Case No. 21-12355

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, Atlanta Division
Case No. 4:21cv220-RH-MAF
The Hon. Robert F. Hinkle

BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION AND PROTECT DEMOCRACY IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 amici curiae make the following disclosures:

Amici are nonprofit organizations that have no parent corporations, and no publicly held corporation owns 10 percent or more of their stock.

Dated: November 15, 2021

Respectfully submitted,

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Counsel for Amici Curiae
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INTEREST OF AMICI[1]

Amici curiae file this brief on behalf of internet users in the United States and around the world who rely on online intermediaries, including social media, to communicate with each other and to access information online. Many internet users are concerned about the power these intermediaries exercise over online discourse. Some users think social media platforms allow too much speech they consider harmful, while others think social media companies "moderate" too much of their users' speech. But all benefit from the diverse options available to them.

Electronic Frontier Foundation EFF has worked for more than 30 years to protect the rights of users to transmit and receive information online. On behalf of its more than 38,000 dues-paying members, EFF ensures that users' interests are presented to courts considering crucial online free speech issues.

The Protect Democracy Project, Inc., is a nonpartisan, nonprofit organization dedicated to preventing our democracy from declining into a more authoritarian form of government. Protect Democracy litigates and advocates to protect elections and voting rights, as well as to protect the public sphere and guard against the particular threat that disinformation poses to a functioning democracy.

[1] All parties consent to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no party's counsel authored this brief in whole or in part, and neither any party nor any party's counsel contributed money towards the preparation of this brief. No person other than amici, their members, or th counsel contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF ISSUES

Amici curiae adopt the Statement of Issues filed by Appellees.

SUMMARY OF ARGUMENT

Although some internet users are understandably frustrated and perplexed by how social media companies curate users' speech on their platforms, internet users nevertheless derive the most benefit when the First Amendment protects the platforms' rights to make those decisions, and 47 U.S.C. § 230 (Section 230) bolsters those rights. These protections ensure that companies can curate their sites free from governmental mandates, resulting in a diverse array of forums for users, with unique editorial views and community norms.

Florida Senate Bill 7072 (SB 7072) aims to take those protections away and force platforms to host speech inconsistent with their editorial vision—unless their parent company also owns a Florida theme park. SB 7072 prohibits online platforms from deprioritizing electoral candidates' posts or deactivating their accounts, even if they violate the platform's rules, and even though such "content moderation" can be valuable to many internet users when it is carefully implemented. SB 7072 creates speaker-based distinctions that are anathema to the First Amendment and exacerbate existing power disparities between government speakers and average internet users.

Inconsistent and opaque private content moderation is a problem for users.

But it is one best addressed through self-regulation.

This Court should affirm the district court's order.

ARGUMENT

I. INTERNET USERS ARE BEST SERVED BY THE AVAILABILITY OF BOTH UNMODERATED AND MODERATED PLATFORMS

Although Florida is purporting to act on behalf on internet users, SB7072 deprives users of the benefits of common content moderation practices. Indeed, internet users are best served under current law, where the First Amendment and Section 230, taken together, create legal space for the emergence of both highly moderated and unmoderated platforms.

A. Moderated Platforms Serve the Interests of Users and the Public Generally

The social media platforms targeted by SB 7072 are not the first online services to moderate—or edit, or curate—the user speech they publish on their sites. Online services, at least from their point of mass adoption, rarely allowed all legal speech to be published on their sites. Most notably, most platforms for user speech banned legal, non-obscene sexual content, speech that enjoys First Amendment protection. Large-scale, outsourced content moderation emerged in the early 2000s.[2]

[2] Jillian C. York & David Greene, *How to Put COVID-19 Content Moderation Into Context*, Brooking's TechStream, May 21, 2020, https://www.brookings.edu/techstream/how-to-put-covid-19-content-moderation-into-context/.

Many internet users greatly benefit from moderated platforms. Users may want to find or create affinity and niche communities dedicated to certain subject matters or viewpoints and exclude others. Users may prefer environments that shield them from certain kinds of legal speech, including hateful rhetoric and harassment. Users may want a service that attempts to filter out misinformation by relying on sources the user trusts.

As a result of this exercise of editorial freedom by online services, users can choose from a variety of social media offerings, many of which reflect distinct editorial viewpoints.

