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 No. 4:21-CV-220-RH-MAF

BRIEF OF AMICI CURIAE THE BABYLON BEE, LLC, AND NOT THE BEE, LLC, IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici Curiae certify that, in addition to those persons listed in the first-filed brief's certificate of interested persons, 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:

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As required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Amici Curiae certify that, apart from undisclosed members of Appellees, no publicly traded company or corporation has an interest in the

outcome of this case or appeal. Amici Curiae further certify that they have no parent corporation, and no publicly held corporation owns 10% or more of their stock.

Dated: September 14, 2021

Respectfully submitted,

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*** Application for admission pending.*

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IDENTITY AND INTEREST OF AMICI CURIAE [1]

The Babylon Bee, LLC, is a Christian satire website that sheds light on faith, politics, and culture through humor and parody. Not the Bee, LLC, is a Christian news website that runs entirely accurate headlines one might expect to find in *The Bee*. *The Bee*'s and *Not the Bee*'s headlines highlight, among other things, social media platforms' viewpoint-based censorship of conservative groups, conservative leaders, and their own satire.

As a Florida limited liability company that not only documents social media censorship but suffers from it, *The Bee* has a direct interest in the outcome of this appeal. *The Bee* believes that the censorship and shadow banning it experiences from social media platforms would give rise to a cause of action under the law at issue in this appeal, section 501.2041(6), Florida Statutes. And that means *The Bee* might be entitled to a good deal of money, which would help keep the lights on and the satire servers running, not to mention remedy its injuries. Because *Not the Bee*'s success relies almost entirely on *The Bee*'s, and because social media

[1] Counsel for Amici Curiae authored this brief in its entirety. No party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund the preparation or submission of this brief. No person—other than Amici Curiae, their members, or their counsel—contributed money that was intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief. Thus, Amici Curiae have authority to file this brief. *See* Fed. R. App. P. 29(a)(2).

platforms' censorship and shadow-banning of *The Bee* have hampered Internet traffic to its site, *Not the Bee* likewise has an interest in this appeal.

Amici also have a more altruistic interest in the outcome of this appeal: a desire for an intellectually diverse social media universe in which all Americans—including those of the religious center-right—have an equal platform to advocate their views. At a minimum, Amici want social media platforms to transparently announce and evenhandedly apply their content standards, as Florida's Senate Bill 7072 requires them to do.

STATEMENT OF THE ISSUES

This appeal comes to this Court in the posture of a grant of a preliminary injunction, which this Court reviews according to a four-pronged test. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). As to the first prong—the plaintiffs' likelihood of success on the merits—this appeal presents two issues:

1. Whether the various and severable provisions of Florida's recently enacted law, Senate Bill 7072, are facially consistent with section 230 of the Communications Decency Act of 1996; and

2. Whether the various and severable provisions of Senate Bill 7072 are facially consistent with the First Amendment to the United States Constitution.

SUMMARY OF THE ARGUMENT

Social media platforms present themselves as a service open to the general public. They represent that they host third-party speech according to objectively administered standards; their user agreements do not disclose that they will unevenly enforce their standards against disfavored viewpoints or speakers. Florida's recently enacted consumer-protection law, Senate Bill 7072, keeps social media platforms accountable to the image of neutrality that they project. Its modest provisions do not dictate the screening and removal standards that platforms should adopt. Rather, the law requires merely that platforms disclose—and evenhandedly apply—the standards that they voluntarily choose.

The accountability that S.B. 7072 requires is sorely needed. As Amici have documented—and personally experienced—social media platforms systematically target conservative users and messages for censorship, selectively invoking vague policies against "hate" and "misinformation" to stunt the free flow of information and silence conservative voices. The examples are legion, and they are egregious. Under the plain text of section 230 of the Communications Decency Act, this bad-faith conduct does not qualify for civil immunity. Nor does it find sanctuary within the First Amendment's protections, especially given how social media platforms hold themselves out to the general public. In sum, S.B. 7072 is a facially valid

exercise of the State of Florida's authority to protect the public from deceptive corporate conduct.

Florida's law isn't just facially consistent with section 230 and the First Amendment; it advances their core purposes. It does so by fostering the free flow of information over the Internet, and by ensuring that all viewpoints—including conservative and religious ones—receive equal treatment under the standards that platforms choose to adopt. Florida's law also protects both the public and social media platforms themselves from improper governmental pressure to circumvent the First Amendment. It does so by requiring consistency in content screening and removal, thus giving social media platforms a basis to refuse governmental demands to target viewpoints and messages that the government disfavors.

ARGUMENT

I. Social Media Platforms Do Not Function as the Good-Faith, Neutral Content Hosts that Section 230 Envisions, and Florida's Law Is Facially Consistent with Section 230's Immunity.

A. When Congress enacted the Communications Decency Act, it envisioned an Internet that "offer[s] a forum for 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 contemplated an Internet where users enjoy "a great degree of control over the information they receive." *Id.* § 230(a)(2). And it

believed the Internet was a place where platforms host users' content according to standards that they evenhandedly enforce in "good faith." *Id.* § 230(c)(2)(A).

While this was the online world that Congress perceived in 1996, it's not the one that we virtually inhabit today. Consider the following ten headlines, which might prompt Hamlet to ask life's most fundamental question in the modern age: *The Bee*, or *Not the Bee*?

