UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 21-11589

NETCHOICE, LLC et al.,

Plaintiffs–Appellees,

v.

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,

Defendant–Appellant.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

No. 21-11589

NetChoice v. Attorney General, State of Florida, et al.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the *amicus curiae*, America First Policy Institute, states that it has no parent corporation and no publicly held corporation holds 10% or more of its stock.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The "classic role of amicus curiae" is "assisting in a case of general public interest,... supplementing the efforts of counsel, and drawing the court's attention to law that might otherwise escape consideration." *Funbus Sys., Inc. v. Cal. Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (citing *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982)). Leave should be granted when the proposed brief has "(a) an adequate interest, (b) desirability, and (c) relevance." *Neonatology Assocs., PA v. Comm'r*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.). The submitted brief satisfies all of these considerations, and accordingly leave to file should be granted.

First, the America First Policy Institute (AFPI) is a 501(c)(3) non-profit, non-partisan research institute. AFPI exists to conduct research and develop policies that put the American people first. Its guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do. Its Constitutional Litigation Partnership works in the courts to preserve the American way of life, including federalism, free speech, and the rule of law.

The Florida Statutes at issue seek to guarantee a fair and open internet and protect democratic discourse. They have extraordinary importance to the general public, warranting participation of *amici curiae* to present the perspective of those public concerns. The Florida Statutes are of tremendous interest to AFPI, in particular, as they present issues central to its mission: the preservation of meaningful free speech and the protection of democratic discourse. This brief seeks to provide useful information about larger implications of this case as well as extensive analysis of relevant statutory provisions. Accordingly, the brief presents valuable and helpful information to decide momentous questions of law.

This case presents the question of whether Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(2) preempts provisions of Florida Statutes §§ 106.072, 287.137, 501.2041. AFPI respectfully requests the

opportunity to demonstrate to the Court why the District Court's decision misapplies Section 230, adopting an extreme interpretation in a matter of first impression for the Eleventh Circuit, that is at odds with the statutory text, congressional intent, and the published decisions of courts nationwide.

AFPI has brought national experts to provide their insights to these issues, so that it would be desirable for the best outcome for the case for the Court to be able to consult its brief. Its expertise is relevant to the questions this Court must answer. The motion for leave to file should be granted.

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(4). The document contains 1,433 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2021, I caused the foregoing **Motion for Leave to File Brief as *Amici Curiae*** to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

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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 AMERICA FIRST POLICY INSTITUTE
IN SUPPORT OF THE STATE OF FLORIDA AND REVERSAL OF THE DISTRICT COURT

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DISCLOSURE STATEMENT AND IDENTITY OF *AMICUS*

Counsel for *amicus curiae* certifies that the America First Policy Institute (AFPI) 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 also certifies that he is not aware of any persons or entities, beyond those listed in the party and amicus briefs filed in this case, that have an interest, financial or otherwise, in the outcome of this litigation. AFPI is a 501(c)(3) public interest organization that has a public policy interest in advocating for the removal of government subsidies such as Section 230, which permit the violation of the First Amendment rights of others. In addition, under FRAP 29(4)(e), no party's counsel had any part in either drafting the brief or funding it. No person funded this brief as described in subpart iii of this above-referenced section.

STATEMENT OF THE ISSUES

(1) Whether 47 U.S.C. § 230 preempts Florida's social media law, FLA. STATS. §§ 106.072, 287.137 & 501.2041? (2) Whether to promote transparency and non-discrimination, states may require platforms to disclose their content-moderation policies and practices? (3) Whether to protect consumers, states may require platforms to follow their own representations concerning content-moderation and provide access to users' own content?

SUMMARY OF THE ARGUMENT

Florida's social media law is a collection of loosely related statutory provisions. It reflects the Florida Legislature's findings that social media platforms' market power gives them unfair advantage over consumers and smaller businesses, disrupts democratic deliberation, and undermines the free press. Most of the law involves disclosure.

Plaintiff network platforms ("NetChoice") claim 47 U.S.C. § 230 grants them blanket immunity for all content-moderation decisions—preempting all state laws regulating their decisions to remove content, ranging from the Florida social media law at issue here to state laws prohibiting racial or religious discrimination.

