No. 21-51178

In the United States Court of Appeals
for the
Fifth Circuit

NetChoice, L.L.C., a 501(c)(6) District of Columbia organization doing business as NetChoice; Computer & Communications Industry Association, a 501(c)(6) non-stock Virginia Corporation doing business as CCIA,
Plaintiffs-Appellees,

v.

Ken Paxton,
in his official capacity as Attorney General of Texas,
Defendant-Appellant.

On Appeal from the United States District
Court for the Western District of Texas, Austin
Division Civil Action No. 1:21-cv-00840-RP

AMICI CURIAE HEARTLAND INSTITUTE &
AMERICAN PRINCIPLES PROJECT
IN SUPPORT OF DEFENDANT-APPELLANT

Craig Parshall
Legal Counsel and Sr. Advisor
Legal Policy and Civil Liberty
American Principles Project
2800 Shirlington Rd, Suite 1201
Arlington, VA 22206

James Taylor, President
Heartland Institute
3939 North Wilke Road
Arlington Heights, Illinois 60004

Joe Sibley
Camara & Sibley LLP
1108 Lavaca St., Ste. 110263
Austin, TX 78701
Tel: (713) 966-6789

Counsel to Heartland Institute and American Principles Project

STATEMENT OF IDENTITY AND INTEREST AND CORPORATE DISCLOSURES

Pursuant to the applicable provisions in Fed. R. App. 26.1, 27, 29 and 32 and this Court's local rules, *Amici* provide this Statement of Identity and Interest and Corporate Disclosure.

Counsel for *Amici* authored this brief in its entirety. No party's counsel authored this brief, in whole or in part, or contributed money intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel contributed money to fund preparation or submission of this brief.

Counsel for all parties have consented to the filing of this brief.

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Heartland Institute is a national non-profit, non-partisan public policy organization based in Arlington Heights, Illinois. Heartland's mission is to discover, develop, and promote freedom-oriented solutions to societal challenges.

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae American Principles Project is a non-profit corporation organized exclusively for the purpose of promoting social welfare under section 501(c)(4) of the Internal Revenue Code. American Principles Project advocates against policies that are detrimental to parents and children, including online threats to both free

speech and to the best interests of minors, believing that defending free speech and protecting children online is a critical component to representing the institution of the family. It conducts research, publishes policy papers, and authors articles regarding the large technology platforms that have benefited from the extraordinary civil immunity currently granted under section 230 of the Communications Decency Act and how that dynamic has increased those threats.

Respectfully submitted,
/s/ Joe Sibley

Joe Sibley
Camara & Sibley LLP
1108 Lavaca St., Ste. 110263
Austin, TX 78701
Tel: (713) 966-6789

Counsel to Heartland Institute and American Principles Project

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SUMMARY OF ARGUMENT

Plaintiff-Appellee NetChoice, LLC d/b/a NetChoice, and Computer & Communications Industry Association d/b/a/ CCIA ("Plaintiffs") assert that their decisions to moderate, remove and promote content, as well as de-platform individuals and terminate accounts constitute their exclusive "editorial discretion." (Plaintiffs' Motion For Preliminary Injunction, NetChoice LLC et al v. Paxton, Docket No. 1:21-cv-00840 (W.D. Tex. Sept. 22, 2021) ("NetChoice Motion for PI") at 24). Because "H.B. 20 compels privately owned platforms to disseminate third-party content," it "interferes with their editorial discretion." (NetChoice Motion for PI 23). Plaintiffs further argue that HB 20 unlawfully interferes with their members providing "unique experiences on their respective platforms that are realized through their terms of service and their content-moderation policies." (NetChoice Motion for PI 24). They claim that HB 20 is unconstitutional because that "editorial function itself is an aspect of 'speech' protected by the First Amendment." (NetChoice Motion for PI 24). Plaintiffs in this litigation assert that their content-moderation policies and similar "editorial function[s]" are their speech. (NetChoice Motion for PI 24).

Yet, Plaintiffs' members in countless lawsuits and representations to federal and state courts at both the trial and appellate level throughout the country have claimed the opposite. When asserting liability protection under section 230, they

have succeeded in claims that their "editorial function" in removing, editing, or moderating content and de-platforming users or terminating accounts is, in fact and under law, speech of "another internet content provider." *See* 47 U.S.C. § 230(c)(1). Following their arguments, courts have ruled that content moderation is legally and factually "third-party" speech, i.e., not the Plaintiffs' members' speech.

