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.

Appeal from a Judgment of the United States District Court for the Northern District of Florida, The Hon. Robert L. Hinkle (Dist. Ct. No. 4:21cv220-RH-MAF)

BRIEF OF AMICUS CURIAE INSTITUTE FOR FREE SPEECH IN SUPPORT OF NEITHER PARTY

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for *amicus curiae* certify that the Institute for Free Speech is a nonprofit corporation, has no parent company, subsidiary, or affiliate, and that no publicly held company owns more than 10 percent of its stock.

Counsel certify that, to the best of their knowledge, the following parties not already identified in Appellants' Opening Brief, have an interest in the outcome of this appeal:

- Institute for Free Speech (IFS) – amicus curiae
- Endel Kolde – counsel for amicus curiae IFS
- Alan Gura – counsel for amicus curiae IFS
- America First Policy Institute (AFPI) – amicus curiae
- Adam Candeub – counsel for amicus curiae AFPI

s/Endel Kolde

s/Alan Gura

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INTEREST OF AMICUS CURIAE[1]

The Institute for Free Speech ("IFS") is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, assembly, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.

Social media has become the modern public square. Protecting individuals' ability to speak about politics on social media platforms is a core aspect of the Institute's organizational mission in fostering free speech.

STATEMENT OF ISSUES

1. Whether 47 U.S.C. §§ 230(c)(1) or (c)(2) preempt Florida's social media law, FLA. STAT. § 501.2041 et seq.;

2. Whether the First Amendment grants social media platforms blanket editorial rights over their users' expression, which states may not cabin through neutral regulations;

3. Whether states may require that social media platforms disclose their content-moderation policies and practices;

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. All parties have provided written consent to the filing of this brief.

4. Whether states may restrict social media's own speech in the form of appending messages to third-party content; and

5. Whether states may create special social media protections for favored speakers such as political candidates, corporate media entities, and the Walt Disney Company.

SUMMARY OF ARGUMENT

Florida's social media law is imperfect. Portions of Chapter 2021-32, enacted by S.B. 7072, impermissibly create favored status for certain speakers and restrict social media platforms' own expression. These provisions cannot survive constitutional scrutiny. But the law also contains consumer protection and non-discrimination provisions that are neither pre-empted by federal statute, nor unconstitutional under the First Amendment. These elements of Florida's law treat platforms as a new form of common carriers in a content-neutral and legally defensible manner that safeguards consumers' free expression interests.

NetChoice's position, reflecting the views of its constituent platforms, essentially boils down to this: "when we restrict users' speech we act and are protected under the First Amendment like newspaper editors or parade organizers, and 47 U.S.C. § 230 lets us do whatever we want on our own platforms without the liabilities of newspaper editors or parade organizers." Their view ignores both § 230's text and practical reality.

Federal law protects social media platforms from being considered the publishers of content posted by their users, and immunizes their

good-faith decisions to take down certain content described in § 230(c)(2). This statute does not give platforms blanket immunity for all content-moderation decisions or insulate them from liability for their own speech.

NetChoice's newspaper/parade analogy is a poor fit because the platforms do not present cohesive speech products. Instead, they distribute the content of many unrelated speakers, on a wide variety of often unrelated topics. They exist primarily to distribute—to platform, and to act as conduits for—the expression of others. This reality, as recognized by the U.S. Supreme Court, means that the platforms "for many are the principal sources for … speaking and listening in the modern public square," where Americans share vital information and express their opinions. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

As such, these relationships can be governed by well-crafted state laws that advance consumer protection and are permissible under the First Amendment. Given the novelty, breadth, and complexity of the issues, it is unsurprising that Florida's first legislative foray into this issue partially misses the constitutional mark. But the state can act to protect consumers in this sphere, and some of its actions here are defensible.

The Supreme Court has long recognized that states may impose factual disclosure requirements on commercial entities. Florida's law

does this by requiring platforms to publish their content-moderation rules, apply them consistently, and give notice and an explanation of speech suppression decisions. In addition, Florida's law provides other beneficial consumer protection measures that promote free expression and individual autonomy.

But Florida's law goes too far in keeping platforms from posting their own content, such as labels or fact-checks. Platforms, as much as their users, enjoy a First Amendment right to affirmatively post their views (as opposed to "expressing" themselves by disrupting or censoring the speech of others). Silencing one party's speech is not typically an acceptable means of securing another's speech rights.