Pinterest, a site designed to visually inspire creative projects, has "community guidelines" that "outline what we do and don't allow on Pinterest."[3] Under these guidelines, Pinterest reserves the right to remove several categories of speech: "Adult content," "Exploitation," "Hateful activities," "Misinformation," "Harassment and criticism," "Private information," "Self-injury and harmful behavior," "Graphic Violence and Threats," "Violent actors," "Dangerous goods and activities," "Harmful or Deceptive Products & Practices," and "Impersonation." Pinterest has special rules for comments users post on other users

[3] *Community Guidelines*, Pinterest, https://policy.pinterest.com/en/community-guidelines (last visited Nov. 11, 2021).

"Pins," including a ban on "Irrelevant or non-purposeful material."[4] Picsart, another site for creators with over 150 million monthly users, has a similar policy.[5]

Roblox, a rapidly growing social network popular with children through which users worldwide play and build their own games, warns that its Community Standards "prohibit things that certain other online platforms allow." For example, Roblox prohibits "Singling out a user or group for ridicule or abuse," "all sexual content or activity of any kind," "The depiction, support, or glorification of war crimes or human rights violations, including torture," and much political content, including any discussion of political parties or candidates for office.[6]

Strava, a social media platform for athletes.[7] Strava's Community Standards warn that non-original content, offensive statements, and hate speech will be removed. One of Strava's main features is for cyclists and runners to share their routes, called "segments," on Strava; but Strava's Community Standards allow only "good segments" created with "common sense."[8]

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[4] *Community Guidelines*, Pinterest, https://policy.pinterest.com/en/community-guidelines (last visited Oct. 7, 2021).
[5] Picsart, https://picsart.com/about-us; *Community Guidelines*, Picsart, https://picsart.com/community-guidelines (each last visited Nov. 11, 2021).
[6] *Roblox Community Standards*, Roblox, https://en.help.roblox.com/hc/en-us/articles/203313410-Roblox-Community-Standards (last visited October 8, 2021).
[7] *Strava Terms of Service*, Strava, https://www.strava.com/legal/terms#conduct (updated Dec. 15, 2020).
[8] *Strava Community Standards*, Strava, https://www.strava.com/community-standards (last visited Oct. 7, 2021).

The internet is full of specialized services with unique editorial viewpoints—from RallyPoint, a social media platform for members of the armed services,[9] to Ravelry, a social media site focused on knitting.[10]

HealthUnlocked, a social media site for the discussion of health information, notifies its users that "Negative and damaging references to identifiable individuals" may be edited or deleted either by HealthUnlocked or by a community administrator and requires users to agree "to share information that is true and correct to the best of your knowledge and . . . that is primarily drawn from your personal experience."[11]

Because their editorial choices are protected by the First Amendment, social media platforms commonly provide forums only for certain political ideologies. Thus, we can have both ProAmericaOnly, https://proamericaonly.org, which promotes itself as "Social Media for Conservatives" and promises "No Censorship | No Shadow Bans | No BS | NO LIBERALS" and The Democratic Hub, https://www.democratichub.com, an "online community … for liberals, progressives, moderates, independent[s] and anyone who has a favorable opinion

[9] RallyPoint, https://www.rallypoint.com/ (last visited Oct. 7, 2021).
[10] Ravelry, https://www.ravelry.com (last visited Oct. 7, 2021).
[11] *How Communities Are Safeguarded?*, HealthUnlocked, https://support.healthunlocked.com/article/11-community-guidelines#enforcing (last visited Oct. 7, 2021); *Terms of Use*, HealthUnlocked, https://support.healthunlocked.com/article/147-terms (updated Sept. 2, 2021).

of Democrats and/or liberal political views or is critical of Republican ideology," and everything else on the political spectrum.

Such ideologically focused sites may constitutionally exclude those, including electoral candidates, who express conflicting political viewpoints. For example, the Conservative Truth Network explains that

> **This is a CONSERVATIVE PLATFORM.** CTN was created as a public space in which patriots, conservatives and right wing politicians can speak their truth, share their knowledge and voice their opinions without being silenced, suspended or banned by big tech social media platforms such as Twitter and Facebook.
>
> However, if you are a liberal or leftist and create an account on CTN to respectfully and politely ask questions for the purpose of becoming educated and enlightened about the Conservative position without using any insulting or defamatory language towards any conservative, patriot or right wing politician on our platform (or not on our platform) or towards the President of the United States, you will be permitted to remain as a CTN member.
>
> If you are a liberal or leftist and create an account on CTN to harass or to "mess with" conservatives, patriots or right wing politicians on our platform (or not on our platform), or if you use any defamatory language towards any CTN member or use any derogatory language in reference to our President, Donald J. Trump, you will receive **only ONE WARNING** to correct your behavior and your demeanor on this platform. If, after receiving this warning, you still refrain from correcting your demeanor and behavior on this platform, **YOU WILL BE PERMANENTLY BANNED; NO EXCEPTIONS.**
>
> If you wish to post negative and derogatory content regarding conservatives, the President of the United States or any right wing politicians, you have other social media platforms on which to share

