No. 21-12355

United States Court of Appeals
for the
Eleventh Circuit

NETCHOICE, LLC, et. al.,

Plaintiffs-Appellees,

– v. –

ASHLEY BROOKE MOODY, in her official capacity as Attorney General of the State of Florida, et. al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION
NO: 21-12355

BRIEF OF CHRISTOPHER COX, FORMER MEMBER OF CONGRESS AND CO-AUTHOR OF CDA SECTION 230, AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Jackson R. Sharman III
jsharman@lightfootlaw.com
Jeffrey P. Doss
jdoss@lightfootlaw.com
Jonathan R. Little
jlittle@lightfootlaw.com
Tatum L. Jackson
tjackson@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE LLC
400 20th Street North
Birmingham, Alabama 35203

NetChoice, LLC, et al. v. Ashley Brooke Moody, et al.
Case No. 21-12355

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici Curiae certify that the following is a complete list of interested persons as required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1:

1. Allen, Jason Todd, *Defendant/Appellant*
2. Allen, Kenneth Winn, *Attorney for Plaintiffs/Appellees*
3. America First Policy Institute, *Amicus Curiae*
4. American Civil Liberties Union of Florida, *Amicus Curiae*
5. American Civil Liberties Union, *Amicus Curiae*
6. Authors Guild Inc., *Amicus Curiae*
7. Barnes, Brian W., *Attorney for Defendant/Appellant*
8. Bassett, Glenn Allen, *Attorney for Defendants/Appellants*
9. Bell, Daniel William, *Attorney for Defendants/Appellants*
10. Blacklock, Evelyn, *Attorney for Plaintiffs/Appellees*
11. Brnovich, Mark, *Attorney for Amicus Curiae State of Arizona*
12. Burhans Jr., Glenn T., *Attorney for Plaintiff/Appellee*
13. Cameron, Daniel, *Attorney for Amicus Curiae State of Kentucky*
14. Candeub, Adam, *Attorney for Amicus Curiae American First Policy Institute*