But section 230(c)(1) does not provide blanket immunity. It only protects social media platforms from publisher or speaker liability for distributing content posted by third-party users. Section 230(c)(2) only immunizes good-faith decisions to take down certain types of content listed in the statute, such as obscenity, that Congress considered regulable in 1996 when it passed the provision.

In contrast, the Florida social media law addresses de-platforming of candidates, notification, disclosure and transparency—and has nothing to do with obscenity or similar content. No federal preemption concern exists.

Beyond section 230, NetChoice asks this Court to extend First Amendment protections suitable for newspaper editors or parade organizers. But, social media

platforms do not create coherent messages by controlling others' speech or by enabling individual conversations.

Most of the Florida social media law consists of disclosure and consumer protection requirements. The First Amendment, as the Supreme Court explains in *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985), permits the states to impose factual disclosure on businesses. Florida's law simply requires platforms to publish their content-moderation rules, § 501.2041(2)(a); apply them consistently, § 501.2041(2)(b); provide notice when the rules change, § 501.2041(2)(c); and give notice and explain content suppression decisions, § 501.2041(2)(d).

On an issue of first impression for the Eleventh Circuit, the lower court's preemption analysis ignores statutory text, placing its decision at odds with most court rulings nationwide and affording platforms unprecedented legal immunity. This Court should reverse the preemption analysis, sever any unlawful provisions, and leave intact the core notice, disclosure, and transparency provisions.

ARGUMENT

I. The Lower Court's Section 230(c)(2) Preemption Analysis Ignores Statutory Text, Congressional Intent, and Relevant Caselaw

Because section 230 has an express preemption provision, 47 U.S.C. § 230(e)(3), the lower court recognized that section 230 does not "preempt the field" (Opinion at 18). "[W]here a legislative enactment contains an express pre-emption

provision . . . [a court's] primary task is only to determine whether the state law in question falls within the scope of the statute expressly promulgated by Congress." *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1253 (11th Cir. 2003).

The lower court read section 230's scope as preempting all regulation of platforms' content restriction and ruled three provisions preempted: §§ 106.072, 501.2041(2)(b), 501.2041(2)(d). Because "deplatforming a candidate restricts access to material the platform plainly considers objectionable within the meaning of 47 U.S.C. § 230(c)(2)," the court ruled § 106.072 preempted. (Opinion at 15). Similarly, the court ruled § 501.2041(2)(b) preempted because it believed consistent application of terms of service somehow implicates platforms' ability to remove content. (Opinion at 20). The court ruled § 501.2041(2)(d)(1) preempted using the same conclusory analysis. (Opinion at 19-20). Finally, because it ruled section 230(c)(2) preempted these provisions, the court preempted Section 501.2041's entire enforcement mechanism, thereby invalidating enforcement for provisions the court did not even discuss or examine.[1] These provisions are mostly disclosure requirements, and some do not regulate speech at all.

[1] *See* §§ 501.2041(2)(a), 501.2041(2)(c), 501.2041(2)(d), 501.2041(2)(e)(1), 501.2041(2)(e)(2), 501.2041(2)(f)(1), 501.2041(2)(f)(2), 501.2041(2)(g), and 501.2041(2)(i).

To reach its conclusion that section 230(c)(2) includes all decisions to deplatform users or restrict content, the court expands the scope of section 230(c)(2) in an untenable way. The provision reads:

> No provider or user of an interactive computer service shall be held liable on account of . . .any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. 47 U.S.C. § 230(c)(2).

The lower court read the phrase, "otherwise objectionable" in the abstract, without reference to its context. Because a platform could conceivably "consider" *any* content objectionable, section 230 preempts all state laws that impose liability for any "decisions to remove or restrict access to content." (Opinion at 15). The lower court's ruling also preempts any regulation of content removals taken in "bad faith" which section 230 in no way regulates.

But, the lower court's reading, which cites no precedent, contradicts the Supreme Court's and Eleventh Circuit's precedent. These courts require *ejusdem generis* when interpreting "otherwise objectionable." The Supreme Court explains, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects *similar in nature* to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) (emphasis added).

