ORAL ARGUMENT NOT YET SCHEDULED

NO. 21-12355

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NETCHOICE, LLC, ET AL.,

PLAINTIFFS-APPELLEES,

V.

ATTORNEY GENERAL, STATE OF FLORIDA, ET AL.,

DEFENDANTS-APPELLANTS,

On Appeal from the United States District Court
for the Northern District of Florida (Case No. 4:21-cv-00220-RH-MAF)

BRIEF OF AMICI CURIAE FLOOR64, INC. D/B/A THE COPIA INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

1. Floor64, Inc., d/b/a The Copia Institute, *Amicus Curiae*

2. Gellis, Catherine, *Attorney for Amicus Curiae*

3. Masnick, Michael, *Founder and principal of Amicus Curiae*

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Floor64, Inc. d/b/a The Copia Institute states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

Amicus Copia Institute is the think tank arm of Floor64, Inc., the privately-held small business behind Techdirt.com ("Techdirt"), an online publication that has chronicled technology law and policy for nearly 25 years. In this time Techdirt has published more than 70,000 articles regarding subjects such as freedom of expression, platform liability, copyright, trademark, patents, privacy, innovation policy and more. The site regularly receives more than a million page views per month, and its articles have also attracted more than a million reader comments, which itself is user expression that advances discovery and discussion around these topics. As a think tank the Copia Institute also produces evidence-driven white papers examining the evidence underpinning tech policy, and, armed with this insight, it regularly files regulatory comments, amicus briefs, and other advocacy instruments on these subjects to help educate lawmakers, courts, and other regulators – as well as innovators, entrepreneurs, and the public – with the goal of influencing good policy that promotes and sustains innovation and expression.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), amicus curiae certifies that all parties in this case have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus curiae further certifies that no party or party's counsel authored this brief in whole or in part, that no party or party's counsel provided any money that was intended to fund the preparation or submission of this brief, and no party or person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

The Copia Institute depends on the First Amendment and the platform liability protection afforded by 47 U.S.C. § 230 ("Section 230") to both enable the robust public discourse found on its Techdirt website and for its own expression to reach its audiences throughout the Internet and beyond. The Copia Institute therefore submits this brief amicus curiae wearing two hats: as a longtime commenter on the issues raised by the underlying Florida statute at issue, and as a small business whose statutory and constitutional rights are themselves threatened by this law.

SUMMARY OF ARGUMENT

The Florida statute, S.B. 7072, impermissibly interferes with the First Amendment, Section 230, and the policy values that each is intended to vindicate. If permitted to come into force it will impinge on the statutory and constitutional rights the Copia Institute, and all platforms similarly situated, depend on to further their own expression and facilitate user expression in general. It will thus chill both, both through its own direct terms and by opening the door to other such legislation.

ARGUMENT

I. The Copia Institute, and others similarly situated, depend on the constitutional and statutory rights the Florida law attacks.

A. The Florida law contravenes the policy values both the First Amendment and Section 230 are intended to advance.

The Florida law takes aim at the protection afforded Internet platforms by the First Amendment and Section 230 in contravention of the policy values both are intended to further – and even in contravention of the policy value that the law itself

purports to further. Even to the extent that the goal of the Florida law might be to help further the diversity of expression online as Section 230 called for, 47 U.S.C. § 230(a)(3), and not simply place its governmental thumb on the scale favoring certain viewpoints, a law like Florida's is exactly how not to do it.

The Internet is unique: for expression to get from one person to another it needs systems to help it. We call these helpers many things – service providers,[2] intermediaries, or, as commonly used in this litigation, platforms – and they come in many shapes and sizes, providing all sorts of intermediating services, from network connectivity to messaging to content hosting, and more. But all of them need to feel legally safe to provide that help, or else they won't be able to.

When Congress contemplated the Internet in the mid-1990s it recognized that for it to fulfill its promise of providing "a variety of political, educational, cultural, and entertainment services," 47 U.S.C. § 230(a)(5), enabling "a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. § 230(a)(3), it was going to need to make it safe for platforms to take the chance of being in the business of helping that online

[2] Section 230 defines them as Interactive Computer Service providers. 47 U.S.C. § 230(f)(2) ("The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.").

world flourish. See 47 U.S.C. § 230(b)(2). At the same time, Congress also was concerned about the hygiene of the online world. *See Reno v. ACLU*, 521 U.S. 844, 849 (1997) (litigating the rest of the Communications Decency Act Section 230 was passed into law with).