15. Carome, Patrick J., *Attorney for Amicus Curiae*

16. Center for Democracy and Technology, *Amicus Curiae*

17. Chamber of Progress, *Amicus Curiae*

18. Clark, Christopher Roy, *Attorney for Plaintiff/Appellee*

19. Clement, Paul D., *Attorney for Plaintiffs/Appellees*

20. Cole, William F., *Attorney for Amicus Curiae State of Texas*

21. Computer & Communications Industry Association, *Plaintiff*

22. Connected Commerce Council, *Amicus Curiae*

23. Consumer Technology Association, *Amicus Curiae*

24. Cooper, Charles J., *Attorney for Defendant/Appellant*

25. Cooper & Kirk, PLLC, *Attorneys for Defendant/Appellant*

26. Cox, Christopher, *Amicus Curiae*

27. Dillon, Dan, *Member of Amicus Curiae*

28. Dillon, Seth, *Member of Amicus Curiae*

29. DLA Piper US LLP, *Attorneys for Plaintiff/Appellee*

30. Doss, Jeffrey P., *Attorney for Amicus Curiae Christopher Cox*

31. Eisenstein, Ilana Hope, *Attorney for Plaintiff/Appellee*

32. Electronic Frontier Foundation, *Amicus Curiae*

33. Engine Advocacy, *Amicus Curiae*

34. Esparza, Servando, *Declarant*

35. Fabens-Lassen, Ben, *Attorney for Plaintiff/Appellee*

36. Fitch, Lynn, *Attorney for Amicus Curiae State of Mississippi*

37. Florida Department of Management Services, *Defendant/Appellant*

38. Florida Elections Commission, *Defendant/Appellant*

39. Florida Office of the Attorney General, *Attorneys for Defendants/Appellants*

40. Ford, Adam, *Member of Amicus Curiae*

41. Gillespie, Patrick, *Defendant/Appellant*

42. Goldstein, Leonid, *Amicus Curiae*

43. Green, Jonathan Allen, *Attorney for Plaintiff/Appellee*

44. Greene, David Allen, *Attorney for Amicus Curiae*

45. Gura, Alan, *Attorney for Amicus Curiae Institute of Free Speech*

46. Hacker, David J., *Attorney for Amicus Curiae*

47. Hayes, John Martin, *Defendant/Appellant*

48. Hinkle, Judge Robert L., *District Court Judge*

49. Holtzblatt, Ari, *Attorney for Amicus Curiae*

50. Homer, Bonner, *Attorney for Amicus Curiae*

51. Homer, Peter Winslow, *Attorney for Amicus Curiae*

52. Hopkins, Christopher, *Attorney for Amici Curiae*

53. Information Technology & Innovation Foundation, *Amicus Curiae*

54. Institute for Free Speech, *Amicus Curiae*

55. Internet Association, *Amicus Curiae*

56. Jackson, Tatum L., *Attorney for Amicus Curiae Christopher Cox*

57. Johnson, Steffen N., *Attorney for Plaintiff/Appellee*

58. Karanjia, Peter, *Attorney for Plaintiff/Appellee*

59. Kilby, Douglas Lamar, *Attorney for Plaintiff/Appellee*

60. Kirkland & Ellis LLP, *Attorneys for Plaintiffs/Appellees*

61. Knudsen, Austin, *Attorney for Amicus Curiae State of Montana*

62. Kolde, Endel, *Attorney for Amicus Curiae Institute for Free Speech*

63. Lightfoot, Franklin & White LLC, *Attorneys for Amicus Curiae Christopher Cox*

64. Little, Jonathan R., *Attorney for Amicus Curiae Christopher Cox*

65. Mackey, Aaron, *Attorney for Amicus Curiae*

66. Mann, Kyle, *Member of Amicus Curiae The Babylon Bee, LLC*

67. Marshall, Steve, *Attorney for Amicus Curiae State of Alabama*

68. Masterman, Joseph, *Attorney for Defendant/Appellant*

69. Mateer, Jeffrey C., *Attorney for Amici Curiae*

70. McDonald Hopkins LLC, *Attorneys for Amicus Curiae*

71. Media Law Resource Center Inc, *Amicus Curiae*

72. Mitchell, Kasdin M., *Attorney for Plaintiffs/Appellees*

73. Moody, Ashley B., *Defendant/Appellant*

74. Morrison, Danielle T., *Attorney for Plaintiff/Appellee*

75. National Black Justice Coalition, *Amicus Curiae*

76. NetChoice LLC, *Plaintiff*

77. Not the Bee, LLC, *Amicus Curiae*

78. Oprison, Christopher George, *Attorney for Plaintiff/Appellee*

79. Opsahl, Kurt, *Attorney for Amicus Curiae*

80. Pavlovic, Corinne, *Declarant*

81. Paxton, Warren Kenneth, *Attorney for Amicus Curiae State of Texas*

82. Pen American Center Inc., *Amicus Curiae*

83. Phillips, Joseph Trumon, *Attorney for Plaintiff/Appellee*

84. Poitier, Joni Alexis, *Defendant/Appellant*

85. Potts, Neil, *Declarant*

86. Pratt, Christine K., *Attorney for Amicus Curiae*

87. Pratt, Jordan E., *Attorney for Amicus Curiae*

88. Progressive Policy Institute, *Amicus Curiae*

89. Protect Democracy Project, Inc., *Amicus Curiae*

90. Reporters Committee For Freedom of the Press, *Amicus Curiae*

91. Rumenap, Stacie D., *Declarant*

92. Rutledge, Leslie, *Attorney for Amicus Curiae State of Arkansas*

93. Schmitt, Eric, *Attorney for Amicus Curiae State of Missouri*

94. Schruers, Matthew, *Declarant*

95. Shackelford, Kelly J., *Attorney for Amicus Curiae*

96. Sharman, Jackson R. III, *Attorney for Amicus Curiae Christopher Cox*

97. Shullman, Deanna K, *Attorney for Amicus Curiae*

98. Shullman, Fugate PLLC, *Attorneys for Amicus Curiae*

99. Siekkinen, Nury Agudo, *Attorney for Amicus Curiae*

100. Smith, Kymberlee Curry, *Defendant/Appellant*

101. Smitha, Bridget Kellogg, *Attorney for Plaintiff/Appellee*

102. Stearns Weaver Miller Alhadeff & Sitterson, P.A., *Attorneys for Plaintiff/Appellee*

103. Stone, Judd E. II, *Attorney for Amicus Curiae State of Texas*

104. Szabo, Carl, *Declarant*

105. Szoka, Berin Michael, *Attorney for Amicus Curiae*

106. Taylor, Treg, *Attorney for Amicus Curiae State of Alaska*

107. TechFreedom, *Amicus Curiae*

108. Technet, *Amicus Curiae*

109. The Babylon Bee, LLC, *Amicus Curiae*

110. Thompson, David H., *Attorney for Defendant/Appellant*

111. Tienken, John W., *Attorney for Defendant/Appellant*

112. Treadwell, Raymond Frederick, *Attorney for Defendant/Appellant*

113. Uthmeier, James William, *Attorney for Defendant/Appellant*

114. Veitch, Alexandra, *Declarant*

115. Walters Law Group, *Attorneys for Amicus Curiae*

116. Walters, Lawrence G, *Attorney for Amicus Curiae*

117. Washington Center for Technology Policy Inclusion, *Amicus Curiae*

118. Webster, Brent, *Attorney for Amicus Curiae State of Texas*

119. Whitaker, Henry C., *Attorney for Defendants/Appellants*

120. White, Lauren Gallo, *Attorney for Plaintiff/Appellee*

121. Willen, Brian M., *Attorney for Plaintiff/Appellee*

122. Wilmer Cutler Pickering Hale and Dorr LLP, *Attorneys for Amicus Curiae*

123. Wilson, Alan, *Attorney for Amicus Curiae South Carolina*

124. Wilson Sonsini Goodrich & Rosati, P.C., *Attorneys for Plaintiff/Appellee*

125. Winship, Blaine H., *Attorney for Defendants/Appellants*

126. Wolfson, Paul R., *Attorney for Amicus Curiae*

127. Xi, James, *Attorney for Plaintiffs/Appellees*

128. Yang, Meng Jia, *Attorney for Plaintiff/Appellee*

129. ZwillGen, *Attorneys for Amici Curiae*

Respectfully submitted this 15th day of November, 2021.

/s/ Jackson R. Sharman III
Jackson R. Sharman III
jsharman@lightfootlaw.com
Jeffrey P. Doss
jdoss@lightfootlaw.com
Jonathan R. Little
jlittle@lightfootlaw.com
Tatum L. Jackson
tjackson@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE LLC
400 20th Street North
Birmingham, Alabama 35203

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Christopher Cox is a former United States Representative (R-CA) who, along with then-United States Representative (now Senator) Ron Wyden (D-OR), authored Section 230 of the Communications Decency Act. 47 U.S.C. § 230 (hereinafter, "Section 230"). Since the law's enactment, Mr. Cox has been a leading observer of developments in the case law and, at the request of the House and Senate, a contributor to recent congressional deliberations about Section 230. As the principal drafter of the statutory text, *amicus* is able to speak authoritatively to the history of the law, Congress's intent in passing Section 230, and the importance of interpreting the law in accordance with the plain meaning of its words in order to be faithful to that intent.