Applying *ejusdem generis*, section 230(c)(2) is a narrow provision that protects platforms when restricting access to "obscene, lewd, lascivious, filthy, excessively violent, harassing" as well as "otherwise objectionable" speech that is "similar in nature" to the enumerated types of content. Under this reading, section 230(c)(2) has a targeted purpose: to protect platforms' restriction of non-family friendly content that Congress considered regulable within the Communications Decency Act itself. The Florida social media law, which primarily concerns political expression, business disclosure, and transparency, is consistent with section 230.

II. Section 230(c)(2): An Ejusdem Generis Reading

Congress passed section 230 as part of the Communications Decency Act of 1996 (CDA), an effort to control pornography and other non-family friendly material on the internet. As opposed to more regulatory parts of the CDA that were struck down in *Reno v. ACLU*, 521 U.S. 844 (1997), Congress intended section 230 to empower parents to control internet content. It did so, in part, by overruling a 1995 New York state case, *Stratton Oakmont v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995).

Applying existing law, *Stratton Oakmont* ruled that Prodigy was a "publisher" for *all posts* on its bulletin boards because it moderated content to render them appropriate for families. Prodigy advertised as an internet service provider (ISP) suitable for children and families. From that perspective, the decision made sense.

But, *Stratton Oakmont* created a Hobson's choice for platforms' content moderation: either moderate content and face liability for all posts on your bulletin board, or don't moderate and have posts filled with obscenity. That legal rule was hardly an incentive for platforms to create family friendly online environments.

Eager to promote wholesome or non-pornographic content in the Communications Decency Act, Congress came to the rescue with section 230(c)(2).[2] By eliminating the Hobson's choice, Congress envisioned a variety of ISPs with different content standards, giving parents the power to choose and thereby control their children's internet environment. Notice what section 230's text does *not do:* give platforms protection for content moderation for any reason, such as political ideology, fairness, or the reasons in the Florida social media law. The district court

[2] Comments in the Congressional record from *every* congressman and woman reveal an understanding that the Online Family Empowerment amendment, now codified as section 230, as a non-regulatory approach to protecting children from pornography and other material perceived to be harmful, which the federal government *already* regulated. *See* 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden) ("We are all against smut and pornography . . . . [rather than give our Government the power to keep offensive material out the hands of children . . .We have the opportunity to build a 21st century policy for the Internet employing . . . the private sector"); 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) ("I strongly support . . . address[ing] the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornography materials available on the Internet") (statement of Rep. Danner); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) ("I have got small children at home. . . . I want to be sure can protect them from the wrong influences on the Internet. But I have to got to tell my colleagues) (statement of Rep. White); id. (statement of Rep. Lofgren) ("[The Senate approach] will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment"); id (statement of Re. Goodlatte) ("Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet"); id (statement of Markey) (supporting the amendment because it "dealt with the content concerns which the gentlemen from Oregon and California have raised"); id. (statement of Rep. Fields) (congratulating all the of legislatures for "this fine work").

arrived at its opposite conclusion by ignoring *ejusdem generis* and interpreting "otherwise offensive" as meaning any material a platform deems offensive.

Both Supreme Court and Eleventh Circuit precedent reject this reading relying on *ejusdem generis*. And, the overwhelming majority of courts that have examined section 230(c)(2) apply *ejusdem generis*.[3] The Eleventh Circuit closely adheres to this rule, stating that "[w]e must interpret 'a general statutory term ... in light of the specific terms that surround it.'" *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 934 (11th Cir. 2000), *quoting Hughey v. United States*, 495 U.S. 411, 419 (1990).