> your negative leftist or liberal viewpoints; that type of behavior will NEVER be permitted here on Conservative Truth Network.[12]

This right to exclude opposing viewpoints extends to all types of belief systems. So, Vegan Forum does not require its users to be "vegan, vegetarian or even have immediate plans to give up animal products"; but since it is a site designed to promote a vegan lifestyle, "we will not tolerate members who promote contrary agendas."[13] And SmokingMeatsForums.com, a "community of food lovers dedicated to smoking meat," more generally bans "fighting or excessive arguing" in its user discussion forums.[14]

Among the numerous content moderation practices is community moderation, with Reddit and Discord among its most popular adopters. Reddit users manage and create thousands of communities, called subreddits. Although Reddit has an overriding content policy, a moderator makes the decisions within each community as guided by Reddit's "Moderator Guidelines for Healthy

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[12] *Terms of Use*, Conservative Truth Network, https://conservativetruthnetwork.com/termsofuse (last visited Oct. 7, 2021) (emphasis in original).
[13] *Membership Rules*, Vegan Forum, https://www.veganforum.org/help/terms/ (last visited Oct. 7, 2021).
[14] *The Rules*, SmokingMeatForums.com, https://www.smokingmeatforums.com/help/rules/ (last visited Oct. 7, 2021).

Communities."[15] Discord employs a similar model.[16] Each site thereby empowers some users to remove and down-rank other users' speech if that speech is against that community's rules.[17] As a result, while a political candidate and their speech may be highlighted in one community, the candidate may be blocked or down-ranked in another.

B. SB 7072 Will Destroy the Many Online Communities that Rely on Curation

Florida SB 7072 purports to make much of this moderation illegal, subject to draconian and onerous fines and numerous civil actions, and it forces platforms to exempt the speech of certain privileged users—Florida electoral candidates and large "journalistic enterprises"—from their policies.[18] SB 7072 likely bars community moderation. And SB 7072 would be a major setback to efforts to combat spam, since every action to limit the spread of spam messages might be

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[15] *Moderator Guidelines*, Reddit, https://www.redditinc.com/policies/moderator-guidelines (effective Apr. 17, 2017).

[16] *Moderating on Discord*, Discord, https://discord.com/moderation (last visited Nov. 11, 2021).

[17] *See, e.g., Reddiquette*, Reddit, https://reddit.zendesk.com/hc/en-us/articles/205926439-Reddiquette (last visited Oct. 7, 2021).

[18] Although SB 7072 only applies to services with either 100 million monthly users or more than $100 million in gross revenues, a service would be forced to abandon the editorial polices that attracted those users and revenues to it once it meets those benchmarks. And services may grow quickly: TikTok needed only five years to surpass 1 billion active monthly users. *See Digital 2021 October Global Statshot Report*, Datareportal, https://datareportal.com/reports/digital-2021-october-global-statshot (last visited Nov. 10, 2021).

considered an impermissible "shadow ban" under the law. § 501.2041(f).[19]

Under SB 7072, one seeking to evade a platform's rules against spam, non-obscene nudity; non-threatening violent content; false but non-defamatory content; or any content that is irrelevant to the platform's purpose or contrary to the platform host's or its community's values, but is nevertheless protected by the First Amendment,[20] need only file to be a candidate for office and gain the state's protection. And in addition to directly prohibiting routine content moderation, SB 7072 will chill the exercise of editorial discretion by forcing platforms to defend their specialized moderation practices in court, perhaps repeatedly.

This is nonsensical and contrary to the interests of internet users.

C. In Praise of the Unmoderated Platform

Unmoderated platforms, where the operator plays no role in selecting protected content or ordering its presentation, also benefit internet users and the public generally by eliminating corporate editors, inhibiting the creation of silos, and allowing users to engage in free-form discussions and debates of their choosing, and find unexpected sources of ideas and information. Users need not

[19] SB 7072 definition of "social media platforms" does not exclude email services or limit the covered services to social media posts. § 501.2041 (f).

[20] *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (non-obscene sexual content protected by First Amendment); *Elonis v. United States*, 575 U.S. 723, 740 (2015) (certain threatening speech protected by First Amendment); *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (certain false speech protected First Amendment).

fear that their communications are actively screened, nor that they may accidentally run afoul of content rules. Unmoderated platforms can be of special value to political dissidents and others who may be targeted for censorship by governments and private actors. They provide an accessible forum for speech that is unpopular, disfavored, or inadvertently suppressed. Given the centrality of the Internet to modern communication, a world where unmoderated online platforms were prohibited would be an impoverished one.