STATEMENT OF COMPLIANCE WITH RULE 29(a)

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no person except *amicus curiae* or his counsel contributed money intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

This is a case about the First Amendment. But in part it also concerns the Supremacy Clause, and in particular the power of Congress expressly to preempt state laws. Two sections of the Florida statute at issue in this case, S.B. 7072 (hereinafter the "Act"), contain direct challenges to Section 230, which preempts inconsistent state laws. Florida's argument that Sections 2 and 4 of the Act are not federally preempted strains the plain meaning of Section 230's text.

The clear statement of express preemption of inconsistent state laws in Section 230, the reasons Congress chose express preemption, and the efficacy of that preemption under the Supremacy Clause are together the subject of this brief.

Florida has claimed that the Act is "consistent" with Section 230 because it must. Only "consistent" state laws can stand under Section 230. As plainly stated in Section 230(e)(3), "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

This brief will compare Sections 2 and 4 of the Act with the text of Section 230, highlighting the Act's irreconcilable conflict with the operative provisions of the federal statute. When the U.S. Supreme Court has found a law's text to be clear, it has buttressed that finding with analysis of the legislative history. *See, e.g.*, *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 458–60 (2012). Accordingly, this brief will next provide relevant background for understanding the architecture and

purposes of Section 230, as set forth in both the text and the legislative history, highlighting additional provisions of the Act that are inconsistent with these purposes. Lastly, it will describe the applicability of the Supremacy Clause to this case, without which not only Florida but every state so inclined would be free to engage in "every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1839 (3d ed. 1858).

To be clear, this brief covers only the partial preemption of the Act by Section 230 and the applicability of the Supremacy Clause to effectuate that preemption. The district court, while addressing the preemption issue, was manifestly correct in anchoring its analysis in the First Amendment, thereby treating the entirety of issues raised by the Act. While it is unquestionable that Congress, in enacting Section 230, intended to encourage platforms to host user-created content without fear of crippling liability, Section 230 achieves this result indirectly and in limited ways. The breadth of the Act, and the burdens it imposes on Internet platforms hosting content created by others, exceed the reach of Section 230. The analysis that follows, including the discussion of U.S. CONST. art. VI, cl. 2, is therefore necessarily supplemental and auxiliary to analysis of the First Amendment issues that are the principal focus of the parties and the decision below.

ARGUMENT

I. SECTIONS 2 AND 4 OF THE ACT DIRECTLY INTERFERE WITH CONTENT MODERATION, IN VIOLATION OF SECTION 230.

A. The Act Prohibits Websites from Enforcing Their Terms of Service and Community Guidelines Against "Candidates."

Both Section 2 and Section 4 of the Act prohibit covered websites from using ordinary forms of content moderation in a variety of circumstances if the content creator is a "candidate" (as loosely defined in the Act). Specifically, a website may not revoke an offending user's privileges even though the user has consistently and flagrantly violated the website's terms of service and community guidelines. It does not matter how reasonable the website's terms of service may be, or that the website's actions are taken in good faith. Nor does it matter that the "candidate" has paid nothing to the website for the privilege of publishing there. Denying free service to even multiple recidivists brings fines of $250,000 *per day* and unlimited exposure to civil liability. Act § 501.2041(2)(h).

This prohibition is in direct conflict with Section 230(c)(2), which protects a website in taking "*any* action" in good faith to restrict access to various categories of objectionable material. (Emphasis added.)

B. The Act Prohibits Websites from Moderating Content Created by *Any* Person "About" a Candidate.

Under the Act, a website may not moderate any content—even illegal content—created by *any* person, if the content is "about" a candidate. Specifically, a website may not take down objectionable content, no matter if it is graphically violent, racist, pro-Hitler, defamatory, or any other kind of awful material that the website, its users, and its advertisers do not wish to associate with. *Id.* §§ 501.2041(2)(f), (h). Indeed, the website must not fail to "prioritize" such content. *Id.* § 106.011(3)(e).

This provision of the Act stands Section 230(c)(2) on its head. Whereas the federal law protects websites that in good faith "*restrict*" access to content, the Florida law requires them to "*prioritize*" it. *Id.* (emphases added).

C. The Act Prohibits Websites from Taking "Any Action" to Moderate Content Created by "Journalistic Entities."

A website covered under the Act may not take "any action" to moderate even illegal content[1] created by an "entity," if the entity meets two flimsy conditions. It must have a website containing 100,000 words (i.e., 200 single-spaced pages, which need not be current or even authored by the entity—posting a public domain copy

[1] The lone exception is obscenity, which a website is allowed to moderate. *Id.* § 501.2041(4).

of *Grimm's Fairy Tales* would suffice). Alternatively, a scant 100 hours of audio will do—recordings of one's garage band apparently meet this trivial requirement. And the entity's website must have a mere 100,000 users over the course of a month, or just half that many subscribers (a pittance in an era when Internet personalities merely "famous for being famous" routinely garner millions of followers). Such an entity automatically qualifies as a "journalistic enterprise," *id.* § 501.2041(1)(d), and is granted by the Act the unfettered right to post to every "social media" site all manner of content, whether or not the content violates the website's community standards and terms of service. *Id.* § 501.2041(2)(j).