In other words, Congress had two parallel and complementary goals: foster the most positive content online, and minimize the most negative. And the best way to achieve both of these goals was not to try to bludgeon platforms into doing its bidding out of fear of sanction, because that was never going to produce good results.[3] Rather, Congress passed Section 230 to make it legally safe for platforms to do the best they could on both fronts. Thanks to the immunity if affords them they can afford to be available to facilitate the most content possible because they don't have to worry about crippling liability if something ends up on their systems that is legally problematic. And they can afford to take steps to remove the most undesirable content, because thanks to this immunity they don't have to worry about crippling liability if they happen to remove more user expression than would be ideal.

[3] The *Stratton Oakmont v. Prodigy* case taught Congress that the fear of legal sanction was instead likely to deter platforms from doing what it wanted them to do, such as moderating user expression. *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

And it has worked: by being an incentive-based "carrot" sort of law, where Congress has aligned platforms' interests with its own, rather than a punitive "stick" sort of law, where their interests would inherently be in tension, platforms, and the user expression they facilitate, have been able to proliferate as Congress had hoped because platforms have not had to fear being crushed by liability if they did not either facilitate or moderate user expression as everyone agreed they should have.

What laws like S.B. 7072 themselves remind is that such agreement can rarely be presumed. When it comes to expression, views will often diverge – in fact, S.B. 7072 was passed because the views of certain platforms and of the Florida legislature were apparently in opposition. See S.B. 7072 § 1. But the First Amendment exists because such disagreement is inevitable, and so it prohibits the government from taking sides and punishing anyone for expressing views that it disfavors. And it is this resulting freedom of expression that is what allows diversity of discourse in America to thrive overall.

This law does violence to both those constitutional and statutory ideals. It proposes to punish those platforms whose expressive activities they disfavor, and in doing so also upend the balance Congress created with Section 230 by reintroducing the punitive the sticks Congress had purposefully eliminated from platform regulation. If allowed to come into force all platforms would be chilled from trying to perform any of its helping tasks – either facilitating user expression, or moderating

user expression – because it will become too existentially threatening to them when they inevitably won't be able to achieve the impossible and do it all in the way the Florida government demands. The result will therefore be less online expression and diverse discourse as there will also be fewer platforms available to help facilitate it, as it will just be too dangerous to them to try.

B. The Copia Institute depends on these rights directly.

The Copia Institute's business, which dates back almost to the statutory birth of Section 230, depends on the First Amendment and Section 230 in a number of ways. One prominent way is with regard to the Techdirt site, which publishes articles and commentary while also allowing reader comments on its articles, thus itself acting as a platform for other user expression. These comments add to the richness of the discourse found on its pages and allows the Copia Institute to build a dialog around its ideas. The comments also often help the Copia Institute's own expression be more valuable, with story tips, error checking, and other meaningful feedback provided by the reader community.[4]

To keep the discussion in the comments meaningful, the Copia Institute employs a system of moderation. This particular system is primarily community-driven, and the reader community can affect what appears on Techdirt's pages in

[4] In fact, so productive is the Techdirt comment section that the Copia Institute has even hired onto staff someone who had previously been a regular contributor to the discussion there.

several ways. One way is through "boosting" comments, and one source of revenue for the Copia Institute is derived from people purchasing credits to be put towards this boosting. Meanwhile all readers can rate comments as either insightful and/or funny, and for the past several years Techdirt has published weekly summaries highlighting the most insightful or humorous comments that appeared on its stories for the previous week.[5] Crucially, readers can also rate comments as abusive or spam, which leads them to be removed from view.[6]

The Copia Institute chooses to host user comments, and moderate them in this way, because doing so fulfills its expressive objectives.[7] It could just as easily choose not to host them, or to moderate them with a different system prioritizing

[5] *See, e.g.*, Leigh Beadon, *Funniest/Most Insightful Comments Of The Week At Techdirt*, TECHDIRT (Nov. 14, 2021), https://www.techdirt.com/articles/20211114/12305547942/funniest-most-insightful-comments-week-techdirt.shtml.