One of the chief advantages of unmoderated platforms is that they avoid the millions of difficult moderation decisions a platform must make once it decides to begin even the smallest amount of moderation. As it is often said, content moderation at scale is impossible to do perfectly, and nearly impossible to do well.[21] Even when using a set of precise rules or carefully articulated "community standards," moderated platforms often struggle to draw workable lines between speech that is and is not permitted. Every online forum for user speech, not just the dominant social media platforms, struggles with this problem.

This is neither a new problem, dating to at least 2007, [22] nor one limited to

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[21] *See, e.g.*, Mike 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.

[22] Jillian C. York, Silicon Values: The Future of Free Speech Under Surveillance Capitalism 25-27 (Verso 2021).

U.S. conservative politics, and thousands of puzzling decisions continue to be made. In 2017, users discovered that Twitter had marked tweets containing the word "queer" as offensive.[23] In January 2021, Facebook's updated policy to remove "harmful conspiracy theories" resulted in it disabling a punk rock band's page because its name, Adrenochrome, is a chemical that has become a central part of the QAnon conspiracy theory.[24] Also earlier this year, Instagram removed posts about one of Islam's holiest mosques, Al Aqsa, because its name is contained within the name of a designated terrorist organization.[25] YouTube has removed videos documenting atrocities in Syria and elsewhere under its graphic violence

[23] Taylor Wofford, *Twitter Was Flagging Tweets Including the Word "Queer" as Potentially "Offensive Content*, Mic, June 22, 2017, https://www.mic.com/articles/180601/twitter-was-flagging-tweets-including-the-word-queer-as-potentially-offensive-content.

[24] *Facebook Treats Punk Rockers Like Crazy Conspiracy Theorists, Kicks Them Offline*, EFF, https://www.eff.org/takedowns/facebook-treats-punk-rockers-crazy-conspiracy-theorists-kicks-them-offline (last visited Oct. 7, 2021).

[25] Ryan Mac, *Instagram Censored Posts About One of Islam's Holiest Mosques, Drawing Employee Ire*, BuzzFeed News, May 12, 2021, https://www.buzzfeednews.com/article/ryanmac/instagram-facebook-censored-al-aqsa-mosque.

policy,[26] and has been accused of restricting and demonetizing LGBTQ+ content.[27] Sex worker advocates have documented how they are routinely shadow banned across a variety of social media platforms.[28]

SB 7072, for its part, would not produce unmoderated platforms. Instead, it would create platforms where Florida political candidates' speech is less moderated than that of other speakers, even when they seek to address the same issues. The resulting asymmetry—political candidates get to always speak, even if they violate a platform's rules; other users who are not candidates do not—denies users the benefits of unmoderated platforms.

II. CURRENT CONSTITUTIONAL AND STATUTORY LAW SUPPORT THE CO-EXISTENCE OF UNMODERATED AND MODERATED PLATFORMS

The law in its current state, without jettisoning decades of binding precedent that upholding SB 7072 demands, supports the co-existence of both moderated and

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[26] Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria*, N.Y. Times, Aug. 22, 2017, https://www.nytimes.com/2017/08/22/world/middleeast/syria-youtube-videos-isis.html; Kevin Anderson, *YouTube Suspends Egyptian Blog Activist's Account*, The Guardian, Nov. 28, 2007, https://www.theguardian.com/news/blog/2007/nov/28/youtubesuspendsegyptianblog.

[27] Megan Farokhmanesh, *YouTube Is Still Restricting and Demonetizing LGBT Videos—and Adding Anti-LGBT Ads to Some*, The Verge, June 4, 2018, https://www.theverge.com/2018/6/4/17424472/youtube-lgbt-domentization-ads-alogrithm.

[28] *See* Danielle Blunt et al., *Posting Into The Void*, Hacking//Hustling, Oct. 2020, https://hackinghustling.org/wp-content/uploads/2020/09/Posting-Into-the-Void.pdf.

unmoderated online platforms.

As the appellees correctly argue, the First Amendment shields platforms from being forced to publish any content that they would otherwise choose not to publish.

Section 230 bolsters these constitutional rights with important procedural benefits that allow for quick dismissal and discourage frivolous lawsuits, thus decreasing platforms' incentives to censor user speech. Section 230 provides online platforms with immunity from liability both for publishing and deciding not to publish user speech. SB 7072, which requires social media companies to publish certain user content, upsets this careful balance.