But decisions to moderate, remove, and promote content, as well as to de-platform individuals and terminate accounts cannot be both speech of "another internet content provider," per the language of section 230(c)(1), entitled to a generous statutory protection, at the same time that the Plaintiff's members' claim that content moderation is their own speech entitled to the highest First Amendment protections.

Plaintiffs' members' efforts to game the federal judiciary is forbidden under the doctrine of "[j]udicial estoppel. . . [the] common law doctrine that prevents a party from assuming inconsistent positions in litigation." *In re Superior Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir. 2004) (citing *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988)). "The purpose of the doctrine is to protect the integrity of the judicial process by preventing parties from playing fast and loose with the courts to suit the exigencies of self-interest." *Id.* (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir.1999)).

Plaintiffs are playing "fast and loose" with this Court. To avoid detriment to the State of Texas and preserve the integrity of the United States judiciary, Plaintiffs are judicially estopped from asserting the First Amendment protects their content moderation decisions.

ARGUMENT

A. Plaintiffs' Members' Long-Held Position On Content-Moderation and Third-Party Speech Under Section 230(c)(1) of the Communications Decency Act of 1996

The point made in this brief may initially seem surprising, even difficult to believe. One reason it may be hard to digest is that, by text and reputation, section 230(c)(1) only deals with material that the Platforms include, not that which they exclude or "moderate." *See* 47 U.S.C. § 230(c)(1) ("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."). In contrast, by text and reputation, their exclusion of material is relegated to section 230(c)(2). *See* 47 U.S.C. § 230(c)(2) ("No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable").

So, it may initially seem odd that the Platforms have persuaded courts to rely on section 230(c)(1) to protect them not only in their decision to include but also in their decision to exclude or moderate. Further complicating matters is that the language used by the platforms and the courts they have persuaded is sometimes slightly opaque. But once one realizes the position successfully taken by the

platforms in earlier cases—that they are not publishers when they moderate content—it becomes obvious that they are saying one thing in most cases and quite another thing in this case.

Congress passed section 230 as part of the Communications Decency Act of 1996 (CDA), P.L. 104-104, 110 Stat. 133, to limit pornography and similar material on the internet. As opposed to the outright speech bans in the CDA struck down in *Reno v. ACLU*, 521 U.S. 844 (1997), section 230 aims to give parents power to control children's exposure to internet content by giving internet service providers economic incentives to offer "family friendly" online environments. "In the brief legislative history, every legislator who spoke substantively about § 230 focused on freeing platforms to block material that was seen as not 'family-friendly.'" Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. S 230(c)(2)*, 1 J. Free Speech L. 175, 185 (2021), *citing* 41 Cong. Rec. H8469 (daily ed. Aug. 4, 1995).

To achieve this end, section 230 overruled a New York state case, *Stratton Oakmont v. Prodigy*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *see FTC v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009) ("Congress enacted the CDA in response to a state-court decision, Stratton Oakmont. . . which held that the provider of an online messaging board could be liable for defamatory statements posted by third-party users of the board.").

Ruling on common law defamation, the *Stratton Oakmont* court determined that internet service provider Prodigy was a "publisher" for all statements on its bulletin boards (and thus potentially liable for those statements) because it content-moderated posts to render its forum family-friendly. *Stratton Oakmont,* 1995 WL 323710 at *2. *Stratton Oakmont* thereby discouraged content moderation by giving platforms an undesirable choice: either moderate content and face liability for all posts on your bulletin board, or don't moderate and have posts filled with obscenity or naked images.

Eager to create family-friendly environments by giving internet service providers correct economic incentives, Congress passed section 230(c)(2), 47 U.S.C. § 230(c)(2). This provision frees all internet platforms from being "held liable" for editing to remove content that they consider to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* With this language, Congress eliminated the Hobson's choice: when platforms content-moderate for these specific reasons to encourage family-friendly online environments, they would no longer be held liable for everything on their site.