- "Priorities: Twitter says Taliban terrorists can post propaganda on platform while Donald Trump remains banned."[2]
- "Twitter suspended a Spanish politician for tweeting 'A man cannot get pregnant. A man has no womb or eggs.'"[3]
- "Twitter says calling the Syrian Muslim CO shooter a 'white Christian terrorist' does not violate its policies on misinformation or hate."[4]
- "You know who doesn't get blocked on Twitter for spreading misinformation about Covid? The Chinese Communist Party."[5]

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[2] *Available at* https://notthebee.com/article/priorities-donald-trump-is-banned-from-twitter-while-the-taliban-is-still-allowed-to-maintain-its-account (last visited Sept. 12, 2021).

[3] *Available at* https://notthebee.com/article/twitter-suspended-a-spanish-politician-for-tweeting-a-man-cannot-get-pregnant-a-man-has-no-womb-or-eggs (last visited Sept. 12, 2021).

[4] *Available at* https://notthebee.com/article/twitter-says-calling-the-syrian-muslim-co-shooter-a-white-christian-terrorist-does-not-violate-its-policies-on-misinformation-or-hate (last visited Sept. 12, 2021).

[5] *Available at* https://notthebee.com/article/you-know-who-doesnt-get-blocked-on-twitter-for-spreading-misinformation-about-covid-the-chinese-communist-party (last visited Sept. 12, 2021).

- "Former Twitter CEO says he'll 'happily' watch as capitalists are lined up and shot."[6]

- "Twitter's Jack Dorsey caught red-handed saying something true: 'We are focused on one account right now, but this is going to be much bigger than just one account.'"[7]

- "Facebook rejects police group's Officer of the Year ad."[8]

- "Facebook whistleblowers say company is censoring 'vaccine hesitant' content without users' knowledge but I'm sure it's for our own good."[9]

- "Facebook, in all its wisdom and glory, will finally allow you to have an opinion on the origin of Covid-19. Thanks, Facebook!"[10]

- "Quick! Check to see if Instagram is forcing you to follow The White House account!"[11]

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[6] *Available at* https://notthebee.com/article/former-twitter-ceo-says-hell-happily-watch-as-capitalists-are-lined-up-and-shot (last visited Sept. 12, 2021).

[7] *Available at* https://notthebee.com/article/twitters-jack-dorsey-caught-red-handed-saying-something-true-we-are-focused-on-one-account-right-now-but-this-is-going-to-be-much-bigger-than-just-one-account (last visited Sept. 12, 2021).

[8] *Available at* https://notthebee.com/article/facebook-rejects-police-groups-officer-of-the-year-post-due-to-sensitive-social-issues- (last visited Sept. 12, 2021).

[9] *Available at* https://notthebee.com/article/facebook-whistleblowers-say-company-is-censoring-content-according-to-how-vaccine-hesitant-it-is-suppressing-any-negative-posts-or-news-about-covid-19-vaccines (last visited Sept. 12, 2021).

[10] *Available at* https://notthebee.com/article/facebook-in-all-its-wisdom-and-glory-will-now-allow-you-to-have-an-opinion-about-the-origins-of-covid-19-thanks-facebook (last visited Sept. 12, 2021).

[11] *Available at* https://notthebee.com/article/quick-check-to-see-if-instagram-is-forcing-you-to-follow-the-white-house-account (last visited Sept. 12, 2021).

There once was a quaint time when these headlines might have appeared in *The Babylon Bee*, "the world's best satire site."[12] But they did not run in *The Bee*. They ran in *Not the Bee*, *The Babylon Bee*'s non-satire news site. This means they are entirely factual, which hopefully will dissuade the *New York Times* from mislabeling them as misinformation (before issuing its compelled retraction).[13]

As *Not the Bee* has painstakingly documented in its headlines, America's social media titans have shattered Congress's expectations for a user-centric, free, and intellectually diverse Internet by repeatedly targeting conservative viewpoints for censorship through the selective and inconsistent application of ever-shifting "standards."[14] Further instances of differential treatment abound. Rather than walk through Appellants' illuminating appendix, Amici will offer just a couple of additional examples from Twitter.

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[12] *See What is The Babylon Bee?*, The Babylon Bee, https://babylonbee.com/about (last visited Sept. 12, 2021).

[13] *See Corrections: June 12, 2021*, N.Y. Times, https://www.nytimes.com/2021/06/11/pageoneplus/corrections-june-12-2021.html (June 11, 2021); *see also* Madeline Roth, *NY Times Corrects Story After Legal Threat, Admits Babylon Bee Is 'Satirical Website' and Not 'Misinformation'*, Yahoo!, https://www.yahoo.com/now/ny-times-corrects-story-legal-001112181.html (June 14, 2021).

[14] That social media companies often correctly denominate their policies as "standards" or "guidelines," rather than "rules," underscores the discretion that they confer to reach preferred, *ad hoc* outcomes. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) (contrasting rules with standards).