Florida's law also veers into constitutionally impermissible content-based restrictions when it grants special status to political candidates, journalistic enterprises, and the Walt Disney Company. A clearer example of speaker-based distinctions that reflect legislative speech preferences is difficult to imagine.

This Court should sever the law's impermissible provisions, but leave intact those core provisions that provide for disclosure, notice, and consumer transparency. In the alternative, if this Court determines that this law cannot be salvaged, it should nonetheless recognize that § 230 preemption has limits, and that the First Amendment does not bar states from all regulation of social media platforms' common-carrier functions. However this Court decides this novel case, it should not

grant platforms *carte blanche* to restrict the speech of others under either § 230 or the First Amendment.

ARGUMENT

I. NEITHER § 230(C)(1) NOR (C)(2) PROVIDE ABSOLUTE IMMUNITY FOR "CENSORSHIP" OR "DEPLATFORMING" AS DEFINED BY FLORIDA LAW.

Social media platforms like to claim that § 230 gives them an unrestricted right to curate their users' expression. It's hard to blame them—unfettered discretion and complete legal immunity make for an appealing combination. Some courts have contributed to this state of affairs by interpreting § 230 too broadly, and specifically by reading § 230(c)(2) out of the statute. This Court should recognize that § 230 has limits.

The plain text of 47 U.S.C. §§ 230(c)(1) and (c)(2) provides platforms with limited legal protection, depending on their specific conduct or the nature of the plaintiff's legal claim. Section 230(c)(1) keeps platforms from being considered the publishers of content posted by their users: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." This protects them from state-law defamation claims for content they did not generate themselves. It says nothing about the platforms' own speech independent of its users' speech, and it says nothing about editorial discretion.

Section 230(c)(2) provides only a limited immunity for platform suppression of users' speech. It immunizes not the removal of any and all expression as platforms see fit, but actions "*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." 47 U.S.C. § 230(c)(2)(A) (emphasis added).

Neither provision immunizes platforms when publishing their *own* content and, however much social media giants might wish it, § 230 does *not* provide blanket immunity for all speech-curation decisions. This Court should resist any attempt to expand the reach of § 230 beyond its textual moorings, or ignore the provisions of § 230(c)(2). This table illustrates the legal protections of § 230:

Section	Legal Protection
Section 230(c)(1)	No liability for publishing third-party posts/speech that the platform hosts or controls
Section 230(c)(2)	No liability for content-moderating obscene, lewd, lascivious, filthy, excessively violent, and harassing content, and similar content
Not covered	Liability for content-moderating types of speech not mentioned in section 230(c)(2)

Adam Candeub, *Reading Section 230 as Written,* 1 J. FREE SPEECH L. 139, 148 (2021) (table copied from article).

Section § 230(c)(1) does protect platforms from being held liable for editorial decisions—when those editorial decisions are made by third parties posting content, not by the platform. *Id.* Some circuits have read Section § 230(c)(1) more expansively, but a Ninth Circuit panel recently recognized that the provision is much narrower. *Compare Zeran v. Am. Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997) *with Lemmon v. Snap, Inc.,* 995 F.3d 1085, 1093 (9th Cir. 2021) ("internet companies remain on the hook when they create or develop their own internet content"). The plain text of § 230(c)(1) does not support the expansive reading and this Court should decline to follow *Zeran's* analysis.

Section 230(c)(2) requires "good faith" adherence to the limits of its text. Platforms cannot simply label any speech they dislike "obscene," "filthy," or "harassing." Nor may platforms file their political objections to consumers' speech under "otherwise objectionable." The context of § 230(c)(2)'s specifically defined immunities supports a narrow reading of the catch-all provision regarding "or otherwise objectionable," linking the phrase to the types of content otherwise enumerated in § 230(c)(2)(A). A "cardinal rule [holds] that statutory language must be read in context since a phrase gathers meaning from the words around it." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004) (internal quotation marks omitted); *see* Adam Candeub & Eugene Volokh, *Interpreting 42 U.S.C. § 230(c)(2),* 1 J. FREE SPEECH L. 175, 176 (2021) ("Applying the *ejusdem generis* canon, "otherwise objectionable"

should be read as limited to material that is likewise covered by the CDA"). Congress did not create immunity for censoring six specific types of content—plus everything else under the sun. Properly interpreted, the "otherwise objectionable" language of § 230(c)(2) does not create an open-ended vessel for platforms to pour in new types of content restrictions, such as political or religious viewpoint-based restrictions. Candeub & Volokh, *supra,* at 189.[2]