However, the platforms, when involved in litigation, have primarily used section 230(c)(1) rather than section 230(c)(2) to claim immunity from suit. Elizabeth Banker, *A Review of Section 230's Meaning & Application Based on More Than 500 Cases* 3 (Internet Ass'n, 2020)("Section 230 protects providers

who engage in content moderation, but typically through application of subsection (c)(1) rather than the good faith provision, (c)(2).").

Section 230(c)(1)'s plain language speaks to liability arising from third-party content, codifying common carriers' liability protection for the messages they deliver. The section reads: 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*. 47 U.S.C. § 230(c)(1) (emphasis added). The legislative history hardly mentions this provision. *See* Adam Candeub, *Reading Section 230 As Written*, 1 J. Free Speech L. 139, 146 (2021) ("section 230(c)(1) . . [was] not the focus of legislative attention as evidenced from the legislative history").

The provision's text grants Plaintiff's members immunity from suit from liability created by third-party content, e.g., postings on Facebook or Twitter, or using the statute's terminology, "information provided by another information content provider." 47 U.S.C. § 230(c)(1). When a Facebook user posts a libelous statement, section 230(c)(1) preserves the user's liability, but immunizes Facebook.

But, upon the urging of Plaintiffs' members, courts have expanded section 230(c)(1) immunity from third-party content "provided by another" to internet platforms' *own* content moderation, editing, or censoring of such third-party

speech. And Plaintiffs' members have been successful in arguing that content moderation, editing, or censoring of such third-party speech, is as a legal and factual matter, third-party content belonging to "another information content provider" under section 230(c)(1). *See* Candeub, *Reading Section 230 As Written*, 1 J. Free Speech L. at 149. ("Numerous courts . . . interpret section 230 as immunizing platforms' own editorial decisions.").

Accepting their argument, courts have immunized Plaintiffs' members from liability for their content moderation decisions in myriad circumstances ranging from claims of discrimination from civil rights laws, *Sikhs for Just. "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095–96 (N.D. Cal. 2015), *aff'd sub nom.*, *Sikhs for Just., Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017), and fraud or misrepresentation under consumer protection laws, *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 836 (2002) (interpreting that "Appellants' UCL cause of action is based upon. . . [the claim] that eBay misrepresented the forged collectibles offered for sale in its auctions") to violation of contract law, *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016) (stressing that "the immunity bestowed on interactive computers service providers by § 230(c) prohibits all of Plaintiff's claims [including contract claims] against Facebook"), *aff'd*, 700 F. App'x 588 (9th Cir. 2017), and even claims for aiding and abetting terrorism. *Force v. Facebook, Inc.*, 934 F.3d 53, 57 (2d Cir. 2019).

Justices and judges, while recognizing that many courts have adopted this interpretation, have often criticized it. In his statement concerning a denial of certiorari, the only Supreme Court statement on section 230 to date, Justice Thomas writes, "Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 16 (2020) (Thomas, J., respecting the denial of certiorari). Justice Thomas recognized that the platforms successfully have argued to many courts that Section 230(c)(1) protects the "'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content."' *Id.* (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). He has recently repeated his concerns that "courts have interpreted §230 'to confer sweeping immunity on some of the largest companies in the world' particularly by employing a 'capacious conception of what it means to treat a website operator as [a] publisher or speaker.'" *Doe v. Facebook, Inc*., No. 21-459, 2022 WL 660628, at *1 (U.S. Mar. 7, 2022) (Thomas, J., respecting the denial of certiorari).

Chief Judge Katzmann, echoing Justice Thomas, has recently criticized his courts' decisions to "extend a provision that was designed to encourage computer service providers to shield minors from obscene material so that it now immunizes

those same providers for allegedly connecting terrorists to one another." *Force v. Facebook, Inc.*, 934 F.3d 53, 77 (2d Cir. 2019) (Katzmann, C.J., dissenting).

Regardless of the wisdom of treating the platforms' decisions to promote, censor, or moderate content as speech of third parties entitled to section 230(c)(1) protection, Plaintiffs' members have consistently and successfully taken that position before numerous courts.