A. The First Amendment Protects a Service's Right to Curate Users' Speech That It Publishes on Its Site

Every court that has considered the issue has rightfully found that private entities that operate online platforms for user speech enjoy a First Amendment right to curate that speech.

The Supreme Court has long held that private publishers have a First Amendment right to control the content of their publications. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-55 (1974). *Cf. Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (reaffirming that "when a private entity provides a forum for speech," "[t]he private entity may . . . exercise editorial discretion over the speech and speakers in the forum"). *See*

also Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) (recognizing cable television providers' First Amendment right to "exercis[e] editorial discretion over which stations or programs to include in its repertoire"). This intrusion into the functions of editors is per se unconstitutional even if the compelled publication of undesired content would not cause the publisher to bear additional costs or forgo publication of desired content. *Tornillo,* 418 U.S. at 258.

The parallels between *Tornillo* and the present case are strong.

Both concern Florida laws that require private companies to publish the viewpoints of political candidates. In *Tornillo*, the law required newspapers that endorsed a candidate for elected office to publish a response from the endorsed candidate's opponents. *Id*. at 243-45. SB 7072 is even broader, flatly prohibiting social media companies from removing or curating the speech of any Florida electoral candidate.

And the policy concerns behind the laws are similar.

SB 7072 is based on the legislative findings that social media platforms inconsistently and in bad faith manipulate the posts on their sites and deprive Floridians of political communications: "Floridians increasingly rely on social media platforms to express their opinions"; "Social media platforms should not take any action in bad faith to restrict access or availability to Floridians." Section 1(3), (8). In *Tornillo*, the Supreme Court rejected "vigorous" arguments that "the

government has an obligation to ensure that a wide variety of views reach the public." 418 U.S at 247-48. The state of Florida had argued in *Tornillo*, similar to the legislative findings that support SB 7072, that the print news media both dominated public discourse—the state cited a "concentration of control of outlets to inform the public," that had "become big business," "noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events," *Id*. at 248-49,—and were biased and manipulated public discourse:

> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. . . . The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires.

Id. at 250-51.

The *Tornillo* Court did not dispute the validity of these concerns, but nevertheless found that governmental interference with editorial discretion was so anathema to the First Amendment and the broader principles of freedom of speech and the press that the remedy for these concerns must be found through "consensual mechanisms" and not by governmental compulsion. *Id*. at 254. *See also Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 134 (9th Cir. 1971) (rejecting argument that the Los Angeles Times' "semimonopoly and quasi-public position" justified order compelling the newspaper to publish certain

advertisements).

Tornillo is not limited to only newspapers or publishers that actively select the content they publish.[29] It applies to any entity that speaks by curating the speech of others, and, though phrased in terms of traditional print newspaper publishers, has been applied in a variety of speech contexts, including thrice in the 2018 Supreme Court term. *See Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring). The Supreme Court applied *Tornillo*, among other authorities, in holding that the organizers of a parade had a First Amendment right to curate its participants, and thus could not be required to include a certain message, even if the parade was perceived as generally open for public participation. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569–70 (1995). As the *Hurley* Court explained, "a private speaker does

[29] Moreover, SB 7072 applies to at least some news publishers. SB 7072's broad definition of social media platform includes "any information service" that with either $100 million in annual revenue or 100 million monthly "platform participants." § 501.2041 (1)(g). The *Washington Post*, for example, claims 104 million monthly visitors to *wapo.com* and the Washington Post Company (NYSE:WPO) is a billion dollar company. *See Washington Post Media Kit*, https://www.washingtonpost.com/solutions/ (last visited June 9, 2021). "Platform participants" is not defined by the law.

not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication." *Id*.

Nor does it matter whether a site predominantly publishes its own content or content written by others. Numerous courts have applied *Tornillo* to social media platforms that primarily, if not exclusively, publish user-generated content.[30] A separate, but related line of cases has rejected the argument that social media platforms are state actors that are limited by the First Amendment in their ability to select the speech of others.[31]

B. Social Media Sites Are Similar to Newspapers' Opinion Pages

[30] *See, e.g., Davison v. Facebook, Inc.*, 370 F. Supp. 3d 621, 628-29 (E.D. Va. 2019), *aff'd*, 774 F. App'x 162 (4th Cir. 2019); *DJ Lincoln Enters., Inc. v. Google, LLC*, No. 2:20-CV-14159, 2021 WL 184527, at *8 (S.D. Fla. Jan. 19, 2021); *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 436-37 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629-30 (D. Del. 2007); *Dreamstime.com, LLC v. Google, LLC*, No. C 18-01910 WHA, 2019 WL 2372280, at *2 (N.D. Cal. June 5, 2019); *e-ventures Worldwide, LLC v. Google, Inc.*, No. 214CV646FTMPAMCM, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017).