This wholesale exemption from any and all content moderation is forbidden by Section 230(c)(2). The heading for this portion of the federal statute is "*Protection* for 'Good Samaritan' blocking and screening of offensive material." (Emphasis added.) Contrary to Section 230, the Act *forbids* blocking and screening of offensive material. The federal law expressly forbids the imposition of *any* liability on a website that in good faith chooses to moderate objectionable content created by state defined "entities." Contrary state laws are expressly preempted in Section 230(e)(3).

D. Under the Act, a Website May Not Rely on Its Own Judgment in Determining What Content Is Objectionable.

Websites covered under the Act are not free to make their own good faith judgments about what content is objectionable, violative of their terms of service,

and in breach of their community standards. Instead, the Act's enforcers—the State of Florida and private litigants—are empowered to challenge those judgments on the ground that they have not been made "consistently." *Id.* § 501.2041(2)(b). As the Act makes no attempt to define what this means, it becomes a wholly subjective standard in the hands of the state—an all-purpose device with which to second-guess a website's good faith determination.

Section 230 forbids such state laws. It clearly provides that a website is protected in using its own judgment in determining whether to restrict access to material that it, or its users, consider objectionable. In the exact words of the statute, moderation of content "that the *provider or user considers* to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" is protected from liability. Section 230(c)(2)(A) (emphasis added).

E. The Act Prohibits Websites from Amending Content Moderation Policies to Meet Developing Threats.

A website covered by the Act is forbidden to amend its terms of service and community guidelines as developing threats require. Instead, it may do so only on a schedule set out in the Act. Specifically, covered websites are prohibited from changing their "user rules, terms, and agreements more than once every 30 days"—so if an unexpected crisis, new cyber threat, or novel form of intimidation, harassment, fraud, or other objectionable content is introduced, the website is prohibited from responding in real time. *Id*. § 501.2041(2)(c).

Section 230, to the contrary, states that websites are entitled to use their own judgment in determining standards for their online communities. Under Section 230(c)(2)(A), the website, not a state government, is responsible for determining what is objectionable. The policy basis for this is expressly stated in Section 230(b)(2). "It is the policy of the United States," the law announces, that the Internet shall be "unfettered by Federal or State regulation." But the Act substitutes Florida's own policy and imposes extensive state regulation that contradicts the federal law protecting websites' discretion in adopting their own content standards.

II. SECTIONS 2 AND 4 OF THE ACT ARE INCONSISTENT WITH SECTION 230.

A. The Structure and Purposes of Section 230.

Section 230 was written to adapt long-standing legal principles governing publisher liability to the new technology of the Internet. It was enacted as part of the first thorough-going overhaul of federal telecommunications law since 1934. Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996).

The principles of prior law followed from the nature of the communications technologies that had occupied the field for decades: broadcast television, radio, newspapers, and magazines. What each of these technologies has in common is that the content originates from a single source, and is distributed to thousands or millions of viewers, listeners, or readers who are passive. The new medium of the Internet flipped this model on its head. Now, the number of content creators—each

a "broadcaster," as it were—became nearly the same as the number of users. As was apparent even in 1996, the number of content creators would soon expand from hundreds of millions to billions.

It was equally apparent that it would be an impossibility for an Internet platform operating at scale to read and understand all of the content that so many people were creating every day. Perforce it would be unreasonable for the law to require this. Newspapers and TV networks may be held liable for their publications and broadcasts because they have a ready opportunity to know in advance what they are publishing. Websites hosting millions and billions of pieces of content plainly operate in a different environment.

Congress recognized, moreover, that it would destroy the essential nature of the Internet for the law to require monitoring of the vast amount of user-created content before it was posted online. What makes the Internet unique is that billions of content creators can interact with the entire planet without any intermediation or any lag time. In order for censors to intervene, they would have to destroy the real-time feature of the technology that makes it so useful.

In adapting long-standing legal principles to this new reality, therefore, form followed function. Section 230(c)(1) places responsibility on those in the best position to prevent harm: the content creators, who are made liable for any illegal content they create. Internet platforms are generally protected from liability for third-

party content, but with an important caveat. If they are complicit in the development of illegal content, even if only in part, the statute offers them no protection. 47 U.S.C. §§ 230(c)(1), (f)(3).

At the same time, Congress was concerned with the dark side of the Internet, including ubiquitous pornography, online harassment, fraud, defamation, and scores of other pathologies. Two different New York courts had ruled that an Internet platform attempting to moderate such content would thereby become unlimitedly liable for all of the content on its site, *Stratton Oakmont, Inc. v. Prodigy Servs. Co*., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), while a platform that made no such effort would not. *Cubby, Inc. v. Compuserve, Inc*., 776 F. Supp. 135 (S.D.N.Y. 1991). The perverse incentive was obvious. To avoid open-ended liability, Internet platforms would need to adopt what the New York Supreme Court called the "anything goes" model for user-created content. This gave birth to what today is codified as Section 230(c)(2), the "Good Samaritan" provisions, which protect websites that, however imperfectly, attempt to moderate content on their sites.

Deliberations over Section 230, originally introduced as a free-standing bill in 1995, Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong., (June 30, 1995), lasted for more than a year.[2] When the bill was added to the

[2] For a complete history of the provision's origins and legislative journey into law, *see* Christopher Cox, *The History and Original Intent of Section 230 of the Communications Decency Act*, RICH. J.L. & TECH. (Aug. 27, 2020),

Telecommunications Act of 1996 as the Cox-Wyden amendment, following enlightening floor debate and nearly unanimous bipartisan support for the careful balance it strikes, the vote was 420 yeas, 4 nays. 141 CONG. REC. 22,054 (1995).