B. Plaintiffs Are Judicially Estopped from Claiming Content-Moderation as Their Own First Amendment-Protected Speech

After decades of arguing that their content moderation, censoring, and promotion of content was speech "provided by another" under section 230(c)(1), Plaintiffs have argued the exact opposite in the court below. There, they stated, "Privately owned Internet platforms have a First Amendment right to moderate user-sub-mitted content disseminated on their platforms. . . . As addressed above, Plaintiffs' members are not mere passive conduits that simply transmit expression of their users. Rather, they provide unique experiences on their respective platforms that are realized through their terms of service and their content-moderation policies. That 'editorial function' itself is an aspect of 'speech' protected by the First Amendment." (NetChoice Motion for PI at 24).

Because its members argued the exact opposite before countless courts in earlier lawsuits, Plaintiffs are judicially estopped from now arguing that their content moderation, censoring, and promotion of content is their own speech entitled to First Amendment protection.[1] "Generally, judicial estoppel is invoked where 'intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008), (quoting *Scarano v. Cent. R.R. Co.*, 203 F.2d 510, 513 (3d Cir.1953)). Judicial estoppel has three requirements: "(1) the party is judicially estopped only if its position is clearly inconsistent with the previous one; (2) the court must have accepted the previous position; and (3) the non-disclosure must not have been inadvertent." *Id.* at 385-6 (citations omitted). Plaintiffs' members have met these requirements.

C. Plaintiffs' Members Have (i) Taken a "Clearly Inconsistent" Position on Whether Content Moderation is Their Own Speech and (ii) Courts Have Accepted Their Previous Position

[1] In this judicial estoppel inquiry, the positions taken by Facebook and Twitter as an example are binding on its representative and agent, NetChoice. It is not required that those who advance the contradictory positions have precisely the same identity, because the doctrine is not concerned with vindicating litigants, but upholding the administration of justice. For instance, for judicial estoppel purposes, the improper non-disclosures of a bankruptcy petitioner's legal representative is binding on the client who is charged with knowledge and later takes a contrary legal position. *Barger v. City of Cartersville,* 348 F.3d 1289 (11th Cir. 2003). In fact, even further, "[t]he majority rule is that a party is not required to have been a party to the prior proceeding to be able to invoke judicial estoppel." 18 James Wm. Moore et al., Moore's Federal Practice ¶ 124.33[1] (3d ed. 2015).

Courts hold section 230(c)(1) protects platforms' decisions against claims based on their "editorial function" of content moderating and amplifying, as well as content censorship or user de-platforming. Arguing that section 230(c)(1) immunizes platforms' "editorial function" as speech "of another," Plaintiff's members have convinced courts that content moderating and amplifying, as well as content censorship, user de-platforming-and even keyword recommendation, is speech "of another" under section 230(c)(1) when successfully defending civil rights claims, fraud and consumer protection, contract, and even aiding and abetting terrorism.

a. Civil Rights and Discrimination Law

In many cases, individuals have brought suit alleging that Plaintiff's members de-platformed or censored users based upon discriminatory animus in violation of federal and state civil rights laws. In these cases, Plaintiffs' members successfully argued that their de-platforming or censorship decisions should receive legal immunity because it was speech of "another" under section 230(c)(1).

For instance, Facebook argued in *Sikhs For Justice, Inc v. Facebook* that section 230(c)(1) barred Plaintiff's claims under the Civil Rights Act of 1964 ("Title II"), 42 U.S.C. § 2000(a) and California Unruh Civil Rights Act (the "Unruh Act"), Cal. Civ. Code §§ 51–51.3, for blocking its site. Facebook urged the court that "any activity that can be boiled down to deciding whether to exclude

material that third parties seek to post online is perforce immune under section 230[(c)(1)]. Here, Plaintiff seeks to hold Facebook liable for its decisions to remove certain content. . . Facebook's conduct is squarely protected by the CDA [section 230(c)(1)]." Motion to Dismiss, *Sikhs For Justice "SFJ," Inc. v. Facebook, Inc.*, 144 F.Supp.3d 1088 (N.D. Cal.) (No. 15-CV-02442-LHK), 2015 WL 11110890, at 6–7.

And the court accepted Facebook's position that "the CDA [section 230(c)(1)] bars all claims that seek to hold an interactive computer service liable as a publisher of third-party content." *Sikhs for Just. "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1095–96 (N.D. Cal. 2015), *aff'd sub nom. Sikhs for Just., Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017).