Like most social media platforms, Twitter prohibits users from posting "hate." According to *Webster's*, the ordinary meaning of "hate" is "intense hostility and aversion usually deriving from fear, anger, or sense of injury"; "extreme dislike or disgust"; or (tautologically) "a systematic and especially politically exploited expression of hatred."[15] Twitter uses any arguable open texture[16] in the term as cover for an open season against conservatives. That includes those who simply tweet facts. For example, in Twitter's judgment, a politician's biologically correct statement that "[a] man has no womb or eggs" is hate speech,[17] but a college professor's profoundly racist statement, "I block white people" because "[t]here is nothing white people can say and do that is creative, profound, and intimidating,"[18] is valuable discourse deserving to remain on the

[15] Merriam-Webster.com, *Hate*, https://www.merriam-webster.com/dictionary/hate (last visited Sept. 12, 2021).

[16] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 60–61 (2015) (discussing the notion of open texture).

[17] *Twitter suspended a Spanish politician for tweeting "A man cannot get pregnant. A man has no womb or eggs."*, Not the Bee, https://notthebee.com/article/twitter-suspended-a-spanish-politician-for-tweeting-a-man-cannot-get-pregnant-a-man-has-no-womb-or-eggs (last visited Sept. 12, 2021).

[18] *Check out this profoundly racist tweet from a college professor that Twitter allows for some reason*, Not the Bee, https://notthebee.com/article/check-out-this-profoundly-racist-tweet-that-twitter-allows-for-some-reason (last visited Sept. 12, 2021).

platform. It appears that in Twitter's judgment, biology is hate, but unadorned racism—at least of a certain variety—is not.

Twitter's approach to "misinformation" is just as inconsistent as its approach to "hate." It suspended the account of a whistleblowing Chinese scientist for suggesting that the novel coronavirus originated from a Chinese lab.[19] After deplatforming the scientist, Twitter continued to platform the Chinese Communist Party as it tweeted, "Further [e]vidence that the [v]irus [o]riginated in the US."[20] There is, of course, ample reason to question the Chinese government's accusation. The first reports of COVID-19 arose in Wuhan, which happens to be the site of a Chinese virology lab that studies coronaviruses. But perhaps that coincidence is a bit too perfect—there might be more to the story, some sort of conspiracy to hide America's culpability. Whatever the case, the one thing Twitter *can* rule out as "misinformation" is the Wuhan virology lab leak theory. Apparently, its sources

[19] Anagha Srikanth, *Twitter suspends account of Chinese virologist who claimed coronavirus was made in lab*, The Hill, https://thehill.com/changing-america/well-being/prevention-cures/516754-twitter-suspends-account-of-chinese-virologist (Sept. 16, 2020).

[20] *You know who doesn't get blocked on Twitter for spreading misinformation about Covid? The Chinese Communist Party*, Not the Bee, https://notthebee.com/article/you-know-who-doesnt-get-blocked-on-twitter-for-spreading-misinformation-about-covid-the-chinese-communist-party (last visited Sept. 12, 2021).

are better than the CIA's.[21] Although, on second thought, given its former CEO's publicly tweeted support for the execution of capitalists,[22] it may not be the most neutral adjudicator to determine which country bears the blame for the pandemic.

B. *The Bee*, a Florida limited liability company, and *Not the Bee*, its more serious younger brother, don't just document social media censorship like the headlines and examples listed above; they have experienced the phenomenon firsthand. For example, Facebook determined that *The Bee* "incit[ed] violence" by posting an article entitled, "Senator Hirono Demands ACB Be Weighed Against a Duck to See If She Is a Witch." When challenged, Facebook adhered to its determination.[23] Lost on Facebook was the essential fact that no ducks, judicial nominees, or members of Congress were harmed in the posting of that article—

[21] Michael R. Gordon & Warren P. Strobel, *New U.S. Intelligence Report Doesn't Provide Definitive Conclusion on Covid-19 Origins*, Wall Street Journal, https://www.wsj.com/articles/biden-to-receive-report-on-coronavirus-origins-but-challenges-persist-in-how-to-deal-with-china-11629825758 (Aug. 24, 2021).

[22] *Former Twitter CEO says he'll "happily" watch as capitalists are lined up and shot*, Not the Bee, https://notthebee.com/article/former-twitter-ceo-says-hell-happily-watch-as-capitalists-are-lined-up-and-shot (last visited Sept. 12, 2021).

[23] *AGAIN! Facebook censors and penalizes The Babylon Bee for the most ridiculous article ever*, Not the Bee, https://notthebee.com/article/again-facebook-is-censoring-the-babylon-bee-for-the-most-ridiculous-story-ever (last visited Sept. 12, 2021).

something that the Facebook censors presumably would have known had they ever seen *Monty Python*.

Unfortunately, this misclassification wasn't a one-off. Instagram shares its parent company's view that *The Bee* is a public menace, and it determined that *The Bee*'s CEO violated community guidelines against "harmful false information" and "hate speech or symbols." His crime? Sharing a *Slate* article entitled, "It's About Time for Us to Stop Wearing Masks Outside," along with the comment, "Sane people never did this."[24]

Meanwhile, *Slate* continues to have a robust social media presence even after promoting—and re-promoting—a podcast episode that advocated violent protest.[25] The tagline to its Facebook post reads that "[a] nice, peaceful protest may not bring about" desired social change,[26] and its tweet more directly states that

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[24] *Babylon Bee CEO posted this to Instagram and they're now threatening to ban him for "harmful false information" and "hate speech." WHAT??*, Not the Bee, https://notthebee.com/article/babylon-bee-ceo-posted-this-to-instagram-and-theyre-threatening-to-ban-him-for-harmful-false-information-and-hate-speech-or-symbols-what (last visited Sept. 12, 2021).