But while this legislative history, including the remarks of legislators during debate and the overwhelming support the law received, is certainly of interest, one need only consult the statute itself to determine the legislative intent. Section 230(a) and (b) set out precisely what Congress had in mind. Unusually, in addition to legislative findings, the law includes an *ex cathedra* statement setting forth the "policy of the United States." This enactment, the product of bicameral legislative process and presentment, duly signed into law by President Clinton, is a uniquely authoritative statement of the legislative objectives.

"It is the policy of the United States," the law states, that the Internet shall be "unfettered by Federal or State regulation." This is not some libertarian manifesto; recall that the law was developed after extensive collaboration among Democrats and Republicans, many of whom were hardly opponents of government regulation. Rather, it reflects their considered judgment that state regulation of *speech* is inherently dangerous. It also reflects the congressional judgment, expressed in Section 230(a) and (b), that "a vibrant and competitive free market" open to a

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https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/.

multiplicity of websites is the best way to ensure that the Internet *overall* will be "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."

Today, there are understandable complaints that particular websites moderate user content in tendentious ways. But to the extent that a website moderates content for purely political reasons, as for example when political party websites prefer views they agree with and ban their opponents' posts, it is not Section 230 but the First Amendment that empowers them to do so. Nor does Section 230 protect websites from liability for their own speech. Indeed, it does not even protect them when they are complicit, even in part, in the development of users' speech. 47 U.S.C. § 230(f)(3). But in part because of the legal certainty around liability that Section 230 has provided, today there are over *200 million* websites available to anyone in the United States with a smartphone, and the vast majority of those websites host user-created content. This, rather than state-compelled viewpoint neutrality on a single platform, is the opportunity for "diversity" that the law was designed to achieve.

B. The Act Imposes a Duty to Continuously Monitor.

Section 230 is premised on the fact that it would be unreasonable for the law to require websites to continuously monitor the vast amount of textual, graphic, audio, and video content posted to their sites around the clock, every day, let alone

to investigate the accuracy or suitability of each piece of content, and once having done so, then to deal on an individualized basis with the thousands, millions, or billions of users who post this content.[3] For this reason, as the Ninth Circuit has held, Section 230's protection may not be vitiated based on "efforts, or lack thereof" to "monitor, or remove user generated content." *Doe v. Internet Brands, Inc*., 824 F.3d 846, 852 (9th Cir. 2016). Congress understood that liability-driven content monitoring and removal would slow traffic on the Internet, discourage the development of new Internet platforms featuring user content, and chill opportunities for users to publish online as websites attempt to avoid liability.

The Act rejects this premise of Section 230. As such, it is an inconsistent state law, expressly preempted by Section 230(e)(3). The Act requires covered websites not only to continuously monitor the content of their users' posts, but also to conduct outside research into the identities of each user to determine whether any one of them might be a "candidate" or a "journalistic entity." Failure to identify each user will expose the website to significant liability, since the Act bars normal content moderation for such users.

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[3] As Rep. White observed during debate on Section 230, referring to Internet platforms: "There is no way that any of those entities, like Prodigy, can take the responsibility [for all of the] information that is going to be coming into them from all manner of sources." 141 CONG. REC. H8471; *see also id.* (statement of Rep. Goodlatte) (emphasizing importance of not requiring platforms to review users' content, calling that imposition "wrong"); *id.* at H8469 (statement of Rep. Cox) ("There is just too much going on [over Internet platforms] for that to be effective.").

Since the Act does not require users to self-identify, the universe that must be investigated is the total user base. In the case of "journalistic entities," the website will have to uncover, somehow, whether a user is owned by an entity with a website, and if so, what the monthly traffic is to that website; what number of paid subscribers it has; and whether the website has met the content volume thresholds in the Act. Such data are not normally supplied by users of "social media" or any other websites, so the website will be working from scratch.

The burden is all the greater because the capacious definition of "journalistic entity" could include almost anyone. The extraordinary interference with a website's ability to enforce its community standards, not to mention the sheer impossibility of the investigatory undertaking, is obvious.

The same labors of Hercules await the website when it must investigate whether its users are "candidates." Here, too, the Act does not require users to self-report, placing the entire burden of discovery on the website, and doing nothing to limit the field of users who must be investigated.[4] And here, too, the definition is so lax that it will allow almost anyone so motivated to claim "candidate" status. The

[4] Section 501.2041(2)(h) of the Act places an additional requirement on the website to provide a means for "candidates" to self-identify, but it places no duty on "candidates" to use it. There are no penalties for users falsely identifying themselves as "candidates." *Id.* In all cases the website will, in self-defense, need to conduct as much research into user identities as is reasonably possible, since whether the user's identity as a "candidate" is "known" to the website is the statutory test for liability. *Id.*

website thus has to investigate, somehow, whether any of its users has sought to qualify for nomination as a candidate for some local office, or to be a write-in candidate. And because the user need not have actually qualified to become a candidate, but may only have made some *attempt* at qualification and failed (that is all that is necessary under the definition), there may be no paper trail whatsoever to identify a user as a "candidate."[5]

Nor is that all the website must investigate. It must also discover whether a person has "receive[d] contributions or [made] expenditures," or consented to someone else doing this in their behalf. Under the Act it does not matter that the user never filed any report of his or her receipt of contributions, or of the appointment of another to collect money.