[31] *See, e.g., Prager Univ. v. Google LLC*, 951 F.3d 991, 995 (9th Cir. 2020); *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 40 (D.D.C. 2019), *aff'd*, 816 F. App'x 497 (D.C. Cir. 2020). *See generally* Eric Goldman and Jess Miers, *Online Account/Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 Journal of Free Speech Law (August 2021) (collecting cases).

That Were Subject to the Right-of-Reply Law in Tornillo

Although *Tornillo* is not limited to newspapers and applies to any exercise of editorial or curatorial discretion, it is helpful to understand the similarities between social media platforms and the opinion pages of a newspaper, the specific forum targeted by the Florida right of reply law struck down in *Tornillo*.

Like social media sites, newspapers publish a mix of original content and items created by others: syndicated and wire service articles, advertisements, wedding, engagement, and birth announcements, and comics. The opinion pages additionally publish opinion pieces, letters to the editor, and syndicated editorial cartoons.[32]

Indeed, perhaps the most powerful pronouncement of freedom of the press in Supreme Court jurisprudence, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), centered on the Times publishing someone else's content, a paid advertisement.

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[32] *See* Jack Shafer, *The Op-Ed Page's Back Pages: A Press Scholar Explains How the New York Times Op-Ed Page Got Started*, Slate, Sept. 27, 2010, https://slate.com/news-and-politics/2010/09/a-press-scholar-explains-how-the-new-york-times-op-ed-page-got-started.html (describing how the pages opposite newspapers' editorial pages became a forum for outside contributors to express views different from those expressed by the paper's editorial board); Michael J. Socolow, *A Profitable Public Sphere: The Creation of the New York Times Op-Ed Page*, Commc'n & Journalism Fac. Scholarship (2010), https://digitalcommons.library.umaine.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1001&context=cmj_facpub; *Op-Ed*, Wikipedia, https://en.wikipedia.org/wiki/Op-ed (last visited Oct. 7, 2021).

The Times' role as an intermediary for the speech of others was critical to the Court's decision: as the Court explained, newspapers are "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press." *Id*. at 266.[33] More recently, the Court recognized that social media sites now play that very role by providing "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

In *Tornillo,* the Supreme Court did not hesitate to recognize the First Amendment right of the opinion page editors to endorse candidates and exclude replies from opponents even though the press in 1974 was much different than that of our nation's Founders. This Court should likewise apply the same rule even if social media sites are not exactly the opinion pages of 1974.

Lastly, both the district court, as well as other amici, erroneously characterized the online services subject to SB 7072 as different from news media in the extent to which they select their content. That characterization disregards both the breadth of SB 7072 and the historical variety of news media.

[33] The *Sullivan* Court also bolstered its actual malice rule by reference to earlier cases dealing with another type of intermediary, booksellers. *Id.* at 278-79 (citing *Smith v. California*, 361 U.S. 147 (1959); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).

First, SB 7072 broadly restricts the editorial discretion of "any information service system . . . that provides or enables computer access by multiple users." §501.2041(1)(g). It makes no distinction between those services that select certain third-party content and those that are completely non-selective.

Second, news media, historically is replete with examples of publications the primary purpose of which was the non-selective transmission of user speech. Pennysavers, for example, local newspapers either entirely or primarily composed of classified advertisements, coupons, life milestone announcements, congratulatory messages, recipes, public notices, and the like, have a long and storied history.[34]

In reality, for each medium, there exists a continuum of selectivity.

III. SB 7072 FORCES ONLINE SERVICES TO FAVOR SPEECH OF POLITICAL CANDIDATES AND OTHERS OVER EVERYDAY INTERNET USERS

A. Compelling Platforms to Privilege Certain Speakers Online Speech Violates the First Amendment

In addition to intruding on information services' First Amendment rights to curate their sites, SB 7072 also violates the First Amendment by mandating favoritism for certain speakers' online content. SB 7072 demands that online services treat the speech of Florida political candidates and highly popular

[34] https://en.wikipedia.org/wiki/Pennysaver (last visited Nov. 11, 2021)

"journalistic enterprises" more favorably than an average internet user's posts.

These are impermissible speaker-based distinctions. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," laws that compel "distinguishing among different speakers, allowing speech by some but not others" are presumptively unconstitutional. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). Thus, "laws favoring some speakers over others demand strict scrutiny when the [government's] speaker preference reflects a content preference." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 170 (2015); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000) ("Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles.").