Applying ejusdem generis, "otherwise objectionable" must be read in light of the specific words: "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing." And the "nature" of the terms preceding "otherwise objectionable" is shown in the statute of which section 230 is a part: the Communications Decency

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[3] *Songfi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 883 (N.D. Cal. 2015) ("Given the list preceding 'otherwise objectionable,'—'obscene, lewd, lascivious, filthy, excessively violent, [and] harassing . . .'—it is hard to imagine that the phrase includes, as YouTube urges, the allegedly artificially inflated view count associated with 'Luv ya.' On the contrary, even if the Court can 'see why artificially inflated view counts would be a problem for . . . YouTube and its users,' MTD Reply at 3, the terms preceding 'otherwise objectionable' suggest Congress did not intend to immunize YouTube from liability for removing materials from its website simply because those materials pose a 'problem' for YouTube."); *Nat'l Numismatic Certification, LLC. v. eBay, Inc.*, No. 6:08-cv-42-Orl-19GJK, 2008 U.S. Dist. LEXIS 109793, at *81, 2008 WL 2704404, at *25 (M.D. Fla. July 8, 2008) ("It is difficult to accept, as eBay argues, that Congress intended the general term 'objectionable' to encompass an auction of potentially-counterfeit coins when the word is preceded by seven other words that describe pornography, graphic violence, obscenity, and harassment. When a general term follows specific terms, courts presume that the gen-eral term is limited by the preceding terms."); *Goddard v. Google, Inc.*, No. C 08-2738 JF (PVT), 2008 U.S. Dist. LEXIS 101890, at *23-24, 2008 WL 5245490, at *6 (N.D. Cal. Dec. 17, 2008) (relying on National Numismatic to conclude that Google rules requiring various advertisers to "provide pricing and cancellation information regarding their services" "relate to business norms of fair play and transparency and are beyond the scope of § 230(c)(2)"); *see generally see generally* Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2),* 1 J. FREE SPEECH LAW, 175 (2021) (arguing for an *ejusdem generis* interpretation of section 230(c)(2)).

Act (CDA). Section 230 codified section 509 of the CDA, which formed Title V of Telecommunications Act of 1996,[4] a sprawling economic regulatory reform package. This law affected all the major telecommunications technologies of the time: telephony, broadcast television and radio, cable television—and in section 230 the new kid on the block, the internet.

Part of the Telecommunications Act, the CDA regulates decency over the same range of media. For instance, the CDA § 502 deals with obscene, lewd, lascivious, harassing and filthy telephone communications. Sections 502 though 505 deal with obscene and sexually explicit speech on cable systems. Section 551 addresses violent and sexually themed programming on broadcast television.

This statutory context makes obvious the similarity among "obscene, lewd, lascivious, filthy, excessively violent, [and] harassing." These terms all refer to types of speech regulated in the very same Title of the Act, because they all had historically been seen by Congress as regulable when distributed via electronic communications. For instance, "[o]bscene, lewd, lascivious, and filthy" speech had been regulated on cable television and in telephone calls. *See* 47 U.S.C. § 532(h) (enacted 1984) (cable television); 47 U.S.C. § 223(a) (enacted 1968) (telephone calls). "Harassing" telephone calls had long been seen by Congress as regulable. *See* Pub. L. 90-229 (1968) (enacting 47 U.S.C. § 223). Similarly, Congress and the FCC have long

[4] Pub. L. No. 104-104 (1996).

considered "excessively violent" to be on par with indecent or "obscene" speech for regulating over-the-air broadcasting. *See Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C.2d 418 (1975); In re Violent Television Programming and Its Impact on Children, 22 F.C.C.Rcd. 7929, 7931 (Apr. 25, 2007)("violent content is a protected form of speech under the First Amendment" and "the government interests at stake, such as protecting children from excessively violent television programming, are similar to those which have been found to justify other content-based regulations.").

Following *ejusdem generis*, "otherwise objectionable" covers similar, objectionable content that the CDA addresses in other sections. *E.g.*, "otherwise objectionable" would include anonymous threats (§ 502), unwanted repeated communications (§ 502), non-lewd nudity (§ 506), or speech aimed at "persuad[ing], induc[ing], entic[ing], or coerc[ing]" minors into criminal sexual acts (§ 508).

But "otherwise objectionable" does not preempt laws, like the Florida social media law, that "purport to impose liability for . . . decisions to remove or restrict access to content." (Opinion at 15) that involve content removals unrelated to the types of content Congress viewed objectionable and regulable in the 1996 Telecommunications Act, such as candidate removals.