[25] *Best of 2020: A History of Violent Protest*, Slate, https://slate.com/podcasts/what-next/2020/12/does-violence-make-protest-more-effective-makes-an-effective-protest (Dec. 24, 2020); *A History of Violent Protest*, Slate, https://slate.com/podcasts/what-next/2020/06/protests-blm-movement-american-history (June 3, 2020).

[26] Slate, Facebook.com, https://www.facebook.com/Slate/posts/if-violent-protests-are-getting-your-attention-are-they-working/10158732609846438/ (Dec. 24, 2020).

"[n]on-violence is an important tool for protests, but so is violence."[27] As of the time this brief was written, despite substantial backlash,[28] the Facebook post and the tweet continue to bless the Internet with their violence-promoting presence.[29] Possibly emboldened by *Slate*'s message, an Antifa group recently tweeted its hope that President Biden will "be the last" U.S. president, unambiguously calling for the end of our democratic republic.[30] Like *Slate*'s expression of support for violence, this incitement to violence also went uncensored.[31]

The takeaway is that left-of-center groups and publications may expressly advocate violence from their social media accounts, but Heaven forbid a right-of-

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[27] *Oops, looks like Twitter forgot to ban Slate for promoting violence*, Not the Bee, https://notthebee.com/article/oops-looks-like-twitter-forgot-to-ban-slate-for-promoting-violence (last visited Sept. 12, 2021).

[28] Joseph Wulfsohn, *Liberal site Slate faces backlash for saying 'violence' is an 'important tool for protests'*, Fox News, https://www.foxnews.com/media/slate-backlash-violence-is-an-important-tool-for-protests (June 4, 2020).

[29] Slate, Facebok.com, https://www.facebook.com/Slate/posts/if-violent-protests-are-getting-your-attention-are-they-working/10158732609846438/ (Dec. 24, 2020); Slate, Twitter.com, https://twitter.com/Slate/status/1268415955937513473?s=20 (June 4, 2020).

[30] Antifa group openly hopes that Biden is the last U.S. president EVER and promotes inauguration-day violence, but is still allowed on Twitter. 😉, Not the Bee, https://notthebee.com/article/antifa-group-openly-hopes-that-biden-is-the-last-us-president-ever-and-promotes-inauguration-day-violence-but-is-still-allowed-on-twitter- (last visited Sept. 12, 2021).

[31] *Id.*

center publication imply that outdoor mask-wearers (or a U.S. senator from Hawaii) are out-of-touch with reality. That, evidently, crosses a dangerous line.

In some cases, it appears that social media and news media work together to suppress conservative viewpoints, or at least to suppress *The Bee*. After social media titans began censoring what they label "misinformation," the *New York Times* ran an article that claimed *The Bee* has "trafficked in misinformation," linking to a prior *New York Times* article that actually *refuted* the claim by acknowledging *The Bee* purveys legitimate satire.[32] When confronted with a demand to retract its defamatory misinformation about *The Bee*, the *Times* did so.[33] But that hasn't stopped hostile news media. Facebook recently announced it would censor satire that "punches down." Unsurprisingly, soon thereafter, *Slate* ran an article that accused *The Bee* of—you guessed it—punching down.[34] One might

[32] Seth Dillon, *How The Babylon Bee Is Fighting Back*, National Review, https://www.nationalreview.com/2021/07/how-the-babylon-bee-is-fighting-back/ (July 3, 2021).

[33] *See Corrections: June 12, 2021*, N.Y. Times, https://www.nytimes.com/2021/06/11/pageoneplus/corrections-june-12-2021.html (June 11, 2021); *see also* Madeline Roth, *NY Times Corrects Story After Legal Threat, Admits Babylon Bee Is 'Satirical Website' and Not 'Misinformation'*, Yahoo!, https://www.yahoo.com/now/ny-times-corrects-story-legal-001112181.html (June 14, 2021).

[34] Brian Flood, *Babylon Bee CEO says satirical site 'punching back' against liberal media, Big Tech censorship*, Fox News, https://www.foxnews.com/media/babylon-bee-ceo-punching-back-against-censorship (June 29, 2021).

perceive a bit of irony in a large online publication dubiously accusing a much smaller one of "punching down."

Perhaps the most pernicious viewpoint censorship, however, happens below the social media surface at the algorithm level, as *The Bee*'s recent shadow-banning experience with Facebook shows. Over the past year, *The Bee* has seen a marked increase in its Facebook followers. But over the same time period—beginning during the 2020 election season, in fact—it has suffered a "drastic, steady decline in reach and engagement" on Facebook.[35] Historically, 80% of its website traffic came from Facebook, and its articles often went viral. But today, it gets only 30% of its traffic from Facebook, and its articles no longer go viral.

For example, a recent post to *The Bee*'s Facebook page reached only 11 users and had only one "like."[36] It's exceedingly implausible that over a million followers would scroll past an article entitled, "Least masculine society in human history decides masculinity is a growing threat."[37]

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[35] Jennifer Graham, *Is Facebook censoring the Babylon Bee, or does Mark Zuckerberg just not get the jokes?*, Deseret News, https://www.deseret.com/2021/8/23/22638183/is-facebook-censoring-the-babylon-bee-or-does-the-mark-zuckerberg-just-not-get-jokes-conservatives (Aug. 23, 2021).