Obscene sexual content is different from provocative political commentary or religious speech. And not everything that someone dislikes or finds uncomfortable is therefore "violent" (let alone "excessively" so) or "harassing." Cabining sexually explicit material or removing terroristic threats in good faith is covered by § 230(c)(2), but removing political speech, or mere opinion regarding social, cultural, or scientific matters, falls outside the statute Congress actually enacted.

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[2] This Court should also view with skepticism any attempt to invent new legislative history favoring blanket immunity, years after § 230's enactment. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *U.S. Steel Mining Co., LLC v. Director, OWCP*, 719 F.3d 1275, 1283 n.9 (11th Cir. 2013) (quoting *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011)). Moreover, discerning a legislator's intent is "almost always an impossible task" because a legislator may have been motivated by any number of reasons, some stated, some not, including benefiting constituents, pleasing a donor, horse-trading, score settling, relationship building, or simple mistake. *Edwards v. Aguillard,* 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting). And legislative history is highly manipulable. *Id.*

That is not to deny that platforms may set rules about political or other speech content in their terms of service, but Section 230 does not pre-empt state laws that require disclosure, notice, and even-handed application of such content-moderation rules.

Florida's limited common-carrier provisions, requiring the publication of any content-removal and deplatforming standards, and their consistent application, are not pre-empted by either § 230(c)(1) or (2).

Indeed, content removal and deplatforming decisions made without reference to known standards or inconsistently applied, may in fact be bad faith decisions that are not immunized by § 230(c)(2). *See Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 267-68 (1977) (substantive and procedural departures from usual practices in zoning decisions may indicate improper purposes); *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1185 (11th Cir. 2020) (lack of departure from cruise line's policies was important to establishing lack of bad faith in failure to preserve evidence); *Bass v. Bd. of Cty. Comm'rs,* 256 F.3d 1095, 1108 (11th Cir. 2001) ("An employer's violation of its own normal hiring procedure may be evidence of pretext"); *Hyundai Motor Am. Corp. v. N. Am. Auto. Servs.*, No. 20-82102, 2021 U.S. Dist. LEXIS 136493, at *34-35 (S.D. Fla. July 22, 2021) (failure to follow own policies led to loss of important evidence).

In order for any speaker to argue that a platform failed to follow its own rules, that speaker would first have to know (1) what the rules were; (2) have notice of their application; and (3) an explanation of why they were applied to that speaker's content. Florida's law protects speakers by requiring platforms to disclose their rules and decisions, and to fairly enforce them.

II. THE FIRST AMENDMENT LEAVES AMPLE ROOM FOR REGULATING SOCIAL MEDIA PLATFORMS AS COMMON CARRIERS

A. Social media platforms are mostly distributors of others' content, not editors of a cohesive speech product like a newspaper.

Social media platforms like to take the position that content-moderation decisions fall within their editorial purview and that they enjoy blanket First Amendment protection for all content moderation. In doing so, they often rest on *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which invalidated Florida's newspaper right-of-reply law nearly fifty years ago. But technologies have changed, and social media platforms do not function like 1970's era newspapers, magazines, or broadcast news.

The platforms-are-like-newspapers view grossly overstates the analogy and misperceives the role of platforms, which exist primarily to distribute the speech of others, not their own content. In addition, such platforms do not present a cohesive speech product, akin to the edition of a newspaper or magazine. *See* Eugene Volokh, *Treating Social Media*

Like Common Carriers? 1 J. FREE SPEECH L. 377, 423-428 (2021) (analyzing key Supreme Court cases on coherent speech products such as parades and periodicals and distinguishing social media); *see also* TWITTER, *Terms of Service: 3. Content on the Services* (last visited September 11, 2021), https://twitter.com/en/tos ("All Content is the sole responsibility of the person who originated such Content. We may not monitor or control the Content posted via the Services and, we cannot take responsibility for such Content"); YOUTUBE, *Terms of Service: Content on the Service* (last visited September 13, 2021), https://www.youtube.com/static?template=terms ("Content is the responsibility of the person or entity that provides it to the Service"). One cannot on the one hand claim to be an editor of a cohesive speech product, and on the other hand disclaim all responsibility for the content.