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III. The Florida Social Media Law's Disclosure Provisions Are Severable

The District Court strikes down provisions of the Florida social media law that could be preserved because they present no constitutional concerns and can independently accomplish their intended legislative purpose. To determine whether to sever a state statutory provision, the Eleventh Circuit looks to state law. *Smith v. Butterworth*, 866 F.2d 1318 (11th Cir.1989). "[U]nder Florida law, '[a]n unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions . . . if the legislative purpose expressed in the valid provisions can be accomplished independently of those [provisions] which are void....'" *Smith v. Butterworth*, 866 F.2d 1318, 1321 (11th Cir. 1989), aff'd, 494 U.S.

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vanilla economic regulation having nothing to do with speech, will give Floridians valuable control over their property without implicating the First Amendment. After all, "it has never been deemed an abridgement of freedom simply because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (quotations omitted).

CONCLUSION

Section 230, 47 U.S.C. § 230, protects platforms from liability arising from third-party speech and decisions to remove certain types of content. Florida's social media law does not regulate these types of speech and, therefore, presents no preemption issues. The lower court's preemption analysis relies on an interpretation of section 230(c)(2) at odds with the statute's text, congressional purpose, and the overwhelming majority of caselaw. In addition, the Florida social media law primarily aims to promote transparency and consumer protection. These provisions are constitutional and can function independently from other parts of the statute. They should be preserved.

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2021, I caused the foregoing **Motion for Leave to File Brief as *Amici Curiae*** to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

Dated: September 14, 2021

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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 AMERICA FIRST POLICY INSTITUTE
IN SUPPORT OF THE STATE OF FLORIDA AND REVERSAL OF THE DISTRICT COURT

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DISCLOSURE STATEMENT AND IDENTITY OF *AMICUS*

Counsel for *amicus curiae* certifies that the America First Policy Institute (AFPI) 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 also certifies that he is not aware of any persons or entities, beyond those listed in the party and amicus briefs filed in this case, that have an interest, financial or otherwise, in the outcome of this litigation. AFPI is a 501(c)(3) public interest organization that has a public policy interest in advocating for the removal of government subsidies such as Section 230, which permit the violation of the First Amendment rights of others. In addition, under FRAP 29(4)(e), no party's counsel had any part in either drafting the brief or funding it. No person funded this brief as described in subpart iii of this above-referenced section.

STATEMENT OF THE ISSUES

(1) Whether 47 U.S.C. § 230 preempts Florida's social media law, FLA. STATS. §§ 106.072, 287.137 & 501.2041? (2) Whether to promote transparency and non-discrimination, states may require platforms to disclose their content-moderation policies and practices? (3) Whether to protect consumers, states may require platforms to follow their own representations concerning content-moderation and provide access to users' own content?

SUMMARY OF THE ARGUMENT

Florida's social media law is a collection of loosely related statutory provisions. It reflects the Florida Legislature's findings that social media platforms' market power gives them unfair advantage over consumers and smaller businesses, disrupts democratic deliberation, and undermines the free press. Most of the law involves disclosure.

Plaintiff network platforms ("NetChoice") claim 47 U.S.C. § 230 grants them blanket immunity for all content-moderation decisions—preempting all state laws regulating their decisions to remove content, ranging from the Florida social media law at issue here to state laws prohibiting racial or religious discrimination.

But section 230(c)(1) does not provide blanket immunity. It only protects social media platforms from publisher or speaker liability for distributing content posted by third-party users. Section 230(c)(2) only immunizes good-faith decisions to take down certain types of content listed in the statute, such as obscenity, that Congress considered regulable in 1996 when it passed the provision.

In contrast, the Florida social media law addresses de-platforming of candidates, notification, disclosure and transparency—and has nothing to do with obscenity or similar content. No federal preemption concern exists.

Beyond section 230, NetChoice asks this Court to extend First Amendment protections suitable for newspaper editors or parade organizers. But, social media

platforms do not create coherent messages by controlling others' speech or by enabling individual conversations.