[6] "Removed from view" generally means hidden but available to readers interested in seeing what had been demoted from automatic display with an extra click. But they may also subsequently be deleted from the system entirely by site operators.

[7] Many publications have opted to not host their own comments, which is obviously a choice they are entitled to make. However, studies have noted that by not doing so, they lose engagement with their readership. Elizabeth Djinis, *Don't read the comments? For news sites, it might be worth the effort.*, POYNTER., (Nov. 4, 2021), available at https://www.poynter.org/ethics-trust/2021/dont-read-the-comments-for-news-sites-it-might-be-worth-the-effort/. The irony is that, without comment sections, what reader engagement there is tends to go to the larger social media sites that have attracted the Florida legislature's ire. *Id.* ("[W]hether or not news outlets choose to play the commenting game, that game will still go on without them. Conversations on Twitter, Facebook and Instagram won't stop.").

different factors.[8] The First Amendment ensures that it can make these editorial and associative choices. Meanwhile, Section 230 makes that right a practical reality, providing the site with critical statutory protection by making it safe to both host user comments at all, as well as remove any deemed to warrant removal without having to fear each of these decisions being challenged in court, regardless of how meritless these complaints, if someone should happen to object to them.

Such legal challenges are not an idle concern. As this litigation illustrates, technology policy can be contentious subject, and Techdirt's trenchant – and First Amendment-protected – commentary can ruffle feathers. Those who are ruffled can be tempted to threaten litigation,[9] but thanks to the First Amendment and Section 230 those threats are ordinarily little more than toothless bluster. But on the occasion that one slipped through and turned into a live lawsuit, the results were devastating to the company. The price of defending the speech in question, which included a

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[8] The decision to close comment sections has frequently been driven by concerns over their moderation. Djinis ("The language in these announcements was sometimes similar, portraying a small group of people taking over a forum meant for the public. They used words like 'hijack' and 'anarchy.'"). But because moderation is so critical to whether a publication can self-host that user engagement, it is critical that these moderation decisions remain legally protected so that these sites can be free to discover the most effective way of moderating that best serves them and their readership.

[9] *See*, *e.g.*, Michael Masnick, *Hey North Face! Our Story About You Flipping Out Over 'Hey Fuck Face' Is Not Trademark Infringement*, TECHDIRT (Nov. 15, 2021), https://www.techdirt.com/articles/20211112/14074147927/hey-north-face-our-story-about-you-flipping-out-over-hey-fuck-face-is-not-trademark-infringement.shtml

related user comment, was lost time and money, lost sleep for the company's principal and editor, lost opportunity to further develop the company's business, and a general chilling of the company's expressive activities.[10] And that was just one lawsuit that still resulted in protected expression remaining online.[11]

Companies like the Copia Institute cannot afford to defend the onslaught of litigation that the Florida law would invite by eviscerating their Section 230 protection and deliberately targeting their own First Amendment rights to moderate. Civil litigation is notoriously expensive. The cost of defending even one frivolous claim can easily exceed a startup's valuation. Engine, Section 230 Cost Report (last accessed Nov. 15, 2019), http://www.engine.is/s/Section-230-cost-study.pdf. Simply responding to demand letters can cost companies thousands of dollars in lawyer fees, not to mention any obligations to preserve documents the letter might trigger, which themselves impose non-trivial costs, especially for smaller companies without the infrastructure larger companies may have to manage them. *Id.* And if these cases somehow manage to go forward, the costs threaten to be even more

[10] *See* Michael Masnick, *The Chilling Effects Of A SLAPP Suit: My Story*, TECHDIRT (Jun. 15, 2017), https://www.techdirt.com/articles/20170613/21220237581/chilling-effects-slapp-suit-my-story.shtml.