Twitter urged similar arguments, which have been accepted by the courts. *Mezey v. Twitter, Inc.*, No. 1:18-cv-21069-KMM , 2018 WL 5306769, at *2 (dismissing lawsuit claiming that Twitter "unlawfully suspended [the plaintiff's] Twitter account" in violation of civils rights laws on grounds of Section 230(c)(1) immunity).

b. Contract and Consumer Protection

Plaintiffs' members have argued that its editorial function in removing, promoting, or censoring content or users is "speech of another." Plaintiffs'

members have urged that 230(c)(1) therefore protects them against users' contract and consumer claims for removing, promoting, or censoring their content in violation of their promises and representations. For instance, in *Lancaster v. Alphabet Inc*., Google states, "Defendants' decision to "remov[e] content is something publishers do, and to impose liability on the basis of such conduct necessarily involves treating the liable party as a publisher. . . while Plaintiff may be responsible for the content of her videos, imposing liability on YouTube for hosting and removing those videos is forbidden by section 230(c)(1)." Motion to Dismiss, *Lancaster v. Alphabet Inc.*, No. 15-cv-05299-HSG, 2016 WL 3648608 (N.D. Cal. July 8, 2016), 2016 WL 865916.

And the court accepted this argument. *See Lancaster v. Alphabet Inc.*, No. 15-CV-05299-HSG, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016) (finding where "plaintiff[s] asserting breach of the implied covenant of good faith and fair dealing sounding in contract. . . CDA [section 230(c)(1)] precludes any claim seeking to hold Defendants liable for removing videos from Plaintiff's YouTube channel"); *see also Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1307–08 (N.D. Cal. 2019) (asserting CDA section 230(c)(1) "immunizes Facebook from. . . the fourth cause of action for breach of contract [between plaintiff and Facebook]").

Similarly, in countering contract and California consumer protection claims for account termination, Facebook urged that "Decisions about whether to deactivate users' accounts also fall squarely within the sphere of 'editorial and self-regulatory functions' protected by the CDA [section 230(c)(1)]." Notice of Motion to Dismiss and Motion, Memorandum of Points and Authorities in Support Thereof, Caraccioli v. Facebook, 167 F.Supp.3d 1056 (N.D. Cal.), 2015 WL 12766449, at 10. And again, Facebook was successful with their argument. *See Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016), *aff'd*, 700 F. App'x 588 (9th Cir. 2017) (stressing that "the immunity bestowed on interactive computers service providers by § 230(c)[(1)] prohibits all of Plaintiff's claims [including contract and UCC claims] against Facebook").

Facebook made similar arguments before the court of appeals, federal district courts and state court. *See Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1304 (N.D. Cal. 2019) ("because Plaintiffs' second through fifth claims are predicated on Facebook's decision to remove content. . . Facebook satisfies the third and final prong of the Communications Decency Act's immunity test [under section 230(c)(1] that Plaintiffs seek to hold Facebook liable as a publisher or speaker of Plaintiffs' content."); *Oberdorf v. Amazon*, 295 F. Supp. 3d 496 (M.D. Pa. Dec. 21, 2017); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 836 (2002).

In *Jurin v. Google Inc.* plaintiff alleged that Google's *own* search suggestions, i.e., speech it generated itself, constituted an interference with contractual advantage. 695 F.Supp.2d 1117, 1117 (E.D. Cal. 2010). Google urged that its own search suggestions in its "Keyword Search" were not its speech. According to Google, Keyword Search works in the following way: "Type in a word or phrase, or website name. Tool will show you a list of similar keywords with a count of how often each word is searched." *See* http://www.googlekeywordtool.com/. Nonetheless, Google argued that its "keyword tool does not create the *content* of the advertisements; it merely gives advertisers the ability to refine keywords that they select. This is a classic example of protected editorial discretion." Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities in Support Thereof, Jurin v. Google, 695 F.Supp.2d 1117 (E.D. Cal. 2010) (No. 209CV03065), 2009 WL 5441279, at 7–8. Because the keywords it generated were not *really* its speech, but that of a third-party, i.e., "another content provider," Google urged Section 230(c)(1) to apply.