[36] *Id.*

[37] *Available at* https://babylonbee.com/news/least-masculine-society-in-human-history-decides-masculinity-is-a-growing-threat (last visited Sept. 12, 2021).

The rabbit hole goes even deeper than *content*-based algorithms. It also includes surreptitious *user*-based algorithms. Just yesterday, it came to light from leaked internal documents that Facebook has a (no-longer) secret program called XCheck. The function of this program is to "exempt[ ] high-profile users from some or all of [Facebook's] rules" and "shield[ ] millions of VIP users from the company's normal enforcement process[.]"[38] Facebook's internal review of its white-listing practices found them "both widespread and 'not publicly defensible.'" The review flatly assessed, "'[w]e are not actually doing what we say we do publicly," and it acknowledged the program is "'a breach of trust.'"[39] In operating the program, Facebook misled not only its users, but also "its own Oversight Board." The troubling nature of the program was patent. As employees commented in response to an internal memorandum, "'having different rules on speech for different people is very troubling to me,'" and "'[Facebook's] decision-making on content policy is influenced by political considerations.'"[40]

[38] Jeff Horowitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt.*, Wall Street Journal, https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353 (Sept. 13, 2021).

[39] *Id.*

[40] *Id.*

C. These countless instances of viewpoint-based censorship, deplatforming, and shadow-banning have serious implications for the civil immunity that section 230 confers on social media platforms and, therefore, for the permissible scope of state regulation in this sphere. And to be clear, the argument here rests not on Congress's unenacted expectations (or on a series of legislative findings), but rather on its enacted, operative text. *See In re Wild*, 994 F.3d 1244, 1256 (11th Cir. 2021) (en banc) (recognizing that it is "statutory text and structure" that constitutes Congress's binding "intent"); *see also* U.S. Const. art. I, § 7 (recognizing as "a Law" only those bills that successfully undergo bicameralism and presentment, and making no provision for unenacted legislative history to become "a Law").

As the State appellants explain, section 230(c)(1) of the Communications Decency Act is a definition that, at most, might provide immunity for the *hosting* of content, not its removal. Initial Br. 18. And as the State appellants also explain, section 230(c)(2)—the only provision of the statute that provides an immunity for the *removal* of content—shields only the "good faith" removal of "objectionable" "material," rather than the *bad-faith* removal of certain disfavored *viewpoints* or disfavored *users*. *See* Initial Br. 13–17 (analyzing the text of section 230(c)(2)).

As a threshold matter, much of Florida's law falls outside section 230(c)(2)'s immunity because it concerns consistency, notification, and publication requirements, rather than social media's actions "to restrict access to or availability

of material[.]" 47 U.S.C. § 230(c)(2)(A); *see* Initial Br. 14–15. And as another threshold matter, upon proper application of the *ejusdem generis* canon to the federal statute, Florida's law does not prevent platforms from removing "material that the provider considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[41] 47 U.S.C. § 230(c)(2)(A); *see* Initial Br. 15–16. But putting these threshold points aside, to the extent that Florida's law regulates social media's screening and removal functions, its provisions are directed toward activities that fall outside the ordinary meaning of "action[s] voluntarily taken in good faith." 47 U.S.C. § 230(c)(2)(A).

The ordinary meaning of "good faith" is "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." *See Black's Law Dictionary* 713 (8th ed. 2004). Florida's law does not target activities that fit within this definition. The law merely requires social media companies to "apply censorship, deplatforming, and shadow banning standards in a consistent manner among [their] users," prohibits them from engaging in these

[41] While their right-of-center humor may irritate easily triggered readers, *The Bee* and *Not the Bee* do not publish content that is obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.

activities "without notifying the user," and prohibits them from engaging in these activities against "a journalistic enterprise based on the content of its publication or broadcast."[42]

Each of the prohibited activities falls outside the natural and ordinary meaning of "good faith." Censoring, deplatforming, and shadow-banning targeted viewpoints—including journalistic enterprises—through inconsistent application of standards is hardly motivated by "honesty in belief or purpose." It certainly doesn't align with what social media companies tell the public. Nowhere in Twitter's, Facebook's, or Instagram's user agreements will one find a provision announcing that their standards will be applied one way for conservatives, and another way for

[42] Florida's law also prohibits social media platforms from "apply[ing] or us[ing] post-prioritization or shadow banning algorithms for content and material posted by or about a user who is known by the social media platform to be a candidate" for elected office. Fla. Stat. § 501.2041(2)(h). Given recent events, the Florida Legislature reasonably could have concluded there is an especially high risk of inconsistent censorship regarding speech by and about candidates. As noted above, *The Bee*'s shadow-banning problem with Facebook began during the 2020 election season. Considering *The Bee*'s critical coverage of the Biden campaign, and in light of social media platforms' open contempt for then-President Donald Trump (culminating in his deplatforming), *The Bee* strongly suspects that its satire has been de-prioritized and shadow-banned for political reasons, and in particular, because of its speech regarding the 2020 presidential candidates. *See Priorities: Twitter says Taliban terrorists can post propaganda on platform while Donald Trump remains banned*, Not the Bee, https://notthebee.com/article/priorities-donald-trump-is-banned-from-twitter-while-the-taliban-is-still-allowed-to-maintain-its-account (last visited Sept. 12, 2021).

everyone else. Systematically inconsistent censorship under cover of supposedly neutral standards is dishonesty, plain and simple.