As a result, Florida's requirements that platforms publish their content-moderation rules, adhere to them, provide notice, and explain their moderation decisions are compatible with the First Amendment and protect the free expression of platform users. Moreover, these core transparency requirements are content-neutral disclosure rules that promote consumer choice and protect individual autonomy.

The district court recognized that social media platforms do *not* act like newspaper editors, because "newspapers, unlike social-media providers, create or select all their content." Dist. Ct. Opinion at 19.

Most of the speech carried by social media platforms is functionally invisible to them.

> Nothing makes it into the paper without substantive, discretionary review, including for content and viewpoint; a newspaper is not a medium invisible to the provider. . . Social media providers, in contrast, routinely use algorithms to screen all content for unacceptable material but usually not for viewpoint, and the overwhelming majority of the material never gets reviewed except by algorithms. Something well north of 99% of the content that makes it onto a social media site never gets reviewed further. The content on a site is, to that extent, invisible to the provider.

Id. at 19-20.

The district court's recognition of this fundamental difference between platforms that carry others' speech, and entities that produce a speech-product, was insightful and significant. "[This] is an important holding because it recognizes, in ways that legal and political discourse around online content moderation generally has not, that social media platforms cannot easily be shoehorned into traditional First Amendment rules based on a simplistic model of platform 'rights.'" Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment,* 1 J. FREE SPEECH L. 337, 366 (2021). The court's acknowledgment that *Tornillo* is a poor fit for social media speech suppression should have determined a different outcome with respect to the common-carrier provisions.

The relatively new technologies, and the power of network effects, prevents Florida's law from falling neatly into traditional First Amendment categories, including *Tornillo*. A user who is booted off a platform, or who routinely has her content suppressed for ideological reasons, often cannot just switch platforms without losing valuable connections, reach, and content. She is unlike a reader who may select a different publication at a newsstand. Deplatformed users are effectively excluded from vast information networks, and that exclusion directly impacts their ability to speak, consume the speech of others, and participate in civic life. In other contexts, the law has long recognized that the impermissible denial of a single choice among other potential options is unacceptable. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).[3]

The district court also correctly noted that Florida's law improperly prevents platforms from appending their own messages to others' content and makes impermissible content-based distinctions between content posted by journalistic enterprises and candidates on the one hand, and everyone else on the other. Dist. Ct. Opinion at 23; *see infra*

[3] To be sure, the history, nature, and impact of invidious discrimination is worse than, and quite different from, deplatforming. But telling wrongly deplatformed speakers to "find another Facebook" is no better answer than that which the law properly rejects in the discrimination context.

at 23-27. But it erred in failing to sever those provisions and leaving the neutral transparency rules intact.

The transparency provisions neither prevent the platforms from creating their own speech, nor prevent them from customizing or enforcing their own content-moderation rules.[4] They simply require that the platforms tell users what the rules are, follow those rules, and explain their application. To be sure, such transparency provisions may cause the platforms to exercise more care before or take remedial steps after suppressing content, but, as they say, that is a feature, not a bug.

B. Content-neutral and factual disclosure provisions are permissible consumer-protection measures.

Requiring commercial actors to disclose information that they don't want to disclose does implicate free speech rights, but when such disclosures are factual, consumer-protection measures, most courts have traditionally applied a low level of scrutiny. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985) ("an

[4] These provisions are thus conceptually different from the speech restrictions at issue in cases such as *Citizens United v. FEC,* 558 U.S. 310 (2010) (upholding the right of corporations to make independent expenditures in political campaigns); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995) (upholding the right of parade organizers to determine the content of their own speech); *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530 (1980) (upholding the right of public utility to include messages on current affairs in its billing statements); *First Nat'l Bank v. Bellotti,* 435 U.S. 765 (1978) (striking down state law limiting political contributions by corporations).

advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers"); *see also, e.g., AHA v. Azar*, 983 F.3d 528, 540-41 (D.C. Cir. 2020) (upholding disclosure requirements for hospitals' negotiated rates with insurers); *ECM Biofilms, Inc. v. FTC*, 851 F.3d 599, 617 (6th Cir. 2017) (upholding biodegradability disclosure requirements); *Disc. Tobacco City & Lottery, Inc. v. United States,* 674 F.3d 509, 558 (6th Cir. 2012) (upholding graphic tobacco disclosure provision); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 309-10 (1st Cir. 2005) (upholding disclosure provisions for pharmacy benefit managers).