[11] Michael Masnick, *Our Legal Dispute With Shiva Ayyadurai Is Now Over*, TECHDIRT (May 17, 2019), https://www.techdirt.com/articles/20190516/22284042229/our-legal-dispute-with-shiva-ayyadurai-is-now-over.shtml

ruinous. A motion to dismiss can easily cost in the tens of thousands of dollars. *Id.* But at least if the company can get out of the case at that stage they will be spared the even more exorbitant costs of discovery, or, worse, trial. *Id.*

Because it is not just a damage award that can be fatal to these small companies. *See UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F. 3d 1006 (9th Cir. 2013) (finding the already bankrupted platform ultimately immune from liability pursuant to the weaker protection of the Digital Millennium Copyright Act, 17 U.S.C. § 512).[12] Having Section 230 deter these lawsuits outright, or at least help companies get out of them relatively inexpensively, helps ensure that a company won't die a "death by ten thousand duck-bites." *Fair Housing Coun. Of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1174 (9th Cir. 2008). If laws like Florida's are allowed to weaken Section 230 they will now need to worry about increased and more expensive litigation, as well as potential damage awards, depleting their bank accounts and scaring off needed investment – including investment for activities that will ultimately foster online expression. *See* Michael

[12] Claims of copyright infringement are one of the few kinds of claims where Section 230 provides platforms no protective benefit. 47 U.S.C. § 230(e)(2). As this case demonstrates, the results of that gap in coverage can be devastating to platforms and illustrates why it is contrary to Congress's original intent if there should be more. *See* Peter Kafka, *Veoh finally calls it quits: layoffs yesterday, bankruptcy filing soon*, C|NET (Feb. 11, 2010), http://www.cnet.com/news/veoh-finally-calls-it-quits-layoffs-yesterday-bankruptcy-filing-soon/ (describing how the startup platform in *Shelter Capital* could not get funding and thus went out of business while it was litigating the lawsuit it eventually won).

Masnick, *Don't Shoot The Message Board*, June 2019, https://copia.is/library/dont-shoot-the-message-board/ (documenting how weakening legal protections for platforms deters investment in technology and online services); Br. amicus curiae for Chris Cox and NetChoice, *Homeaway.com v. City of Santa Monica*, No. 18-55367 (9th Cir. filed Apr. 25, 2018) ("Cox Brief") 26, available at https://www.techdirt.com/articles/20180601/22040239958/highlights-former-rep-chris-coxs-amicus-brief-explaining-history-policy-behind-section-230.shtml ("[Platforms], facing massive exposure to potential liability if they do not monitor user content and take responsibility for third parties' legal compliance, would encounter significant obstacles to capital formation.").[13]

Whittling away at the critical balance Congress had originally struck when it passed Section 230 thus unduly threatens these smaller and more vulnerable platform companies and puts greater pressure on them to refuse their users' expression. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number

[13] Then-Representative Chris Cox, with then-Representative, now Senator Wyden, were the original drafters of Section 230. This brief discusses the history of their drafting choices, particularly with respect to why pre-emption was critical to the utility of the statute. The Copia Institute archived this brief on Techdirt to enable further discussion on this recurrent jurisdictional issue.

and type of messages posted.”). But this law would give those threats teeth and prevent platforms from providing forums for discourse, no matter how valuable.

Techdirt itself dates back almost to the statutory birth of Section 230.[14] If Section 230 is undermined, the best days for the site and the company's expressive activities are likely behind it. At minimum it would likely be forced to close its comments and would likely also lose access to the other platforms it relies on to spread its message. *See infra* Section I.C. If platforms like Techdirt are going to be able to stay the expressive ventures the Constitution and Section 230 are designed to facilitate, laws like Florida's cannot be allowed to erode them.

C. The Copia Institute depends on these rights indirectly.

The Copia Institute doesn't just provide a platform hosting third-party expression for Techdirt comments; it also is the user of others' platforms and thus needs them to remain sufficiently protected to be able to offer it those services. It would be of little comfort or utility to the Copia Institute if the Florida law spared them but drove offline any of the platforms it currently uses to support its own expressive activities. For instance, the Copia Institute needs other platforms to help it deliver its expression to audiences. Sometimes these are backend platforms, like

[14] See https://www.techdirt.com/articles/990317/0341214/august-17-23-1997.shtml for the first publication in 1997, and https://www.techdirt.com/articles/990312/1757227.shtml for its first article in its current blog publication form from 1999.

