). Courts have found that in enacting Section

230 Congress specifically intended "to allow computer service providers to establish standards of decency without risking liability for doing so." *Domen v. Vimeo, Inc.,* 991 F.3d 66, 73 (2nd Cir. 2021).

The Congressional Research Service confirms that when Congress introduced Section 230, members who spoke in favor "argued that it would allow private parties, in the form of parents and internet service providers, to regulate offensive content, rather than the FCC".[15] In *Attwood v. Clemons* the Court explained that Section 230 "is a part of a larger legislative policy to allow private social media companies and private users to censor violent or obscene content from social media without fear of civil liability. Section 230(c)(2). Congress has chosen to allow *private companies* and *private users* to censor." *Attwood v. Clemons*, 2021 U.S. Dist. 49586 (N.D. Fla. Mar. 17, 2021) [emphasis in original]. It goes further and states that Congress intended for social media and the Internet to be unfettered by federal or state regulation. *Id.* "Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Circuit 2003). Section 230 was therefore designed, in part, "to maintain the robust nature of Internet communication, and to accordingly keep government

[15] Valerie Brannon, Eric Holms, Cong. Research Serv., *Section 230: An Overview,* (April 7, 2021), https://crsreports.congress.gov/product/pdf/R/R46751.

interference in the medium to a minimum." *Zeran v. Am. Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997).

Congress recognized that privatized content moderation provides a safety check against the spread of harmful information by empowering private parties to demand that Platforms provide a healthy Internet environment that encourages the free flow of information while discouraging harmful content. Thus, Section 230 works hand-in-glove with the First Amendment.

2. Section 230 Preempts State Laws Like S.B. 7072

"The majority of 'federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" *Almeida v. Amazon.com, Inc.,* 456 F.3d 1316, 1321 (11th Cir.2006) (quoting *Zeran v. Am. Online, Inc.,* 129 F.3d 327 (4th Cir. 1997). Florida's Supreme Court too has recognized the CDA's broad preemptive effect. *Doe v. Am. Online, Inc.,* 783 So.2d 1010, 1018 (Fla.2001) (Section 230 expressly bars state actions).

Because Congress enacted Section 230 to encourage *private parties* to engage in online content moderation and S.B. 7072 prohibits it, the Act must be enjoined as inconsistent with and thus, preempted by, federal law.

C. State Laws Like S.B. 7072 Harm The Growing Internet Sector Of The United States Economy

U.S. businesses that permit and provide user-generated content represent a significant and growing portion of the Internet sector of the U.S. economy. According to a comprehensive study by the International consulting group and highly ranked think tank[16], McKinsey Global Institute, the Internet sector has greater weight on GDP than agriculture or utilities.[17] A primary reason such businesses have flourished is because of immunities for the speech of others that Section 230 provides to users and Platforms. According to a 2020 study, by leading researcher Verified Market Research, the market for user-generated content software was valued at $90.70 billion in 2019, and is projected to reach $434.03 billion by 2027, growing at a compound annual growth rate of 21.5% from 2020 to

[16] "*History and Reputation of the McKinsey Global Institute*", ThinkTank Watch, (16 June 2016), http://www.thinktankwatch.com/2016/06/history-and-reputation-of-mckinsey.html

[17] James Manyika and Charles Roxburgh, "*The Great Transformer: The Impact of the Internet on Economic Growth and Prosperity*", McKinsey Global Institute, (Oct. 2011), https://www.mckinsey.com/~/media/mckinsey/industries/technology%20media%20and%20telecommunications/high%20tech/our%20insights/the%20great%20transformer/mgi_impact_of_internet_on_economic_growth.pdf

2027.[18] The study concludes that the possibility of regulation of user-generated content is one of the main impediments to growth in the market for that sector.

Similarly, an Internet Association study asked American consumers about features and services most important to them when purchasing online.[19] The survey showed that features and services enabled by Section 230 mattered most to consumers. Section 230 encourages Platforms to host user-generated content, such as reviews, by holding speakers, not Platforms, liable for speech they post. Results showed user reviews offer a sense of safety to sharing-economy customers, many of whom indicated they would not use the Platform without reviews.

Another study by the Internet Association showed that reducing intermediary liability safe-harbor protections would cost the U.S. economy about $44 billion and 425,000 jobs each year.[20] It showed companies will face higher

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[18] "*User Generated Content Software Market Size and Forecast*", Verified Market Research (Sept. 2020), https://www.verifiedmarketresearch.com/product/user-generated-content-software-market/.

[19] *Best Of The Internet: Consumers Rely On User-Generated Content,* Internet Association, (25 June 2019), https://internetassociation.org/files/ia_best-of-the-internet-survey_06-26-2019_content-moderation/

[20] Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections,* NERA Economic Consulting, (5 June 2017), http://internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf

entry costs, limiting innovation, and that without the protections, consumers face higher costs and a less open and enjoyable online user experience.

The importance of Section 230 to industry and society can also be demonstrated by turning to countries that do not provide such protections. For example, a 2021 Malaysian appellate court decision held an online news Platform liable for the speech of its users who posted comments on a news story about government corruption in Malaysia.[21] Because Malaysia neither provides its citizenry with protections like those in Section 230, nor those found in our First Amendment, online news outlet *Malaysiakini* was fined $124,000 over 5 comments posted by users that the court deemed insulting to the judiciary. Due to the hefty fine and legal risk of continuing to allow user-generated content on its platform, the news outlet was forced to go out of business.[22] Put simply, where Section 230 immunities are absent, and government is allowed to dictate speech, Publishers simply cannot take the financial risk of allowing user-generated content.

Myriad studies and anecdotal evidence buttress the findings of Congress and of our Courts – maintaining Section 230's broad immunities and the related First

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[21] Richard C. Paddock, "5 reader comments just cost a news website $124,000" THE NEW YORK TIMES (2021), https://www.nytimes.com/2021/02/19/world/asia/malaysia-press-freedom-guilty.html (last visited Nov 13, 2021).

[22] *Id.*

Amendment protections is critical to the growth of the Internet economy. That economy, among the fastest growing sectors of the U.S. economy is also the "most participatory form of mass speech yet developed" (*Reno,* 521 U.S. 864) with its social media component providing among the "most important places . . . for the exchange of views." *Packingham v.* 137 S. Ct. at 1735.

V.

CONCLUSION

For the above reasons, *Amicus Curiae* urges the Court to uphold the preliminary injunction against S.B. 7072.

Dated: November 15, 2021

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CERTIFICATE OF COMPLIANCE

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I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on November 15, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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