Under NetChoice's theory, the First Amendment would eviscerate many disclosure-based consumer-protection regimes. Governments could not, for example, require newspapers to disclose their subscription cancellation policies or allow individuals to correct credit reports. There is no reason to categorically exempt social media platforms from requirements that are routinely applied to financial institutions, pharmacy benefit managers, auto dealers, credit agencies, or tobacco companies. Considering the critical role these platforms play in today's society and their profound impact on every facet of the modern American economy, Florida does not ask too much in requiring them to make the same essential consumer disclosures required of other high-impact industries.

Requiring social media platforms to disclose their content-moderation rules and provide notice and an explanation of their decisions are fairly run-of-the-mill consumer-protection measures.[5] Although the topic of content moderation may itself engender some controversy, a rule's contents is a factual matter, and the platforms presumably know what their own rules provide. Similarly, this is not a situation where the state is compelling the platforms to mouth government slogans – they are simply being asked to disclose their own rules and notify users when and how they are applied. Apparently, like other commercial actors subject to disclosure requirements, the platforms would prefer not to disclose their own rules or explain themselves, but that is precisely why mandatory disclosure regimes exist in all sorts of settings. There is a distinction between a corporation being required to disclose more than it wants about its own products, and being forced to utter an opinion about a contested political issue or other controversial social matters.

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[5] *See* Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?* 1 J. FREE SPEECH L. 97, 126 (2021) ("At a minimum, legislation requiring platforms to follow specific and consistent procedures in making deplatforming decisions, and perhaps granting an internal appeals process…probably should survive First Amendment scrutiny… the state interest in protecting *all* users from inconsistent or discriminatory treatment by platforms seems obvious[.]").

There are numerous practical ways in which the Florida law's disclosure provisions promote consumer interests, in a manner that is viewpoint and content neutral:

- § 501.2041(2)(a): requiring platforms to publish their rules for suppressing speech;
- § 501.2041(2)(d): requiring notice to the user of speech suppression;
- § 501.2041(2)(f)(1): requiring categorization of speech-curation algorithms;
- § 501.2041(2)(f)(2): allowing users[6] to opt-out of algorithm-curated feeds and select chronological content feeds that are not subject to hidden rules;
- § 501.2041(2)(g): requiring annual notice of opt-out availability;
- § 501.2041(3)(a)-(d): requiring written notice to a user explaining the rationale for speech suppression in each case

[6] "User" is defined in FLA. STAT. § 501.2041(1)(h). In this context, common sense requires "user" to be understood to apply only to a consumer of content, not the poster of content. Indeed, the statutory definition does not require that users actively post content. It includes Floridians who may choose to passively consume the content of others; a phenomenon that is understandable in today's cultural moment, where a post can derail a career or result in a revoked college admissions offer. A statute allowing a person posting content to deny platforms the ability to subject his speech to algorithm-curation would raise a different set of constitutional issues.

and disclosing how the speech was flagged for suppression, unless the speech was obscene;

- § 501.2041(2)(c): requiring notification of changes in terms of service and limiting frequently shifting terms of service; and
- § 501.2041(2)(i): allowing deplatformed users time to retrieve their own posted speech.

These provisions promote consumers' rights by giving them insight into what the rules are and how they are applied. The last provision secures speakers' property rights in their own content, enabling them to retrieve it and possibly publish it elsewhere. *Cf.* 17 U.S.C. § 201(a) (copyright vests initially in work's author). In addition, while the platforms may of necessity retain some default control over post-prioritization, users who wish to have a less filtered feed should be able to opt for a chronological presentation, which is supposedly not influenced by the platforms' algorithms.