SB 7072 privileges the online speech of political candidates for public office in a variety of ways. § 106.072 (1)(a). The statute prevents online services from banning political candidates from their platforms at any point before an election, even when candidates repeatedly violate the service's policies or engage in unlawful speech or conduct. § 106.072 (2). The prohibition on removing a political candidate from a service is backed by draconian fines that the Florida Election Commission can assess against services to the tune of $250,000 per day for candidates for statewide office and $25,000 per day for candidates for other Florida offices. § 106.072 (3). The prohibition and accompanying penalties effectively

give political candidates a green light to violate any platform's rules with impunity, even when it results in abuse, harassment, or spreads harmful misinformation, and even when the speech is unprotected by the First Amendment. Users who are not running for office, on the other hand, enjoy no similar privilege.

SB 7072 unconstitutionally privileges political candidates' speech in other ways, too. The statute prevents online services from using algorithms to curate, arrange, or present "content and material posted by or about" a political candidate. § 501.2041 (2)(h). This exceedingly vague prohibition limits online services from applying even the most innocuous aspects of their content moderation policies, such as using automated means to present user-generated content in any way other than chronological order. Both Twitter and Facebook, for example, allows users to choose whether they would like to view content of users they follow chronologically or via the service's ranking algorithm. SB 7072 requires them to disable their algorithms with respect to political candidates and force every user to view candidates' tweets chronologically, even if the user does not want to. The prohibition would also appear to limit even community moderators and other users on certain services from down-ranking a political candidate's speech they do not like.

SB 7072 also provides similar privileges for certain speakers that meet the statute's definition of a "journalistic enterprise." The definition is both sharply

underinclusive and overinclusive and, while it wisely avoids defining what journalism is, it uses a measure of popularity, with thresholds for various forms of media. § 501.2041 (1)(d). In addition to restrictions on a platforms ability to curate those entities' posts or remove news media users that violate a platform's policies, SB 7072 prevents online services from "post[ing] an addendum to" any posts from such "journalistic enterprises." § 501.2041(2)(j).

SB 7072 thus fails strict scrutiny because, among other reason, it is fatally underinclusive, in at least three ways, and thus "raises serious doubts about whether Florida is, in fact, serving, with this statute the significant interests" lawmakers claim. *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

First, SB 7072 deliberately excludes all other internet users besides political candidates and "journalistic enterprises" from its must-carry provisions, even though the speech of other users may be important for both electoral debates and political discourse in general.

Second, the law inexplicably excludes social media platforms owned by companies that also own theme parks in Florida with no explanation as to why those social media platforms do not cause the same purported harms as the ones bound by the law. This puzzling exclusion contradicts Florida's arguments that it has a compelling interest in protecting candidate speech on platforms.

Third, SB 7072 targets its speech compulsions and restrictions to only a

subset of social media platforms and does not punish any other entity whose editorial choices could result in equal or greater harm to a candidate's chances at public office, including critical news coverage or editorial endorsements. Indeed, many other entities—most notably, print and broadcast media that do not meet the monthly user or subscriber thresholds—also make decisions to edit, to not publish, or to otherwise distribute political candidates' speech. In this respect, SB 7072 is akin to yet another prior Florida law invalidated by Supreme Court. *See id.* The law in *The Florida Star* criminalized the disclosure of sexual assault victims' names by an "instrument of mass communication," but not by any other speaker, even though such disclosures could result in equal or greater harm than media disclosure; this underinclusivity rendered the law unable to satisfy First Amendment strict scrutiny. *Id.*

B. SB 7072's Legally Compelled Favoritism for Certain Speakers Also Raises Distinct Human Rights Concerns By Giving Already Powerful Speakers Additional Legal Protections

Reinforcing its constitutional failings, SB 7072 is bad policy that will inhibit the public's ability to engage in diverse and wide-ranging debate about political candidates and their public acts, all while giving those candidates much greater power online. SB 7072's requirements that platforms must carry, and cannot moderate, political candidates' speech reinforces existing discrepancies in power, resources, and the ability to disseminate speech that political candidates already

enjoy over the general public. See Kit Walsh and Jillian C. York, *Facebook Shouldn't Give Politicians More Power Than Ordinary Users*, EFF Deeplinks (Oct. 6, 2019).