At the very least, the foregoing real-world examples of social media's bad-faith targeting of conservatives—not to mention those that the State appellants compiled before the district court—should more than suffice to demonstrate the numerous circumstances in which Florida's law can be applied without abridging section 230's immunity for "good faith" actions. That alone dooms the appellees' claim that Florida's law is facially preempted. *See Arizona v. United States*, 567 U.S. 387, 458 (2012) (Scalia, J., concurring in part and dissenting in part); *see also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995) (as Justice Scalia observed in *Arizona*, applying the *Salerno* standard in a preemption case).

Florida's law thus centers not only on a real and increasing consumer-protection problem, but on one that section 230 leaves it free to regulate. This Court should conclude that section 230 of the Communications Decency Act does not facially preempt Florida's law.

II. Because Social Media Platforms Act Like Common Carriers of Communications, Florida's Law Does Not Facially Violate the First Amendment.

Florida's law is facially consistent not only with section 230, but also with the First Amendment. Florida's law does not prohibit social media platforms from censoring, deplatforming, or shadow-banning users and the content they post.

Rather, it simply requires them not to engage in certain deceptive and unfair practices when they do these things. It accomplishes this basic consumer protection objective principally by requiring the platforms to publish and consistently apply their own content standards; it does not dictate what those standards should be. As the State appellants explain, *see* Initial Br. 18–51, this modest regulation of conduct does not interfere with social media platforms' First Amendment right to speak or their First Amendment right against compelled speech.

But even assuming *arguendo* that Florida's law—or, more precisely, a subset of its severable provisions—implicates the First Amendment, it nonetheless is facially constitutional. This is because any First Amendment rights that social media platforms enjoy are circumscribed due to their operation as common carriers of online communications, and Florida's law merely requires them to honor the representations that they make to the public whose communications they carry.

A. Social media platforms and the American public enjoy a special relationship unlike most others involving private entities. Courts and commentators rightly have called the Internet, and social media platforms in particular, "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). Social media titans like Facebook and Twitter provide for many Americans their primary source of news, political and associational activities, interpersonal

communication, and—in the age of COVID-19—even religious services.[43] Much of what previously might have been broadcast or carried by cable, telephone, or telegraph now appears in news feeds. And as with those utilities, the social media marketplace is dominated by a handful of large, powerful companies.

Many Americans were drawn to social media by promises of access to the free flow of information, opportunity to contribute to public discourse, and even-handed enforcement of basic conduct standards. Like the Supreme Court of the United States, users have been led to believe that social media platforms "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard" by "allow[ing] a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Packingham*, 137 S. Ct. at 1737 (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)). *The Babylon Bee* and *Not the Bee* are no exception. *The Bee* and *Not the Bee* always have depended on social media to spread their message. Today, thanks to their witty humor carried through social media, their readers number in the millions.

[43] *See Church Members Worshiping At Home Could Get Used To This Mute Feature*, The Babylon Bee, https://babylonbee.com/news/church-members-could-get-used-to-this-newfound-ability-to-mute-worship-band (Apr. 17, 2020).

America thus began its love affair with social media in a state of hopeful bliss. But the relationship status has devolved into "it's complicated," as social media platforms have accelerated their targeting of conservative views. Without consumer-protection regulations like Florida's, one can easily envision a future in which social media platforms more resemble a public pillory than a public square. To a substantial degree, that shift already has occurred.

B. As the appellees would have it, the Internet's shift toward suppression of the free exchange of ideas is inevitable, and government lacks even the basic power to require social media platforms to honestly, fairly, and transparently curate their content. In their view, their status as private companies entitles them to blanket First Amendment protections that courts afford to traditional private citizens and companies.

Appellees' assumption that social media platforms are traditional private actors is wrong, at least with respect to their hosting of users' content. In every relevant respect, social media titans act as common carriers of third-party communications rather than as private speakers or publishers.

Social media platforms "are at bottom communications networks, and they 'carry' information from one user to another." *Biden v. Knight First Amendment Institute at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring). They "hold themselves out as organizations that focus on distributing

the speech of the broader public," rather than as selective publishers or as private speakers themselves. *Id.* (Indeed, to Amici' knowledge, no social media platform's user agreement, policies, or standards disclose that conservatives will be targeted for exclusion). Social media platforms also "have dominant market share," and control of these companies is "highly concentrated" among a very small number of individuals. *Id.* "Much like with a communications utility"—and unlike Congress' vision of an Internet with "a great degree of [user] control," 47 U.S.C. § 230(a)(2)—"this concentration gives" social media platforms "enormous control over speech." *Knight First Amendment Institute*, 141 S. Ct. at 1224 (Thomas, J., concurring). And these platforms exercise "substantial market power" because there are no comparable alternatives. *Id.* at 1225.