Importantly, the notice provision provides an important check against government jawboning or a heckler's veto by political opponents. Platforms are required to disclose how speech was flagged for suppression, including whether speech was suppressed because of a state actor's complaint.[7] This provision is of obvious value in protecting

[7] *See* FLA. STAT. § 501.2041(3) (notice to user "must . . . (d) [i]nclude a precise and thorough explanation of how the social media platform became aware of the censored content or material").

the First Amendment rights of platform users. Platforms are vulnerable to political coercion seeking the repression of government-disfavored speech, as some state actors may seek to have the platforms do indirectly what the state actors cannot do directly. Setting out the rules ahead of time can be a valuable tool in preventing government from outsourcing censorship to the platforms.

Presently, content-moderation decisions often defy common sense; rules are unknown and haphazardly applied and too much room exists for government actors, or others, to use platforms to quietly censor content that officials or hecklers find disagreeable. Recent history is replete with such events. *See, e.g.,* Matt Taibbi, *Meet The Censored: Ivermectin Critic David Fuller,* TK NEWS (September 2, 2021), https://bit.ly/3kJCkzk ("[YouTube's content] moderation system is secretive, random and very disrespectful to creators who have made large amounts of money for the company"); Mia Cathell, *Breaking: Psaki doubles down on Biden's plan to monitor and censor Americans' social media,* THE POST-MILLENNIAL (July 16, 2021), https://bit.ly/2Xa3gk0 (Psaki: "We are in regular touch with the social media platforms and those engagements typically happen through members of our senior staff, but also members of our COVID-19 team."); *Twitter's purge of the anti-woke satirists,* SPIKED ONLINE (August 18, 2020), https://bit.ly/3BHyygE ("Sir Lefty revealed on Parler that the only reason given for his suspension was 'platform manipulation and

dissemination of spam'"); Dan Verbin, *FB bans popular Jewish academic for post denouncing Hitler tweet,* ARUTZ SHEVA (May 12, 2021), https://bit.ly/3BFq7Cx ("I am losing hope. @Facebook has banned me for sharing a tweet of a person who was endorsing Hitler. The Lebanese Jew gets banned for speaking out against endemic Jew-hatred"); Didi Rankovic, *Twitter, Facebook, President Biden, and Surgeon General sued for alleged censorship collusion,* RECLAIM THE NET (September 7, 2021), https://bit.ly/3lcXzd0 ("Hart alleges collusion between these privately owned giants and the US government, with the purpose of monitoring, flagging, suspending and deleting content that it chooses to label as misinformation").

Indeed, just yesterday, the Wall Street Journal revealed that Facebook "shields millions of VIP users from the company's normal enforcement process," allowing favored people to violate the company's content rules with impunity. Jeff Horvitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt,* WALL STREET J., September 13, 2021, https://on.wsj.com/3tBbvBk. Online, the elite really do live by a different set of rules. And apparently, incumbent office holders are exempt from rules applied to challengers: "While the [privilege] program included most government officials, it didn't include all candidates for public office, at times effectively granting incumbents in elections an advantage over challengers." *Id.*

The problems of opaque and arbitrary "content moderation"—including vague guidance on permissible content, unreliable algorithms, and a failure to explain a reason for removed content—are real. The core disclosure and transparency provisions of Florida's law are legitimate attempts to ameliorate these problems. Requiring that elite-posting policies such as Facebook's be disclosed by the platforms, rather than through investigative journalism, is not unconstitutional.

C. Requiring transparent and consistent post-prioritization rules for subscribed content feeds promotes free expression and individual autonomy.

Proponents of unfettered platform censorship often argue that consumers wouldn't want to use a platform with anything less than total platform speech-control because their feeds would be flooded with porn, spam, and other unwanted content. This is a false dichotomy. The concern for filtering is weighty and one that should be taken seriously, but it leaves room for states to require platforms to apply their rules neutrally and allow users to self-curate their feeds.

Florida's law does not ban content curation; it merely requires that it be done according to known rules, in a consistent manner, and with notice. Thus, enforcing the law's core provisions will not open the floodgates to unwanted content. And the "Hobson's choice" metaphor doesn't really apply here. Under Florida's law, the platforms can moderate content, but they can't do it in a black box.

