

No. 21-12355

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

NETCHOICE LLC, *et al.*,

Plaintiffs-Appellees,

v.

ATTORNEY GENERAL, STATE OF FLORIDA *et al.*,

Defendants-Appellants.

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

**BRIEF OF AMICUS CURIAE CENTER FOR DEMOCRACY &
TECHNOLOGY IN SUPPORT OF PLAINTIFFS-APPELLEES
NETCHOICE, LLC ET AL. AND URGING AFFIRMANCE**

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, amicus curiae the Center for Democracy & Technology states that it has no parent corporation and that, because it is a non-stock corporation, no publicly held corporation owns 10% or more of its stock. The undersigned certifies that, in addition to the persons and entities already identified in the CIPs in Appellants' brief and Appellees' brief, the following persons or entities are known to the filer to have an interest in the outcome of this case:

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Pursuant to 11th Cir. R. 26.1-1(a)(3), the undersigned also certifies there are no additional attorneys, persons, associations of persons, firms, partnerships, or

corporations that have an interest in the outcome of this particular case on appeal that were omitted from Appellants' and Appellees' certificates.

Dated: November 15, 2021

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Center for Democracy & Technology (CDT) respectfully submits this brief as amicus curiae in support of Plaintiffs-Appellees. CDT is a non-profit public interest organization. For more than twenty-five years, CDT has represented the public's interest in an open, decentralized internet and worked to ensure that the constitutional and democratic values of free expression and privacy are protected in the digital age. CDT regularly advocates in support of the First Amendment and protections for online speech before legislatures, regulatory agencies, and courts.

As an organization that supports internet users' free expression and other human rights, CDT has a strong interest in ensuring that online hosts of user-generated content can exercise their First Amendment right to moderate content in ways that protect and promote the interests of their users. Social media platforms commonly establish content policies that specify what speech users can and cannot post and enforce those policies to shape their users' online environment and experience or express a platform's own values. S.B. 7072 unconstitutionally restricts covered social media platforms' ability to create and enforce their content policies. While mistakes are inevitable when moderating large amounts of content, and social media platforms may at times develop and enforce content policies in a manner that subjects them to public criticism for lack of consistency, the First

Amendment does not permit the government to substitute its judgment for that of private speakers about what speech the speakers will or will not host. CDT writes to explain that S.B. 7072 violates the First Amendment because content moderation decisions are a quintessential exercise of editorial judgment, and that the law harms internet users and the public.

SOURCE OF AUTHORITY TO FILE

Counsel for Appellants and Appellees have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

RULE 29(a)(4)(E) STATEMENT

Amicus declares that: (i) no party's counsel authored the brief in whole or in part; (ii) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and (iii) no person, other than amicus, their members and their counsel, contributed money intended to fund the preparation or submission of this brief.

STATEMENT OF THE ISSUE ADDRESSED BY AMICUS

1. Whether the district court properly held that Plaintiffs-Appellees established a likelihood of success on the merits of their claim that S.B. 7072 violates the First Amendment and that the public interest weighed in favor of a preliminary injunction.

SUMMARY OF ARGUMENT

Online hosts of user-generated content make decisions about what content to allow or forbid, highlight or deprioritize, label, or otherwise act upon. These editorial judgments, which are known as “content moderation,” shape the values and messages a host wishes to convey, the types of speech in which users can engage, and the information users receive when using these services.

The First Amendment prohibits the government from interfering with those judgments, even—or especially—when they are controversial and government officials disagree with them. *See Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). The First Amendment’s protection for editorial control over speech is not limited to the traditional press, but extends to other private speakers’ decisions about what speech to include or exclude and how to arrange or distribute that speech. S.B. 7072 violates the First Amendment by interfering with covered social media platforms’ decisions about what content or accounts to host, their enforcement of their content policies, and their decisions about how to arrange and display content.

In addition, S.B. 7072 harms internet users and the public. Two provisions are especially detrimental to the public interest: S.B. 7072’s prohibition on suspending political candidates’ accounts for more than fourteen days and its prohibition on removing or labeling content by journalistic enterprises. These

provisions harm internet users and the public by preventing social media platforms from effectively responding to illegal, offensive, misleading, or graphic content posted by any user, including politicians, journalists, and everyday individuals, and thereby depriving users of the ability to choose platforms on which they can avoid such content.