As Justice Thomas has observed, in comparison to conventional private companies, common carriers traditionally have been subject to more robust governmental regulation, "including a general requirement to serve all comers." *Id.* at 1222. In this respect, courts have treated "communications networks," such as telegraphs, like common carriers. *Id.* at 1223. For all the above reasons, courts should regard social media platforms the same way. And this categorization goes directly to the First Amendment analysis. "The long history in this country and in England of restricting the exclusion right of common carriers" shows that the founding generation accepted those restrictions as permissible under the First

Amendment, and thus they are valid today. *Id.* at 1224 (citing *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

When social media platforms are correctly categorized in this way, the facial constitutionality of Florida's law is clear. Indeed, Florida's law stops a step short of an "all comers" requirement. Rather than require social media companies to platform everyone, Florida's law simply requires that they evenhandedly and transparently enforce their own content standards. *A fortiori*, this more modest regulation survives whatever First Amendment scrutiny might apply.[44]

C. Social media platforms might respond that the common-carrier doctrine traps them in a constitutional no-man's land where, unlike most other private entities, they lack core First Amendment protections. While it's true that common carriers enjoy fewer constitutional protections and are subject to more pervasive governmental regulation, *see Knight First Amendment Institute*, 141 S. Ct. at 1222–25 (Thomas, J., concurring), one cannot discount the other end of the bargain. Common carriers enjoy an enormous share of a market that provides a critical public service that Americans are unwilling to live without. *See id.* at 1224.

[44] Moreover, the abundant inconsistent censorship described throughout this brief demonstrates, at the very least, the plainly legitimate sweep, and substantial number of valid applications, of Florida's law—enough to save it from facial invalidation. *See Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (describing the standard for a facial First Amendment challenge).

And they receive "special government favors" in exchange for higher levels of government regulation, *id.* at 1223—immunity from civil liability, for instance, *see, e.g.*, 47 U.S.C. § 230. There are worse things than being worth $138 billion in shareholder equity,[45] facing little market competition, and enjoying a degree of special civil immunity, but having to announce and even-handedly apply the user standards that your own lawyers and policy officials wrote.

But even indulging social media's tone-deaf claim to victimhood status here, their status is one of their own choosing. The common-carrier doctrine gives social media platforms a choice to avail themselves of the First Amendment's full protections: stop holding themselves out as a neutrally administered public service and start acknowledging that they will selectively enforce their policies against disfavored viewpoints. *Cf. Knight First Amendment Institute*, 141 S. Ct. at 1224 (Thomas, J., concurring) ("[U]nlike newspapers, digital platforms *hold themselves out* as organizations that focus on distributing the speech of the *broader public*." (emphases added)). Until they do so, however, the First Amendment permits state governments to take them at their word and treat them as the common carriers that they proclaim themselves to be.

[45] *See* Sean Dennison, *How Much Is Facebook Worth?*, GoBankingRates.com, https://www.gobankingrates.com/money/business/how-much-is-facebook-worth/ (Aug. 19, 2021).

III. Florida's Law Promotes the Free Exchange of Ideas and Protects Religious Viewpoints from Censorship.

Florida's law doesn't just comport with section 230 and the First Amendment—it advances their core values by promoting the free exchange of ideas and by protecting religious viewpoints, among others, from censorship.

Religious Americans hold traditional views on many issues of intense public debate. For example, many Christians, Jews, and Muslims believe that marriage is the lifelong union of a man and a woman; that God created mankind male and female; and that abortion is the wrongful taking of innocent human life. But whereas the Supreme Court has recognized that these perspectives are held "in good faith by reasonable and sincere people," *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015), today's social media platforms see things differently. To them, these perspectives are not dissenting views to be given a voice, but hateful bigotry to be silenced. And these companies have not hesitated to press into service their outsized power over speech to accomplish their censorship goal.

Not even mainstream religious groups and leaders can escape Mark Zuckerberg's and Jack Dorsey's Eye of Sauron. When Focus on the Family's *Daily Citizen* explained transgenderism for its unwoke followers—noting that a "transgender woman" is "a man who believes he is a woman"—Twitter

permanently banned the publication for posting "hate."[46] Facebook gave Pastor Franklin Graham a 24-hour timeout for "hate speech" after he criticized Bruce Springsteen's boycott of North Carolina and expressed support for the state's law prohibiting men from using women's restrooms and locker rooms. It later apologized, but only after backlash.[47] Instagram labeled as "harmful or false information" the worship videos of popular Christian artist Sean Feucht.[48] YouTube temporarily booted theologian John Piper's audiobook, *Coronavirus and Christ*, for "violating community guidelines."[49]

Further examples of social media's bias against religious viewpoints, including pro-life viewpoints, have been well-documented. When Susan B.

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[46] *Twitter dropped the banhammer on a Christian magazine for this "hateful" sentence*, Not the Bee, https://notthebee.com/article/twitter-censors-focus-on-the-family-magazine-for-this-hateful-sentence (last visited Sept. 12, 2021).

[47] Aris Folley, *Facebook temporarily banned evangelist Franklin Graham from site*, The Hill, https://thehill.com/policy/technology/423205-facebook-temporarily-banned-evangelist-franklin-graham-from-site (Dec. 29, 2018).

[48] Andrea Morris, *Instagram Censors Worship Leader's Praise Post, Labeling His Faith 'False and Harmful'*, CBN News, https://www1.cbn.com/cbnnews/us/2020/june/instagram-censors-worship-leaders-praise-post-labeling-his-faith-false-and-harmful (June 24, 2020).