Second, many platforms include a self-curation function, which allows users to select the content they want to view. *See* TWITTER, https://help.twitter.com/en/using-twitter/following-faqs (last visited September 7, 2021) ("Following someone on Twitter means: [1] You are subscribing to their Tweets as a follower [2] Their updates will appear in your Home timeline"); *id., About your Home timeline on Twitter* https://help.twitter.com/en/using-twitter/twitter-timeline (last visited September 9, 2021) (explaining content-curation on users' timelines and feature to switch to primarily chronological display of content); Volokh, *supra,* at 440 (noting the significance of the subscription function). Other platforms, such as Facebook, have a "friending" feature. FACEBOOK, https://bit.ly/3DVEtAH (last visited September 7, 2021). These subscription functions promote individual autonomy without the need for direct content-curation by the platform, because users can filter their own feeds. If someone begins posting content that offends a given user, or proves merely tiresome, that user can simply "un-follow" or "un-friend" the speaker. Some platforms also have a "mute" function which provides a comparable benefit.[8]

[8]LINKEDIN, https://www.linkedin.com/help/linkedin/answer/72150 (last visited September 7, 2021) ("If you're connected to a person and choose to unfollow or mute them, you'll remain connected, but won't see their updates"). Indeed, on at least one platform, a user can even mute certain words or phrases. TWITTER, *How to use advanced muting options* (last visited September 13, 2021), https://bit.ly/3levd26.

It is also true that platforms enhance the user experience (and engage in their own speech) by promoting certain content ahead of other content – for example, trending content – in a user's timeline. *See* Volokh, *supra,* at 443. Doing so can prevent content overload, particularly for users that follow hundreds of accounts, and amounts to what is called "post-prioritization" under Florida's law.

"Post prioritization" as defined by the Florida law is often constitutionally protected activity. After all, the vast amount of speech on social media platforms must be organized in some fashion, and platforms have an interest in making these organizational choices. At the same time, Florida may require proper notice and opt-out availability. So long as no one is censored or deceived, a choice to avail oneself of post-prioritization only enhances the user experience. Banning post-prioritization (unless it's paid prioritization) for candidates and journalistic enterprises is thus unconstitutional. Post-prioritization is not, however, generally subject to § 230, so platforms might still be subject to claims that they violated their own terms of service, or possibly other state-law claims, for engaging in the practice.

Nor is post-prioritization constitutionally immune from all regulation. If done correctly, states (or Congress) can require platforms to apply their post-prioritization rules in a viewpoint-neutral manner. *See* Volokh, *supra,* at 440, 443. One can analogize this situation to that faced by military recruiters in *Rumsfeld v. Forum for Academic &*

Institutional Rights, Inc., 547 U.S. 47, 60-62 (2006). There the Supreme Court required law schools to not only host military recruiters, but to provide email and other notice to students on the same terms as to other recruiters, even though the law school faculties disagreed with the then-existing military rules regarding gay and lesbian servicemembers. *Id.* at 62; *see also* Volokh, *supra,* at 440-45.

Similarly, through various anti-discrimination laws, both Congress and state legislatures have for decades constrained the hiring decisions of employers in requiring that decisions to hire, fire, and promote not be based on race or other protected characteristics. These same principles can be applied in the social media context. Florida's requirements to categorize (disclose) post-prioritization algorithms and to apply shadow banning (including secret post-prioritization) in a consistent manner are in accord with this non-discrimination principle. The requirement that users be allowed to opt-out of post-prioritization by obtaining a chronological feed is also an important option that enhances individual autonomy.

III. SOCIAL MEDIA PLATFORMS ENJOY A FIRST AMENDMENT RIGHT TO ATTACH ADDENDA TO USER CONTENT, BUT SUCH SPEECH DOES NOT ENJOY IMMUNITY UNDER § 230.

Florida's law is unconstitutional to the extent that it prevents platforms from engaging in their own speech, including posting

addenda[9] to content. *See* Volokh, *supra,* at 433 ("And, as with *Rumsfeld,* the platforms retain the right to 'voice their disapproval of [users'] message,' for instance by posting fact-checks or warnings, if they wish"). This allows platforms to signal that they are not endorsing certain content that may not reflect the platform's values or hurt its image. As Prof. Volokh has noted, such addenda are comparable to law schools voicing their disapproval of military policy, while still hosting military recruiters and providing non-discriminatory access.

But it is worth noting that such speech does not enjoy immunity under § 230, because in such instances the platform becomes the publisher of its own speech. When platforms post addenda or warnings, they are speaking for themselves, which isn't immunized by § 230. *See* Sections I.(A) & (B), *infra.* And if they defame someone in so doing, they are potentially liable under state law.