Most of the Florida social media law consists of disclosure and consumer protection requirements. The First Amendment, as the Supreme Court explains in *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985), permits the states to impose factual disclosure on businesses. Florida's law simply requires platforms to publish their content-moderation rules, § 501.2041(2)(a); apply them consistently, § 501.2041(2)(b); provide notice when the rules change, § 501.2041(2)(c); and give notice and explain content suppression decisions, § 501.2041(2)(d).

On an issue of first impression for the Eleventh Circuit, the lower court's preemption analysis ignores statutory text, placing its decision at odds with most court rulings nationwide and affording platforms unprecedented legal immunity. This Court should reverse the preemption analysis, sever any unlawful provisions, and leave intact the core notice, disclosure, and transparency provisions.

ARGUMENT

I. The Lower Court's Section 230(c)(2) Preemption Analysis Ignores Statutory Text, Congressional Intent, and Relevant Caselaw

Because section 230 has an express preemption provision, 47 U.S.C. § 230(e)(3), the lower court recognized that section 230 does not "preempt the field" (Opinion at 18). "[W]here a legislative enactment contains an express pre-emption

provision . . . [a court's] primary task is only to determine whether the state law in question falls within the scope of the statute expressly promulgated by Congress." *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1253 (11th Cir. 2003).

The lower court read section 230's scope as preempting all regulation of platforms' content restriction and ruled three provisions preempted: §§ 106.072, 501.2041(2)(b), 501.2041(2)(d). Because "deplatforming a candidate restricts access to material the platform plainly considers objectionable within the meaning of 47 U.S.C. § 230(c)(2)," the court ruled § 106.072 preempted. (Opinion at 15). Similarly, the court ruled § 501.2041(2)(b) preempted because it believed consistent application of terms of service somehow implicates platforms' ability to remove content. (Opinion at 20). The court ruled § 501.2041(2)(d)(1) preempted using the same conclusory analysis. (Opinion at 19-20). Finally, because it ruled section 230(c)(2) preempted these provisions, the court preempted Section 501.2041's entire enforcement mechanism, thereby invalidating enforcement for provisions the court did not even discuss or examine.[1] These provisions are mostly disclosure requirements, and some do not regulate speech at all.

[1] *See* §§ 501.2041(2)(a), 501.2041(2)(c), 501.2041(2)(d), 501.2041(2)(e)(1), 501.2041(2)(e)(2), 501.2041(2)(f)(1), 501.2041(2)(f)(2), 501.2041(2)(g), and 501.2041(2)(i).

To reach its conclusion that section 230(c)(2) includes all decisions to deplatform users or restrict content, the court expands the scope of section 230(c)(2) in an untenable way. The provision reads:

> No provider or user of an interactive computer service shall be held liable on account of . . .any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. 47 U.S.C. § 230(c)(2).

The lower court read the phrase, "otherwise objectionable" in the abstract, without reference to its context. Because a platform could conceivably "consider" *any* content objectionable, section 230 preempts all state laws that impose liability for any "decisions to remove or restrict access to content." (Opinion at 15). The lower court's ruling also preempts any regulation of content removals taken in "bad faith" which section 230 in no way regulates.

But, the lower court's reading, which cites no precedent, contradicts the Supreme Court's and Eleventh Circuit's precedent. These courts require *ejusdem generis* when interpreting "otherwise objectionable." The Supreme Court explains, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects *similar in nature* to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) (emphasis added).

Applying *ejusdem generis*, section 230(c)(2) is a narrow provision that protects platforms when restricting access to "obscene, lewd, lascivious, filthy, excessively violent, harassing" as well as "otherwise objectionable" speech that is "similar in nature" to the enumerated types of content. Under this reading, section 230(c)(2) has a targeted purpose: to protect platforms' restriction of non-family friendly content that Congress considered regulable within the Communications Decency Act itself. The Florida social media law, which primarily concerns political expression, business disclosure, and transparency, is consistent with section 230.

II. Section 230(c)(2): An Ejusdem Generis Reading

Congress passed section 230 as part of the Communications Decency Act of 1996 (CDA), an effort to control pornography and other non-family friendly material on the internet. As opposed to more regulatory parts of the CDA that were struck down in *Reno v. ACLU*, 521 U.S. 844 (1997), Congress intended section 230 to empower parents to control internet content. It did so, in part, by overruling a 1995 New York state case, *Stratton Oakmont v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995).