And there is yet another way a person can claim to be a candidate: merely file papers and take the candidate oath. So websites will have to constantly surveil every public repository for documentary evidence that one of their users has done this, and then compare this against their entire user base of millions of individuals.

The burdens of monitoring, moreover, extend well beyond the "social media" websites clearly covered by the Act. Section 4 of the Act defines "social media platform" to include an "information service," or a "system," or even an "access

[5] Florida consistently claims in its opening brief that the Act's provisions apply only to "qualified candidates." State Br., *passim.* The Act plainly states otherwise.

software provider." Act § 501.2041(1)(g). These very broad categories are not themselves defined in the Act, leaving it to the imagination of the state, civil litigants, and Internet service providers themselves whether a particular website is, or isn't, covered. Indeed, the definition forswears any limitation to actual social media platforms. It expressly states that it includes "an Internet platform *or* a social media site." *Id.* (emphasis added). The alternative category of "Internet platform" includes, of course, all Internet platforms.

Many more websites, easily ensnared in the vagaries of the Act's threshold definition because they are an "Internet platform" of one kind or another,[6] must continuously monitor whether they meet certain activity thresholds. These metrics are of vital importance, because they determine whether punishments and civil liability await a website that uses otherwise normal forms of content moderation. Specifically, websites must measure, on a monthly basis, "individual platform participants." *Id.* This term is not defined in the Act, and it is different from the better-understood industry term "unique visitors." But even if the Act had adopted the industry term, more clarity would be needed, since there is no single definition

[6] The Act's definition of "social media platform" does provide admirable clarity in one instance: it expressly excludes platforms "operated by a company that owns and operates a theme park or entertainment complex." *Id.*

uniformly agreed upon in the United States. As a result, conscientious websites are at a loss to know whether the Act covers them. Courts will be, too.[7]

The Act exposes a website to outsize penalties and unlimited liability in any month in which it has 100 million "individual platform participants." Act § 501.2041(1)(g). Leaving aside the compliance problems created by the Act's vague definition, the threshold of 100 million "unique users" (using the industry term as a stand-in) covers many more websites than what is connoted by Florida's purported targeting of "Big Tech." For contextual purposes, the nonprofit Wikipedia—which appears to satisfy the other elements of the Act's definition of "social media platform"—had more than 2.5 *billion* unique users as of June 2021.[8]

Websites do not have control over the number of visitors they receive, nor can a commercial website choose whether to "do business" in Florida (it is, after all, the World Wide Web—even for the local hardware store, whether in Cleveland or

[7] Distinguishing "unique visitors" from repeat visitors continues to pose technological challenges. As users increasingly rely on privacy protections that routinely change IP addresses and delete cookies, these measurement tools become increasingly prone to overstating the actual number of "unique visitors," often by factors of 200% or more. For background, s*ee generally* Max Fomitchev-Zamilov, *Proceedings of the 19th International Conference on the World Wide Web* (2010), https://www.academia.edu/44305349/How_google_analytics_and_conventional_cookie_tracking_techniques_overestimate_unique_visitors.

[8] *Most popular websites worldwide as of June 2021, by unique visitors*, STATISTA (Sept. 7, 2021), https://www.statista.com/statistics/1201889/most-visited-websites-worldwide-unique-visits/.

Madrid). Constant monitoring of "individual users" is therefore essential to ensure compliance with the Act. That monitoring is rendered all the more burdensome by the inherent difficulty in knowing what it is, exactly, the Act requires a website to measure.

The very reason that Section 230(c)(1) protects websites from liability as if they were the publisher of their users' content is that it would be unreasonable for the law to require continuous monitoring of all of the content that thousands, millions, and even billions of people post to individual websites each day. A state law that requires websites to continuously monitor user activity, the content they create, and their offline identities and activities is fundamentally inconsistent with Section 230.

C. The Act Mandates Individualized Attention to User Posts.

A further inconsistency with Section 230 is the Act's requirement that a covered website provide, to each user whose content is moderated in any way, an individualized explanation—"a thorough rationale," in the language of the Act—for why it determined the content to be objectionable. The explanation must be "precise." Websites must also explain to the user, with precision, how they became aware of the objectionable content. If an algorithm was used to flag the objectionable content, the website must inform the user of this fact, explain how the algorithm

works, and describe how it operated in the particular case to identify or flag the user's content or material as objectionable. Act §§ (2)(d)(1), (3)(c)–(d).

Furthermore, the Act requires a covered website to respond, on an individual basis, to each user who requests information about how many other users have seen his or her "content or posts." Specifically, the website must report to each inquiring user the number of "individual platform participants" (again, that undefined and technologically elusive term) who were provided or shown content or posts created by *that particular user*. Each user's opportunity to post content, and thereafter to lodge inquiries about viewership of it, is unlimited. So too is the number of times a website must respond to each individual user.

The Act's mandate that a website not only devote individualized attention to each user's posts on demand, but also that it compile personalized data reports for each user on an unlimited number of occasions, *id.* § 501.2041(2)(e)(2), is a further inconsistency with Section 230, which is intended to protect websites from any imposition of a duty to monitor individual activity and content.

D. The Act's Definitions Sweep in Far More than "Social Media."

Section 230 governs all of the over 200 million websites available to U.S. users. Many of these, although no one would consider them to be "social media" platforms, are at risk of being swept into the Act's bespoke definition of "social media." The sheer breadth of the Act's coverage makes its multiple mandates

requiring continuous monitoring of user content and activity all the more consequential, and all the more inconsistent with Section 230.