web hosts and domain registrars. Other times they are specialized platforms that host other forms of content the Copia Institute produces, such as SoundCloud and the AppleStore, which serve its podcasts to listeners. In the past the Copia Institute has also used ad platforms to monetize its Techdirt articles, and in general its monetization activities themselves require the support of payment providers and other platforms like Patreon that help facilitate the monetization of expression in innovative ways.[15] As an example, one way the Copia Institute makes money is by allowing readers to become "Insiders" in exchange for certain perks, including being part of an exclusive reader community, and the Copia Institute is currently using the Discord platform to provide that community a forum to interact. But none of these platforms could exist to support the Copia Institute's expressive business were it not for the First Amendment and Section 230 enabling them to provide these services. Affecting their protection will inevitably affect the Copia Institute as well.

And that is the case even for the social media platforms the Copia Institute uses to promote its expression, find audiences, and enable the easy sharing of its ideas. Obviously there is no guarantee that trying to use these services will be productive, or even possible, thanks to the discretion the First Amendment and Section 230 affords these platforms to minimize the reach of Copia Institute's

[15] For a list of some of the ways the Copia Institute raises funds, particularly in ways that require the help of other platforms, see https://www.techdirt.com/pages/support.php.

expression on them. But S.B. 7072's provision requiring platforms to favor the content of journalistic enterprises, FLA. STAT. § 501.2041(2)(j), of which Techdirt could potentially qualify given its number of articles and monthly readership, FLA. STAT. § 501.2041(1)(d), would still provide no real benefit. On the contrary, by undermining the protection First Amendment and Section 230 affords these platforms by taking away their editorial discretion it will only hurt the expressive prospects of the Copia Institute. Because it is only with these protections that there are any outlets able to afford to let others use to promote their expression. Just as these protections are critical for the Copia Institute to itself remain available to facilitate user expression, so are they to these platforms. Undermining them will do nothing to make any of them any more available, and instead will only shrink the universe of outlets for the Copia Institute to use to spread its own expression.

II. If allowed to come into force, the provisions of the Florida law will chill the expressive activity of the Copia Institute, and others similarly situated.

A. It will chill them through its direct terms.

i. The provisions of the Florida law are punitive, onerous, and often impossible to comply with.

The Florida bill takes aim at the protection afforded Internet platforms by the First Amendment and Section 230 in broad strokes. If laws like this are allowed to go into force, those rights will be threatened, regardless of their specific provisions,

because on the whole they make those rights less durable for the platforms that depend on them.

But the specific ways the Florida law undermines these rights illustrate why they are such an affront to these rights and themselves problematic. For instance the law requires that platforms disclose their moderation standards. FLA. STAT. § 501.2041(2)(a) (requiring platforms "publish the standards … used for determining how to censor" and incorporating by reference FLA. STAT. § 501.2041(1)(b) (defining "censor" as "any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post, remove, or […] inhibit the ability of a user to be viewable by or to interact with another user of the social media platform.")). And it also puts limits on how platforms can do this moderation.

But even if Techdirt wanted to comply with these terms, it could not. First of all, it does not even offer some of the basic functionality the Florida law regulates.[16] As for disclosure, Techdirt does not have anything to disclose because its moderation

[16] For instance, Techdirt does not provide a tool for commenters to see how many people have read their comments, as the statute would require. FLA. STAT. § 501.2041(2)(e). It also has no practical way to identify, favor, or even deter postings by political candidates, as the law would require platforms to privilege. FLA. STAT. § 501.2041(2)(h). In addition the commenting interface does not currently offer tools to enable easy sharing, as the law would seem to demand it provide.

system is primarily community-driven[17] and subject to the community's whims and values of the moment, which means it could not meet the consistency requirement. FLA. STAT. § 501.2041(2)(b).[18] Furthermore, in the event that Techdirt editors might overrule the community, it may be doing so due to exigent circumstances which can neither wait for the next monthly opportunity to change the moderation practices, FLA. STAT. § 501.2041(2)(c) (limiting changes to moderation practices to no more than every 30 days), or be for a reason that can be publicly disclosed, let alone any business of the government to know.[19]

But even if any of this moderation were to be driven by bias, the existence of expressive bias is not something for regulation to correct; it is something for regulation to *protect*. Bias is evidence of expressive freedom, that we could be at liberty to have preferences, which we can then express. This law targets that

[17] And implemented with some algorithmic logic, which the Florida law would also potentially prohibit. FLA. STAT. § 501.2041(2)(h) and FLA. STAT. § 501.2041(1)(e).