Applying existing law, *Stratton Oakmont* ruled that Prodigy was a "publisher" for *all posts* on its bulletin boards because it moderated content to render them appropriate for families. Prodigy advertised as an internet service provider (ISP) suitable for children and families. From that perspective, the decision made sense.

But, *Stratton Oakmont* created a Hobson's choice for platforms' content moderation: either moderate content and face liability for all posts on your bulletin board, or don't moderate and have posts filled with obscenity. That legal rule was hardly an incentive for platforms to create family friendly online environments.

Eager to promote wholesome or non-pornographic content in the Communications Decency Act, Congress came to the rescue with section 230(c)(2).[2] By eliminating the Hobson's choice, Congress envisioned a variety of ISPs with different content standards, giving parents the power to choose and thereby control their children's internet environment. Notice what section 230's text does *not do:* give platforms protection for content moderation for any reason, such as political ideology, fairness, or the reasons in the Florida social media law. The district court

[2] Comments in the Congressional record from *every* congressman and woman reveal an understanding that the Online Family Empowerment amendment, now codified as section 230, as a non-regulatory approach to protecting children from pornography and other material perceived to be harmful, which the federal government *already* regulated. *See* 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden) ("We are all against smut and pornography . . . . [rather than give our Government the power to keep offensive material out the hands of children . . .We have the opportunity to build a 21st century policy for the Internet employing . . . the private sector"); 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) ("I strongly support . . . address[ing] the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornography materials available on the Internet") (statement of Rep. Danner); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) ("I have got small children at home. . . . I want to be sure can protect them from the wrong influences on the Internet. But I have to got to tell my colleagues) (statement of Rep. White); id. (statement of Rep. Lofgren) ("[The Senate approach] will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment"); id (statement of Re. Goodlatte) ("Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet"); id (statement of Markey) (supporting the amendment because it "dealt with the content concerns which the gentlemen from Oregon and California have raised"); id. (statement of Rep. Fields) (congratulating all the of legislatures for "this fine work").

arrived at its opposite conclusion by ignoring *ejusdem generis* and interpreting "otherwise offensive" as meaning any material a platform deems offensive.

Both Supreme Court and Eleventh Circuit precedent reject this reading relying on *ejusdem generis*. And, the overwhelming majority of courts that have examined section 230(c)(2) apply *ejusdem generis*.[3] The Eleventh Circuit closely adheres to this rule, stating that "[w]e must interpret 'a general statutory term ... in light of the specific terms that surround it.'" *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 934 (11th Cir. 2000), *quoting Hughey v. United States*, 495 U.S. 411, 419 (1990).

Applying ejusdem generis, "otherwise objectionable" must be read in light of the specific words: "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing." And the "nature" of the terms preceding "otherwise objectionable" is shown in the statute of which section 230 is a part: the Communications Decency

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[3] *Songfi Inc. v. Google, Inc.*, 108 F. Supp. 3d 876, 883 (N.D. Cal. 2015) ("Given the list preceding 'otherwise objectionable,'—'obscene, lewd, lascivious, filthy, excessively violent, [and] harassing . . .'—it is hard to imagine that the phrase includes, as YouTube urges, the allegedly artificially inflated view count associated with 'Luv ya.' On the contrary, even if the Court can 'see why artificially inflated view counts would be a problem for . . . YouTube and its users,' MTD Reply at 3, the terms preceding 'otherwise objectionable' suggest Congress did not intend to immunize YouTube from liability for removing materials from its website simply because those materials pose a 'problem' for YouTube."); *Nat'l Numismatic Certification, LLC. v. eBay, Inc.*, No. 6:08-cv-42-Orl-19GJK, 2008 U.S. Dist. LEXIS 109793, at *81, 2008 WL 2704404, at *25 (M.D. Fla. July 8, 2008) ("It is difficult to accept, as eBay argues, that Congress intended the general term 'objectionable' to encompass an auction of potentially-counterfeit coins when the word is preceded by seven other words that describe pornography, graphic violence, obscenity, and harassment. When a general term follows specific terms, courts presume that the gen-eral term is limited by the preceding terms."); *Goddard v. Google, Inc.*, No. C 08-2738 JF (PVT), 2008 U.S. Dist. LEXIS 101890, at *23-24, 2008 WL 5245490, at *6 (N.D. Cal. Dec. 17, 2008) (relying on National Numismatic to conclude that Google rules requiring various advertisers to "provide pricing and cancellation information regarding their services" "relate to business norms of fair play and transparency and are beyond the scope of § 230(c)(2)"); *see generally see generally* Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2),* 1 J. FREE SPEECH LAW, 175 (2021) (arguing for an *ejusdem generis* interpretation of section 230(c)(2)).