As noted, Section 4 of the Act defines "social media platform" to include an "information service," or a "system," or even an "access software provider," and it is explicitly *not* limited to actual social media platforms. The repetitive use of the term "social media platform" throughout the Act, given that these words (but not the Act's re-definition of them) are well understood, disguises the Act's extraordinary reach. By casting such a broad net, Florida has, whether unintentionally or purposefully, imposed the Act's significant compliance costs on many websites that are not actually social media platforms.

The universe of websites that will bear these compliance costs is broader still simply because, given the relatively low user threshold and the vagueness of the definition, at least thousands of the over 200 million websites accessible to anyone in the United States with a smartphone[9] will not be able to rule themselves out of coverage without persistently monitoring user activity, and in many cases, not even then with certainty. The Act's imposition of a duty to monitor thus extends well beyond "social media" and "Big Tech." While undoubtedly the Act's sponsors in

[9] See *How Many Websites Are There?*, WEBSITE SETUP, https://websitesetup.org/news/how-many-websites-are-there/ (last visited Nov. 9, 2021).

the Florida legislature did not have this objective in mind, gross interference with Section 230's objectives is the result.

III. THE SUPREMACY CLAUSE REQUIRES THAT SECTIONS 2 AND 4 OF THE ACT YIELD TO FEDERAL LAW.

Throughout the history of the Internet, Congress has sought to strike the right balance between opportunity and responsibility. Section 230 is such a balance—holding content creators liable for illegal activity while protecting Internet platforms from liability for content created entirely by others. At the same time, Section 230 does not protect platforms from liability when they are complicit—even if only in part—in the creation or development of illegal content. 47 U.S.C. §§ 230(c)(1), (f)(3). The plain language of Section 230 also makes clear its deference to criminal law. *Id.* The entirety of federal criminal law enforcement is unaffected by Section 230. *Id.* So is all of state law that is consistent with the policy of Section 230. *Id.* § 230(e)(3).

Still, state law that is inconsistent with the aims of Section 230 is preempted. *Id.* Why did Congress choose this course? First, and most fundamentally, it is because the essential purpose of Section 230 is to establish a uniform federal policy, applicable across the Internet, that avoids results such as the New York state court decision that exposed websites to liability for content moderation. The Internet is the quintessential vehicle of interstate, and indeed international, commerce. Its packet-

switched architecture makes it uniquely susceptible to multiple sources of conflicting state and local regulation, since even a message from one cubicle to its neighbor inside the same office can be broken up into pieces and routed via servers in different states.

Were every state free to adopt its own policy concerning when an Internet platform will be liable for content created by others, not only would compliance become oppressive, but the federal policy itself could quickly be undone. Section 230 would then become a nullity.

Section 230 thus establishes a uniform federal policy and enforces it with the full authority of the Supremacy Clause, in the broadest possible terms: *No* liability may be imposed under *any* State or local law that is inconsistent with Section 230. 47 U.S.C. § 230(e)(3). This is express, not implied, preemption; and "inconsistency" is the broadest basis for expressly asserting federal priority.

Florida claims that *NCTA—The Internet & Television Ass'n v. Frey*, 7 F.4th 1 (1st Cir. 2021), is to the contrary and supports its contention that the express preemption in Section 230(e)(3) must be construed narrowly. State Br. 10. But *NCTA* stands for the opposite proposition. It held that when a federal statute *disclaims* an intent to preempt any state law unless its terms are "specifically" preempted, the scope of that preemption is narrower than if the federal statute were to expressly preempt every state law "merely if it is 'inconsistent with'" federal law.

NCTA, 7 F.4th at 8. When Congress uses the "inconsistent with" language, *NCTA* explains, this connotes a more expansive preemption. *Id.* Of course, this is the precise language used in Section 230. Section 230(e)(3) unambiguously preempts "any State or local law that is inconsistent with this section."

Puente Ariz. v. Arpaio, 821 F.3d 1098 (9th Cir. 2016), the other case cited by defendants, similarly does not support the proposition that this court must strain to avoid applying the express preemption language of Section 230(e)(3). *Arpaio* repeats the long-established rule that Congress may exercise its power to preempt state law not only expressly but impliedly; preemption, the court added, may be implied even where federal law does not occupy the field, whenever the state law "conflicts with federal law" by "stand[ing] as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* at 1103 (internal quotations omitted) (quoting *Arizona v. United States*, 567 U.S. 387 (2012)).

The facts in *Arpaio* required this analysis of implied preemption, because the federal statute at issue did not expressly preempt state law. *Id.* Section 230, of course, *does* expressly preempt state law. Moreover, in *Arpaio* the federal statute did not make Congress's intent to preempt state law "clear and manifest," *id*. at 1104, whereas Section 230(e)(3) most certainly does. The congressional intent to preempt all "inconsistent" state laws could not be more clear. As drafter of those words, I can testify that this is no accident.

Arpaio also reminds that "in the First Amendment context," a facial challenge to an overbroad state law will be upheld if "a substantial number of its applications are unconstitutional." *Id.* (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). The Act, of course, is being challenged for overbreadth under the First Amendment, in this very case. In short, Florida's assertion that in this case Plaintiffs must bear "the burden to establish . . . that *no* set of circumstances exists under which the [Act] would be valid" is simply wrong. State Br. 10 (emphasis added) (quoting *NCTA*).