[18] As the Copia Institute has also long chronicled, content moderation at scale is always impossible to deliver consistently. *See* Michael Masnick, *Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, TECHDIRT (Nov. 20, 2019), https://www.techdirt.com/articles/20191111/23032743367/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well.shtml; https://www.techdirt.com/blog/contentmoderation/ (collecting case studies of moderation challenges).

[19] Indeed, the more that laws like this one create legal risk for platforms, the more likely it will be that platforms will be removing content on the advice of counsel, which should be privileged from disclosure.

freedom by denying platform operators the ability to express those preferences.[20] While it may be good policy to encourage a diversity of ideas online, or even just certain ideas, the government cannot conscript platforms to achieve that end, which is what this law openly aims to do.[21]

ii. There is no assurance that S.B. 7072 could not potentially reach the Copia Institute.

Even if the question of equal protection may not be squarely before this court, Br. Florida 50, it nevertheless informs the overall infirmity of the Florida law. Either the law is of narrow applicability, in which case it will reach few platforms but be facially unconstitutional for singling out an arbitrary population of platforms to apply to, or its criteria for enforcement is broad and impinges on the rights of all too many platforms. Of course, in the case of the Copia Institute, or another similarly

[20] Ironically, to the extent that this bill was driven by animus towards Facebook, Techdirt has articulated its own displeasure towards the company's practices. *See, e.g.*, Michael Masnick, *Facebook Banning & Threatening People For Making Facebook Better Is Everything That's Wrong With Facebook*, TECHDIRT (Oct. 12, 2021), https://www.techdirt.com/articles/20211009/01035347721/facebook-banning-threatening-people-making-facebook-better-is-everything-thats-wrong-with-facebook.shtml. But this law is about more than Facebook; it is about the entire ecosystem of online platforms that this law threatens to devastate.

[21] This law tries to force platforms to do its expressive bidding in at least one other key way, by forbidding platforms from ever adding an addendum to a user-provided comment. FLA. STAT. 501.2041(1)(b). While it has generally not been Techdirt's practice to do so, this prohibition stands a prior restraint against such speech it might like to express in the future.

situated platform, both situations may apply. Because while today the law may not reach the Copia Institute, tomorrow it might.

The Florida statute purports to apply only to entities with either "annual gross revenues in excess of $100 million" or "at least 100 million monthly individual platform participants globally." FLA. STAT. § 501.2041(1)(g). Per this criteria, as of today, the Copia Institute might be beyond its reach. But tomorrow that status could easily change. Perhaps it is unlikely that the company will suddenly attain that much revenue, but every platform aspires to grow, and terms like these create policy pressure deterring growth. Especially because there are ways to grow other than in revenue, which puts platforms like Techdirt and others with relatively small revenue streams but potentially large user bases on a collision course with the law, especially as they grow more popular.

Even small sites like Techdirt can easily attract large audiences.[22] Indeed, the very point of the Copia Institute enterprise is to reach and influence people.

[22] Any site can of course aspire to virality. But for the Copia Institute it is not an immodest pipe dream to have such reach. For instance, in 2005 company founder and Techdirt editor Michael Masnick coined the term, "the Streisand Effect," as part of his commentary. It is a term that has had significant staying power, remaining in common parlance as a term for discussing the unwanted attention ill-considered attempts at censorship might unleash. It even has its own Wikipedia page. *See* https://en.wikipedia.org/wiki/Streisand_effect. But should a comment in a future post similarly capture the public's attention, and the Florida law be in force, it would risk significant legal trouble to achieve such popularity. Thus the Florida law has the perverse effect of discouraging sites from reaching wider audiences, which is both anathema to its stated purpose and the First Amendment.