For these reasons, CDT urges the Court to affirm the district court's grant of a preliminary injunction enjoining enforcement of S.B. 7072.

ARGUMENT

I. Content moderation requires online intermediaries to make editorial decisions about whether and how to host user-generated content.

Users of online services post millions or even billions of pieces of content every day. *See, e.g.*, Josh Constine, *How Big is Facebook's Data? 2.5 Billion Pieces of Content and 500+ Terabytes Ingested Every Day*, TechCrunch (Aug. 22, 2012);¹ Anmar Frangoul, *With Over 1 Billion Users, Here's How YouTube Is Keeping Pace With Change*, CNBC (Mar. 14, 2018) (reporting that more than 500 hours of new content are uploaded to YouTube every minute);² Staff, *Reddit's 2020 Year in Review*, Reddit (Dec. 8, 2020) (reporting that Reddit had 303.4

¹ <https://techcrunch.com/2012/08/22/how-big-is-facebooks-data-2-5-billion-pieces-of-content-and-500-terabytes-ingested-every-day/> [<https://perma.cc/N8RA-WQP5>].

² <https://www.cnbc.com/2018/03/14/with-over-1-billion-users-heres-how-youtube-is-keeping-pace-with-change.html> [<https://perma.cc/ZW6F-JH28>].

million posts and 2 billion comments in 2020).³ “Content moderation” is the set of policies, systems, and tools that online hosts of user-generated content use to decide what user-generated content or accounts to allow or forbid and how to display and arrange the content they host. See Hannah Bloch-Wehba, *Automation in Moderation*, 53 Cornell Int’l L.J. 41, 42, 48 (2020).

Though content moderation differs from host to host, it often involves the creation of a “content policy,” or set of rules about what content is and is not allowed on a service. Spandana Singh, *Everything in Moderation*, Open Tech. Inst. (July 22, 2019).⁴ A host’s decision about what content to allow on its service may be based on its judgment about what content is most useful or attractive to its users, the type of community a host wishes to build, or the values or messages a host wants to convey. Because content policies differ from service-to-service, users can choose between services based on the content policies that best fit their needs.

Through content policies, hosts control and shape the particular topics and environment available on their services. A host’s content policy may permit only content that discusses a particular subject matter, such as books. See *Community*

³ <https://www.redditinc.com/blog/reddits-2020-year-in-review/> [<https://perma.cc/88UY-GLNY>].

⁴ <https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/introduction> [<https://perma.cc/9B3K-JJDG>].

Guidelines, Goodreads (last visited Nov. 12, 2021)⁵ (“Goodreads is a community where you can discuss exactly what brought you here in the first place—books!”). It may limit the content permitted to create a particular tone or environment on its service, such as a professional atmosphere, *see LinkedIn Professional Community Policies*, LinkedIn (last visited Nov. 12, 2021)⁶ (explaining that LinkedIn wants its service “to reflect the best version of professional life” and that all content should be “professionally relevant”), or one appropriate for children, *see Community Guidelines*, Kinzoo (last visited Nov. 12, 2021)⁷ (prohibiting, on a private messaging app for kids and parents, the sharing of content that is inappropriate for children including “bad words or external links”). Some hosts’ content policies foster conversation among likeminded individuals and limit viewpoints that would be disruptive or unwelcome. For example, the true crime investigation web forum Websleuths prohibits “attacking or bashing a victim” or posting information about victims’ family members, friends, or others who have not been officially designated as suspects in a crime, as well as “[t]rolling or making posts with the intention of creating problems on the forums.” *Etiquette & Information*,

⁵ <https://www.goodreads.com/community/guidelines> [<https://perma.cc/XS3W-BPKC>].

⁶ <https://www.linkedin.com/legal/professional-community-policies> [<https://perma.cc/77G4-JGMH>].

⁷ <https://kinzoo.com/community-guidelines/> [<https://perma.cc/NU9Q-8XSE>].

Websleuths (last visited Nov. 12, 2021).⁸ Hosts’ decisions about their content policies allow diverse users to choose the online services that best serve their interests and needs.