And again, Google was successful. The court accepted its claim "[b]y suggesting keywords to competing advertisers Defendant merely helps third parties to refine their content. This is tantamount to the editorial process protected by the CDA. Defendant's keyword suggestion tool hardly amounts to the participation

necessary to disqualify it of CDA immunity [under section 230(c)(1)]." *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010).

c. Aiding Terrorism

In *Force v. Facebook*, the plaintiff alleged that Facebook's sorting, prioritization, and promotion of content willfully and knowingly promoted terrorist acts. Facebook disclaimed that its own sorting, prioritization, and promotion of content was its own speech. Instead, it claimed these actions were third party speech, i.e., speech "of another" under section 230(c)(1). Facebook stated, "No court of appeals has held that the sorting, prioritization, and promotion of content-whether through automated means or otherwise-deprives an online publisher of § 230[(c)(1)]'s protections." Brief in Opposition to Petition for Certiorari, Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019) (No. 19-859), 2020 WL 1479918, at 18.

And again, Facebook was successful. The U.S. Court of Appeals ruled that "form[ing] 'connections' and 'matches' among speakers, content, and viewers of content, whether in interactive internet forums or in more traditional media. . . . is an essential result of publishing" that receives protection under section 230(c)(1). *Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019).

D. Plaintiff's Non-Disclosure Was Willful and Detrimental to the State of Texas

Parties can be presumed to know the legal and factual positions they assumed in prior lawsuits, especially those recently litigated. Plaintiffs' members must have known about their section 230 positions, given the importance the statute plays in their industry. In fact, NetChoice has submitted amicus briefs in vital section 230 cases—briefs that demonstrate deep familiarity with the cases and issues discussed herein. *See* Brief for Chris Cox & NetChoice as Amici Curiae Supporting Plaintiffs, *Homeaway.com, Inc. v. Santa Monica*, 918 F.3d 676 (9th Cir. 2019) (Nos. 2:16-cv-6641, 2:16-cv-6645) 2018 WL 2121075; Brief for Chris Cox & NetChoice as Amici Curiae Supporting Defendants, La Park La Brea A LLC v. Airbnb, Inc., 285 F.Supp.3d 1097 (C.D. Cal. 2017) (No. 18-55113) 2018 WL 4854727.

Finally, Plaintiffs' position harms Texas. It prevents its citizens from bringing suit against these firms for the harms they cause—and prevents the State from passing laws to remediate the harms they cause. Plaintiffs are playing "fast and loose" with this Court, the entire federal judiciary, and the citizens of Texas.

CONCLUSION

Judicial estoppel is an equitable doctrine to protect the integrity of the judicial process. Parties that successfully convince courts of contradictory, inconsistent positions undermine the rule of law and the faith Americans have in a truthful, consistent legal system. By arguing that content moderation, censorship, and promotion is not their speech in order to gain section 230(c)(1) immunity but is their speech for protection under First Amendment, Plaintiff-Appellees seek to receive extraordinary statutory privileges—and the same time they seek immunity from any legal regulation. They cannot maintain both positions.

Respectfully submitted,

/s/ Joe Sibley

Joe Sibley
Camara & Sibley LLP
1108 Lavaca St., Ste 110263
Austin, TX 78701
Tel: (713) 966-6789

Counsel to Heartland Institute and American Principles Project

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on March 9, 2022 . I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

/s/ Joe Sibley

Joe Sibley
Camara & Sibley LLP
1108 Lavaca St., Ste 110263
Austin, TX 78701
Tel: (713) 966-6789

Counsel to Heartland Institute and American Principles Project

CERTIFICATE OF COMPLIANCE

This *Amicus* filing supporting Appellant's motion contains 3827 words, excluding the parts of the motion exempted by rule. This filing complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word.

Respectfully submitted,

/s/ Joe Sibley

Joe Sibley
Camara & Sibley LLP
1108 Lavaca St., Ste 110263
Austin, TX 78701
Tel: (713) 966-6789

Counsel to Heartland Institute and American Principles Project

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with counsel for all parties to this appeal by email on March 7, 2022 and they are unopposed to the filing of this Brief, thereby making a motion for leave to file under FRAP 29.

Respectfully submitted,

/s/ Joe Sibley

Joe Sibley
Camara & Sibley LLP
1108 Lavaca St., Ste 110263
Austin, TX 78701
Tel: (713) 966-6789

Counsel to Heartland Institute and American Principles Project