Act (CDA). Section 230 codified section 509 of the CDA, which formed Title V of Telecommunications Act of 1996,[4] a sprawling economic regulatory reform package. This law affected all the major telecommunications technologies of the time: telephony, broadcast television and radio, cable television—and in section 230 the new kid on the block, the internet.

Part of the Telecommunications Act, the CDA regulates decency over the same range of media. For instance, the CDA § 502 deals with obscene, lewd, lascivious, harassing and filthy telephone communications. Sections 502 though 505 deal with obscene and sexually explicit speech on cable systems. Section 551 addresses violent and sexually themed programming on broadcast television.

This statutory context makes obvious the similarity among "obscene, lewd, lascivious, filthy, excessively violent, [and] harassing." These terms all refer to types of speech regulated in the very same Title of the Act, because they all had historically been seen by Congress as regulable when distributed via electronic communications. For instance, "[o]bscene, lewd, lascivious, and filthy" speech had been regulated on cable television and in telephone calls. *See* 47 U.S.C. § 532(h) (enacted 1984) (cable television); 47 U.S.C. § 223(a) (enacted 1968) (telephone calls). "Harassing" telephone calls had long been seen by Congress as regulable. *See* Pub. L. 90-229 (1968) (enacting 47 U.S.C. § 223). Similarly, Congress and the FCC have long

[4] Pub. L. No. 104-104 (1996).

considered "excessively violent" to be on par with indecent or "obscene" speech for regulating over-the-air broadcasting. *See Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C.2d 418 (1975); In re Violent Television Programming and Its Impact on Children, 22 F.C.C.Rcd. 7929, 7931 (Apr. 25, 2007)("violent content is a protected form of speech under the First Amendment" and "the government interests at stake, such as protecting children from excessively violent television programming, are similar to those which have been found to justify other content-based regulations.").

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The disclosure requirements in the Florida social media law are certainly "reasonably related" to these legislative concerns. They require information, now not public, about how the platforms treat and moderate user-generated content—issues vital in world where the platforms are the "modern public square." *Packingham v. N.C.*, 137 S. Ct. 1730, 1737 (2017).

Finally, the Florida social media law regulates actions which are not speech at all. Section 501.2041(2)(i) allows users who have been deplatformed to access their information, content, material, and data for at least 60 days after they have been removed. Users *own* the material they post on social media pursuant to copyright law. *See* 17 U.S.C. § 201(a) ("copyright in a work protected under this title vests initially in the author or authors of the work."). Section 501.2041(2)(i), a plain

vanilla economic regulation having nothing to do with speech, will give Floridians valuable control over their property without implicating the First Amendment. After all, "it has never been deemed an abridgement of freedom simply because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (quotations omitted).

CONCLUSION

Section 230, 47 U.S.C. § 230, protects platforms from liability arising from third-party speech and decisions to remove certain types of content. Florida's social media law does not regulate these types of speech and, therefore, presents no preemption issues. The lower court's preemption analysis relies on an interpretation of section 230(c)(2) at odds with the statute's text, congressional purpose, and the overwhelming majority of caselaw. In addition, the Florida social media law primarily aims to promote transparency and consumer protection. These provisions are constitutional and can function independently from other parts of the statute. They should be preserved.

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2021, I caused the foregoing **Motion for Leave to File Brief as *Amici Curiae*** to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

Dated: September 14, 2021

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