This Court should sever the provisions regarding content addenda, while leaving the core common-carrier and consumer-protection provisions intact.

IV. FLORIDA'S FAVORED TREATMENT OF CANDIDATES, DISNEY, AND JOURNALISTIC ENTERPRISES IS UNCONSTITUTIONAL.

Florida's law carves out special treatment for political candidates and journalistic enterprises, and it exempts local theme-park owners

[9] The definition of "censor" includes posting "an addendum to any content or material posted by a user." FLA. STAT. § 501.2041(1)(b).

(that is, the Walt Disney Company) entirely. FLA. STAT. §§ 501.2041(1)(g), (2)(h) and (j). These provisions are content-based and therefore subject to strict scrutiny—which they fail.

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015) (citations omitted).

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. The "commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Id.* (internal quotation marks omitted). It does not matter whether a law does so by "defining regulated speech by particular subject matter," or by "defining regulated speech by its function or purpose." *Id.* "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163-64; *see also Sorrell v. IMS Health Inc.,* 564 U.S. 552, 571 (2011) ("The State has imposed content- and speaker-based restrictions on the availability and use of prescriber-identifying information").

Florida's different legal treatment of Disney, candidates, and journalistic enterprises all require examining the content of the speech

or the speaker's identity in order to determine whether the special status applies. IFS can imagine no compelling state interest that these exemptions would advance, let alone in a narrowly tailored manner.

The carve-out for journalistic enterprises is further objectionable because the First Amendment belongs to everyone, not just large media corporations. *Bellotti,* 435 U.S. at 795-802 (freedom of the press is not limited to the institutional press and "does not 'belong" to any definable category of persons or entities: It belongs to all who exercise its freedoms.") (Burger, C.J., concurring); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today,* 160 U. Pa. L. Rev. 459, 463 (2012) ("people during the Framing era likely understood the text as fitting the press-as-technology model - as securing the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the publishing industry").

As such, the special treatment of journalistic enterprises is additionally suspect here. To be sure, it is understandable that lawmakers would rightly be concerned about high-profile incidents such as the suppression of New York Post reporting about a presidential candidate's alleged entanglements with foreign governments.

Similarly, there is no particular justification for special treatment of candidates—the democratic process belongs to all the people, and all people have a right to speak out in the course of political campaigns, not

just candidates. And as with the press, it is understandable that the legislature may be concerned about the removal from multiple platforms of a former president and major political figure in one of the two major parties.

But these concerns are better addressed through neutral, non-discrimination rules that apply equally to all content providers, and do not favor certain speakers or content. The correct approach under such circumstances is to sever the improper exemptions, leaving intact the useful and otherwise constitutional provisions of the law. *See Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335 (2020).

IFS submits that while several identified provisions are unconstitutional, other core provisions of Florida's law should survive, because they are neutral, non-discrimination rules that promote transparency, consumer protection, free expression, and individual autonomy in a manner permissible under the First Amendment. In the event the Court disagrees and holds that this law must go in its entirety, IFS respectfully asks that the Court nevertheless recognize the limits of § 230's preemption scope, and the fact that social media platforms are not equivalent to newspaper editors for First Amendment purposes. The regulations before this Court may not represent the only potential response to the challenges posed by the platforms' behavior. Just as the platforms continuously evolve, the law should be given space to do so as well in response.

CONCLUSION

This Court should uphold the common carrier and consumer protection components of Florida's law, while severing the provisions that prevent platforms from speaking themselves and require favored treatment for candidates, Disney, and journalistic enterprises.

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Respectfully submitted,

s/Endel Kolde

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CERTIFICATE OF COMPLIANCE

In accordance with FED.R.APP.P. 32, I certify that this brief is set in 14-point Century Schoolbook, a proportionately spaced font, and as, calculated by Microsoft Word, contains 6172 words, less than half the number of words permitted for the parties' briefs.

Dated: September 14, 2021

s/Endel Kolde

CERTIFICATE OF SERVICE

I hereby certify that today I electronically filed this brief using the appellate CM/ECF system and that all participants are registered CM/ECF users and will be served via that platform.

Dated: September 14, 2021

s/Endel Kolde