Moreover, the whole point of the Florida law is ostensibly to help connect online speakers to online audiences. Its requirements that platforms favor "journalistic enterprises," suggest that sites like Techdirt, which would appear to meet their criteria, are supposedly being helped. But they are not, because the reward for their popularity is that they may now fall within the crosshairs of the Florida law and be subject to the terms the Florida legislature has dictated for how Techdirt may continue to engage with its readership on its site.

Because Techdirt would otherwise seem to meet the law's other criteria for being subject to its enforcement. The Act's definition of the artificial construct "social media platform" is certainly broad enough to encompass Techdirt. After all, it is an "information service" or "system" that "enables computer access by multiple users to a computer server." FLA. STAT. § 501.2041(1)(g). It also "hosts" user expression when it hosts their comments. Br. Florida 5. And its parent company does not own a theme park. FLA. STAT. § 501.2041(1)(g). While the absurdity of the theme park carve-out shines a light on the censorial motives behind this law, the overall constitutionality of the law does not pivot on this factor. The danger to all platforms, including the Copia Institute, is that even if by its terms this particular law may never reach them, if such a law could be permitted then any other state could issue their own, with their own arbitrary enforcement .criteria, which may well apply to Techdirt or other similarly-situated platforms. *See infra* II.B

B. It will chill them by opening the door to every state to pass its own laws with other similarly arbitrary enforcement criteria and potentially conflicting terms.

i. There is no principled basis to explain why a platform's constitutional and statutory rights can be extinguished if the platform happens to meet Florida's, or any other state's, arbitrary enforcement criteria.

There is no sensible rationale, let alone one offered, that could justify why the constitutional and statutory rights of platforms can be extinguished when they make the arbitrary amount of money or attract the arbitrary size of audience that this law targets. If these rights are ever to be trumped, then there has to be some rationale that could survive at least some raised level of scrutiny. Br. NetChoice 47-50. Yet the Florida legislature has provided none; it has simply decided that sites meeting these terms are too wealthy or too popular for their constitutional or statutory rights to remain protected, without articulating any sort of state interest, let alone a compelling one, to warrant this abrogation.

There is also no language within Section 230 to suggest that any "interactive computer service provider" is to be excluded, no matter what their revenue or audience size. On the contrary, the plain language of the statute and majority of precedent make clear the definition of covered platforms is purposefully expansive and in no way revenue- or audience-dependent. The Florida law proposes editing Congress's own language to make the deliberately broad statutory immunity it has provided now conditional.

But even if such an exercise were not so ill-advised, or so contrary to Congress's expressed intent in passing the law, it is not for states to take it upon themselves to rewrite the statute for Congress, especially in light of the pre-emption provision Congress also consciously chose to include in its legislation. *See Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1753 (2020) ("The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress."). Congress is fully capable of rewriting its statutes itself, if it so desires.[23]

ii. If laws like these are not pre-empted by Section 230 then other states will pass their own with other similarly arbitrary criteria and potentially conflicting terms.

The Florida law is itself a relevant example of why Congress included a pre-emption provision in Section 230. 47 U.S.C. §230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). As *amici* Texas, et al., noted, Texas has also passed a similar law. Br. amicus curiae for Texas, et al. 13-14. In fact, at least 30 state

[23] Congress has, in fact, amended Section 230 itself, with the FOSTA bill it passed in 2018. Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA"), Pub. L. No. 115-164, 132 Stat. 1253 (2018). However, even Congress must still comport with the First Amendment as it amends its statutes, and a Constitutional challenge to this change, which affected platforms' content moderation practices and consequently the availability of lawful user speech, remains pending. *See Woodhull Freedom Foundation v. US*, 948 F. 3d 363, 374 (D.C. Cir. 2020).

legislatures have proposed some sort of content moderation bill.[24] This fact is alarming, but not at all surprising. The liability Section 230 insulates platforms from is often rooted in state law, and states can therefore be inclined to change their laws to make sure liability can still attach to platforms. *See* Cox Brief 25 ("Other state, county, and local governments would no doubt find that fining websites for their users' infractions is more convenient than fining each individual who violates local laws.").