The authority and source for Florida's quoted sentence from *NCTA* is *United States v. Salerno,* 481 U.S. 739 (1987). *Salerno* stands for the proposition that a *criminal* statute may not be attacked as overbroad "outside the limited context of the First Amendment." *Id*. at 745 (citing *Schall v. Martin*, 467 U.S. 253, 269 n.19 (1984)) ("Outside the limited First Amendment context, a criminal statute may not be attacked as overbroad."). The Act, of course, is not a criminal statute. Moreover, as noted, the Act is being challenged for facial overbreadth under the First Amendment in this very case. Among the Act's First Amendment infirmities is its principal inconsistency with Section 230: it directly interferes with websites' content moderation decisions.

This is hardly a case where, in the words of *Salerno*, the Act "*might* operate unconstitutionally under some conceivable set of circumstances." *Id*. at 745

(emphasis added). In this case, it is certain that "a substantial number of [the Act's] applications are unconstitutional," which as *Arpaio* affirms is the applicable test. *Id.* at 1104.

Moreover, the Act *will* operate unconstitutionally in *all* circumstances where Section 230(c)(2) applies, because it empowers the State of Florida to interfere with *every* content moderation decision a website makes. Florida argues that the Act only applies when content moderation is not in good faith. But the Act provides that whenever a website "censors" (using the Act's defined term), it will *always* be an act of bad faith. Specifically, websites "that unfairly censor, shadow ban, deplatform, or apply post-prioritization algorithms … are not acting in good faith." Act § 1(7). Since, as the district court in this case observed, "even a mistaken application of standards may occur in good faith," App. 1710, the Act's threats of outsize penalties serve as an all-purpose weapon against websites whose viewpoints the state does not share and deems to be "unfair."

Section 230's plain language establishes that Congress intended to preempt not only state laws in direct conflict, but also all state laws that are "merely" inconsistent, as the court put it in *NCTA*. The Supremacy Clause, U.S. CONST., art. VI, § 2, provides that federal law in such cases reigns supreme, "the Laws of any State to the Contrary notwithstanding."

Florida cannot controvert this, and so instead attempts to turn the tables by arguing that Section 230 preemption is *itself* unconstitutional under the First Amendment. To make this factitious argument, the State claims that by *outlawing* government censorship of online speech in favor of a marketplace in which decentralized private choices govern, Congress in Section 230 deviously managed to deputize censorship in the manner of ancient England, where in return for grants of monopoly private actors with "complicated ties" to the King carried out censorship of "speech unfavorable to the Crown." State Br. 17 (citing *Rossignol v. Voorhaar*, 316 F.3d 516, 526 (4th Cir. 2003)).[10] By such alchemy, we are told, the undeniably private action in this case may be converted into state action.

But rather obviously, neither the 104th Congress that enacted Section 230 nor any federal government before or since has had any way of knowing what the millions of websites regulated by Section 230 would do with their content moderation policies. The government cannot know whether "speech unfavorable" to it will be censored, or whether instead it will be amplified. (Experience over the last 25 years of Section 230 suggests that both have occurred.)

Just as obviously, the State's comparison to *Rossignol v. Voorhaar* is wholly inapt. There, the censorship was carried out by government employees. Equally

[10] The quotation in *Rossignol* cited in Florida's brief is from Fredrick Seaton Siebert, *Freedom of the Press in England, 1476–1776*, at 64–66, 135 (1952).

inapposite is Florida's invocation of *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956). That case actually explains in unmistakable terms why the State's argument is wrong. In *Hanson*, a federal statute—not the Constitution itself—was the source of the power exercised by private actors. *Hanson*, 351 U.S. at 225. Their exercise of power was deemed state action because "the federal statute [was its] source." *Id.* In such a case, *Hanson* explains, the "action on the part of Congress"—the requisite state action in a First Amendment claim—"is a necessary part." *Id.* at 231–32.

In this case, by contrast, the First Amendment itself guarantees platforms' rights to exercise editorial control and to moderate content on their sites. This is so with or without Section 230, which is therefore not a "necessary part." The exercise of First Amendment rights by private actors thus remains private action. Far from raising First Amendment concerns, facial preemption of the Act buttresses well-established First Amendment rights and helps protect them from abridgement by state action such as Florida's.

Accordingly, there is no reason to avoid, and every reason to enforce, the command of the Supremacy Clause that Sections 2 and 4 of the Act yield to federal law. Enforcement of the Supremacy Clause and the preemptive intent of Congress, expressed in Section 230, is necessary to ensure that the uniform national policy formally established as "the policy of the United States" is not undermined by a

multiplicity of alternative state policies attempting to govern the quintessential vehicle of interstate, and indeed international, commerce that is the Internet.

CONCLUSION

For these reasons, this Court should affirm the District Court.

Dated: November 15, 2021

/s/ Jackson R. Sharman III
Jackson R. Sharman III
jsharman@lightfootlaw.com
Jeffrey P. Doss
jdoss@lightfootlaw.com
Jonathan R. Little
jlittle@lightfootlaw.com
Tatum L. Jackson
tjackson@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE LLC
400 20th Street North
Birmingham, Alabama 35203
Counsel for Amicus Curiae
Christopher Cox

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume requirements in Fed. R. App. P. 32(a)(5), (6), (7)(b) and 32(f). The foregoing brief was prepared on a computer using Microsoft Word. A proportionately spaced typeface was used as follows:

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/s/ Jackson R. Sharman III
OF COUNSEL

CERTIFICATE OF SERVICE

I certify that, on November 15, 2021, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: November 15, 2021

/s/ Jackson R. Sharman III
OF COUNSEL