SB 7072 would force Facebook to revert to its widely criticized previous policy whereby it exempted certain politicians' posts from its fact-checking and hate speech rules, resulting in the platform hosting speech that Facebook may have otherwise deleted.[35]

IV. SB 7072'S PUBLICATION MANDATE UNDERMINES SECTION 230

SB 7072's ban on editorial discretion violates and undermines the protections of Section 230, the legal bedrock of the internet.[36] Congress enacted Section 230 to make it clear that the privately operated internet intermediaries that comprise the internet have the right to do exactly what Florida seeks to prevent them from doing—moderate content unencumbered by the threat of legal liability

[35] *See* Corynne McSherry and Jillian C. York, *Facebook's Policy Shift on Politicians Is a Welcome Step*, EFF Deeplinks, June 7, 2021, https://www.eff.org/deeplinks/2021/06/facebooks-policy-shift-politicians-welcome-step

[36] *See* David Post, *Opinion: A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or so Dollars of Value*, Washington Post, Aug. 27, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/ ("[I]t is impossible to imagine what the Internet ecosystem would look like today without [Section 230].").

for doing so.[37]

Section 230 bolsters the First Amendment right of social media companies to have their sites reflect their curatorial perspective. Subsection 230(c)(1) provides internet intermediaries with immunity from liability based on the harm plaintiffs suffered from the intermediary acting as a publisher of user-generated content. 47 U.S.C. § 230(c)(1). This includes "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). *Accord Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014); *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003). Subsection 230 (c)(2) provides additional protection against claims brought by content creators based on the intermediaries having blocked the plaintiffs' content or enabled others to do so. See 47 U.S.C. § 230(c)(2).

Prior to Section 230, online platforms had two strong disincentives to moderate or otherwise engage with user-generated content. First, online platforms faced traditional publisher liability for content posted by their users: the liability could be based on notice if the platforms acted as mere passive conduits; but the liability did not require notice if the platforms engaged with user content in any way. *See Barnes*, 570 F.3d at 1101. Second, online platforms faced tort liability if a

[37] *See A Brief History of NSF and the Internet*, National Science Foundation, Aug. 13, 2003, https://www.nsf.gov/news/news_summ.jsp?cntn_id=103050.

user was harmed by their content being taken down, blocked, or otherwise moderated. *See Barnes*, 570 F.3d at 1105.

Congress passed Section 230 to remove these disincentives and encourage platforms to develop and apply their own editorial standards, in ways that benefit users, or subsets of users, and reflect the values of the company, rather than acting out of fear of liability. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

SB 7072 cannot be reconciled with Section 230's protections or policy goals.

V. INTERNET USERS ARE BEST SERVED BY VOLUNTARY MEASURES FOR CONTENT MODERATION RATHER THAN SB 7072'S MANDATES

With respect to SB 7072's mandated transparency and complaint procedures, requirements such as these may be appropriate as an alternative to government restrictions on editorial practices only if they are carefully crafted to accommodate competing constitutional and practical concerns.

But SB 7072 is not such a carefully crafted regulatory scheme and should not be upheld. Its user-focused protections, such as requiring annual notice to users on the use of algorithms, are not severable – they are inextricably embedded within the framework of the law's speaker-bias, theme-park-bias, and other glaring constitutional errors.

Internet users are better served by "consensual mechanisms," in the words of the Supreme Court in *Tornillo*, 418 U.S. at 254, however imperfect they may be. Both companies and users can look to several models for self-regulation. EFF is among a broad range of civil society groups that has endorsed the Santa Clara Principles.[38] UNESCO has published principles focusing on transparency around content moderation decisions that are purposefully high-level, rather than prescriptive, in recognition of the "[v]ast differences in types, sizes, business models and engineering of internet platform companies" that make government mandates inappropriate.[39] The Internet Commission's annual Accountability Report aims to identify best practices scaled to an online service's maturity.[40]

Importantly, these are not templates for regulation. And even if they were to be transformed into sensible regulations, any such effort must consider and accommodate the effects of new rules on users and companies beyond platforms, and beyond U.S. borders.

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[38] *See EFF and Coalition Partners Push Tech Companies To Be More Transparent and Accountable About Censoring User Content*, EFF (May 7, 2018), https://www.eff.org/press/releases/eff-and-coalition-partners-push-tech-companies-be-more-transparent-and-accountable; The Santa Clara Principles, https://santaclaraprinciples.org/.

[39] *Letting the Sun Shine In: Transparency and Accountability in the Digital Age* at 1, UNESCO (2021), https://unesdoc.unesco.org/ark:/48223/pf0000377231.

[40] *Accountability Report 1.0*, Internet Comm'n (2021), https://inetco.org/report.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Court affirm the District Court.

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Respectfully submitted,

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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 6,498 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify, that on November 15, 2021, I electronically filed the foregoing Brief of Amici Curiae Electronic Frontier Foundation and Protect Democracy Project Inc. was filed with the Clerk of the Court for the Eleventh Circuit Court of Appeals, using the CM/ECF system,

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 15, 2021 *s/ Christopher B. Hopkins, Esq.*