But recognizing that temptation, and the unlimited legal risk it presented to platforms, is why Congress included a broad pre-emption provision to get states out of the business of regulating them. Because the Internet inherently transcends state boundaries, without Section 230 immunity platforms could be exposed to regulators in every jurisdiction they reach, which is inherently all of them. *See* Cox Brief 27 ("A website […] is immediately and uninterruptedly exposed to billions of Internet

[24] Jennifer Huddleston & Liam Fulling, *Examining State Tech Policy Actions in 2021*, AM. ACTION FORUM (Jul. 21, 2021), https://www.americanactionforum.org/insight/examining-state-tech-policy-actions-in-2021/. *Amici* Texas, et al., also cited this piece, but in doing so omitted the authors' caution that, despite what *amici* Texas, et al., maintain, the proliferation of all these state bills is a reason for *not* giving the go-ahead to this Florida one. *Id.* ("[S]tates risk creating a disruptive patchwork that deters innovation and limits what consumers can access. Because of the interstate nature of the internet and many other technologies, state laws regulating the internet can have a national impact. […] Without uniform regulation on many issues, however, tech companies may face a patchwork of regulation and have to repeatedly engage in costly compliance, with the ultimate result that consumers may be denied access to beneficial features available in other jurisdictions.").

users in every U.S. jurisdiction and around the planet. This makes Internet commerce uniquely vulnerable to regulatory burdens in thousands of jurisdictions. So too does the fact that the Internet is utterly indifferent to state borders."). But if each state and local jurisdiction could meddle with the operation of Section 230, then Section 230 couldn't work to protect platforms at all. *See id.* 13 ("Were every state and municipality free to adopt its own policy concerning when an Internet platform must assume duties in connection with content created by third party users, not only would compliance become oppressive, but the federal policy itself could quickly be undone.").[25]

If it is possible for a law like Florida's to reach platforms like plaintiffs-appellees', then it is possible for any other state, or even any local jurisdiction, to reach them as well, regardless of how well they would choose to regulate them, or what sort of challenges platforms would face in complying, or whether the requirements among all these regulations were even consistent. Pre-emption is therefore also important because not every jurisdiction will agree on what the best policy should be for imposing liability on platforms. Even if it were practical for

[25] None of this was an idle concern, given that *Stratton Oakmont* itself was a case where a state court, interpreting state law, had created an enormous risk of platform liability based solely on local law. *Batzel v. Smith*, 333 F.3d 1018, 1029 (9th Cir. 2003). See also Cox Brief 25 ("Given the unlimited geographic range of the Internet, unbounded by state or local jurisdiction, the aggregate burden on an individual web platform would be multiplied exponentially.").

platforms to comply with the rules of one state, they could easily find themselves with the impossible task of having to please multiple masters, or face existential legal risk if they could not, as is likely to be the case. Which means that there would be a race to the bottom, where the bottom is the most censorial policy, as some states could effectively set Internet policy for all others, regardless of whether the others liked that policy or not.

There is often simply no practical or cost-effective way for a platform to cabin compliance with a specific jurisdiction's rules, much less the potentially countless specific rules of potentially countless jurisdictions this law would invite, and not others. Platforms would instead have to try to adjust their platforms and monitoring practices to accommodate the most restrictive rules. Thus, if one jurisdiction can effectively chill certain types of speech facilitation with the threat of potential liability, it will often chill it for every jurisdiction everywhere, even in places where that speech may be perfectly lawful or even desirable. *See* Huddleston ("[T]he interstate nature of most user interactions on platforms raises concerns about the extra-territorial implications of these policies.").

As a result, when it comes to platform liability, the only policy that is supposed to be favored is the one Congress originally chose "to promote the continued development of the Internet and other interactive computer services," 47 U.S.C. §230(b)(1), and all the expression these services offer. And the only way to

give that policy the effect Congress intended is to ensure local regulatory efforts are unequivocally pre-empted so they cannot distort the careful balance Congress codified to achieve it.

CONCLUSION

For the forgoing reasons, the Florida law S.B. 7202 is both unconstitutional and pre-empted by statute, and as a result the injunction barring the enforcement of any of its provisions should be sustained.

Dated: November 15, 2021

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