[49] Melissa Barnhart, *Youtube restores John Piper's 'Coronavirus and Christ' audiobook after 'violation' ban*, Christian Post, https://www.christianpost.com/news/youtube-restores-john-pipers-coronavirus-and-christ-audiobook-after-violation-ban.html (May 19, 2020).

Anthony List ran ads describing then-candidate Joe Biden's position on late-term abortions, Facebook pulled them, giving a delayed reinstatement only after substantial pushback.[50] Twitter likewise took down as "inflammatory" a pro-life campaign ad by then-candidate Marsha Blackburn that described her efforts to halt Planned Parenthood's sale of aborted body parts.[51] TikTok banned the pro-life group Live Action, reinstating it only after a national backlash, and opaquely citing "human error."[52] TikTok and Instagram similarly have censored Students for Life of America.[53] Planned Parenthood's pro-abortion political ads, meanwhile, were never censored.[54]

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[50] Press Release, Susan B. Anthony List, https://www.sba-list.org/newsroom/press-releases/update-facebook-apologizes-to-sba-list-then-takes-down-another-pro-life-ad (Nov. 1, 2018).

[51] Kevin Robillard, *Twitter pulls Blackburn Senate ad deemed 'inflammatory'*, Politico, https://www.politico.com/story/2017/10/09/marsha-blackburn-twitter-ad-243607 (Oct. 9, 2017); https://thehill.com/opinion/healthcare/356012-twitters-suppression-of-pro-life-speech-must-stop

[52] Lila Rose, *Twitter's suppression of pro-life speech must stop*, The Hill, https://www.liveaction.org/news/live-action-banned-tiktok-app/ (Oct. 18, 2017).

[53] Brenna Lewis, *Instagram Just Censored this Pro-Life Post*, Students for Life of America, https://studentsforlife.org/2021/06/04/instagram-just-censored-this-pro-life-post/ (June 4, 2021); Brenna Lewis, *TikTok Censors Students for Life, Then Reinstates Video Without Explanation*, https://studentsforlife.org/2020/04/14/tiktok-censors-students-for-life-then-reinstates-video-without-explanation/ (Apr. 14, 2020).

[54] John Wesley Reid, *A Double Standard? Unpacking Twitter's Pro-Life Ad Ban*, CBN News, https://www1.cbn.com/cbnnews/2017/june/a-double-standard-unpacking-twitters-pro-life-ad-ban (June 29, 2017).

To be sure, some of these censorship decisions were retracted, but many were not. And regardless, the sheer number of examples—and the substantial public pressure that has preceded retractions—makes clear that these episodes are far from random. They are targeted. Of course, when confronted about their biases, social media giants often try to hide behind their algorithms, pretending they didn't foresee the viewpoint-based outcomes that those algorithms would generate. But at some point, after a consistent pattern of conservative and religious viewpoint suppression, the algorithms begin to look more like the result of an intelligent and intentional design than a big bang in a circuit board.

By ensuring content standards will not be inconsistently applied to target disfavored viewpoints—including traditional religious viewpoints—Florida's law helps keep the Internet "a forum for a true diversity of political discourse," 47 U.S.C. § 230(a)(3), and promotes the "marketplace of ideas" that the First Amendment protects, *see Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Thus, it not only comports with section 230 and the First Amendment, but it serves their core purposes as well.

IV. Florida's Law Protects Both the Public and Social Media Platforms from Censorship Pressure by the Government.

Florida's law is principally a consumer-protection measure. But it protects more than just the public; it protects social media platforms, too, from improper government pressure to censor.

It's hornbook law that under the First Amendment, government generally lacks the power to censor private speech on the basis of its content or viewpoint. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 168–69 (2015). In recent months, however, government officials—including the President of the United States—have pressured social media platforms to censor messages with which those officials disagree.[55] It doesn't take a rocket (or political) scientist to foresee the very grave First Amendment concerns that this phenomenon poses. When the same government officials who wield vast regulatory power over social media companies use their bully pulpit to rail against them for hosting certain content, there is a risk of the government indirectly coercing censorship that it lacks the authority to conduct itself.

Florida's law protects against this kind of inappropriate government intimidation. It does so by requiring social media content standards to be published and consistently applied. If and when government officials demand that platforms stifle debate on a particular issue, or that they censor messages the officials disfavor, the platforms can refuse and cite their obligations under Florida's law. In

[55] *See, e.g.*, Joe Concha, *Hypocritical Psaki leads chilling effort to flag 'misinformation'*, The Hill, https://thehill.com/opinion/white-house/563547-hypocritical-psaki-leads-chilling-effort-to-flag-misinformation (July 18, 2021); Rebecca Klar, *Feds step up pressure on social media over false COVID-19 claims*, The Hill, https://thehill.com/policy/technology/563470-administration-puts-new-pressure-on-social-media-to-curb-covid-19 (July 18, 2021).

other words, Florida's law offers social media platforms a basis on which to refuse inappropriate government pressure to censor disfavored messages.

In this way, Florida's law provides a needed prophylactic defense for a core First Amendment protection. And this defense benefits social media platforms just as much as it benefits the American public.

CONCLUSION

This Court should reverse the district court's order entering a preliminary injunction.

Dated: September 14, 2021

Respectfully submitted,

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** *Application for admission pending.*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,450 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f).

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Dated: September 14, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on September 14, 2021. 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.

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