Content policies also allow hosts to express their own values and their aspirations for their services. For example, the hyperlocal social networking service NextDoor believes that “[b]y bringing neighbors and organizations together, we can cultivate a kinder world where everyone has a neighborhood they can rely on.” *We Believe In the Possibilities Nearby*, NextDoor (last visited Nov. 12, 2021).⁹ It uses its Community Guidelines “to define the values of the community we want to build”: a place where users feel “a shared connection to a place—your neighborhood.” *Community Guidelines*, NextDoor (last visited Nov. 12, 2021).¹⁰ TikTok, a video-based social networking site, explains that its “mission is to inspire creativity and bring joy.” *Community Guidelines*, TikTok (last visited Nov. 12, 2021).¹¹ It uses its Community Guidelines “to maintain[] a

⁸ <https://www.websleuths.com/forums/threads/etiquette-information.65798/> [<https://perma.cc/5B2J-AAM9>].

⁹ <https://about.nextdoor.com/> [<https://perma.cc/GR9M-599Z>].

¹⁰ https://help.nextdoor.com/s/article/community-guidelines?language=en_US#guidelines [<https://perma.cc/LS3B-WWSE?type=image>].

¹¹ <https://www.tiktok.com/community-guidelines?lang=en> [<https://perma.cc/6HGW-786W>].

supportive environment for our community,” as it seeks to “build[] a global community where people can create and share, discover the world around them, and connect with others across the globe.” *Id.* The online parenting community BabyCenter describes its “philosophy” as “welcom[ing] all, no matter what stage of the parenting journey you are on” and says it “value[s] an honest and supportive exchange of ideas and experiences.” *BabyCenter Community Guidelines*, BabyCenter (last visited Nov. 12, 2021).¹² Its content rules are designed to further that philosophy by ensuring the site remains “a place where differences in philosophies, beliefs, opinions, and parenting styles are welcomed.” *Id.*

Other hosts may mold the environment of their services by setting a baseline content policy but empowering their users to create additional content rules that reflect users’ preferences and values. For example, the social media site Reddit consists of a network of communities called “subreddits” that are created and run by users. *Reddit Content Policy*, Reddit (last visited Nov. 12, 2021).¹³ While Reddit itself has a content policy, it also allows each individual subreddit to shape its own culture by establishing more specific rules. *Id.* Thus, a subreddit devoted to respectful discussions about the Catholic faith can bar content “[a]dvocating

¹² <https://www.babycenter.com/community-help-guidelines> [<https://perma.cc/39ZG-CFUR>].

¹³ <https://www.redditinc.com/policies/content-policy> [<https://perma.cc/T7K8-2AP4>].

leaving the Catholic Church or disobedience to her teachings or her leaders,” *see Catholicism: All about the Catholic faith*, Reddit (last visited Nov. 12, 2021),¹⁴ while a subreddit devoted to a popular television show can prohibit “serious spoilers” about the show in titles of posts, *see The Great British Bake Off*, Reddit (last visited Nov. 12, 2021).¹⁵

In addition to the creation of a content policy, content moderation also involves detection of content that violates that policy. The technical realities of hosting massive amounts of user-generated content shape hosts’ ability to detect violating content and enforce their content policies. Hosts typically use some form of user-reporting of unwanted or abusive content to detect violating content, through which users flag a post for review by the host. *See Singh, supra*. Some services also use automated systems to assist in moderating content, including for spam and malware, but also to detect more subjective rule violations such as hate speech or disinformation. *Id.*¹⁶ (describing the use of natural language processing to detect hate speech). And in some cases, hosts may have employees or contractors who manually review content for violations. Because automated

¹⁴ <https://www.reddit.com/r/Catholicism/> [<https://perma.cc/H8AU-F88U>].

¹⁵ <https://www.reddit.com/r/bakeoff/> [<https://perma.cc/P3MC-EXB3>].

¹⁶ <https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/how-automated-tools-are-used-in-the-content-moderation-process> [<https://perma.cc/4XGR-7YH7>].

methods of detection are imperfect, *see* Carey Shenkman, Dhanaraj Thakur, & Emma Llansó, *Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis*, Ctr. for Democracy & Tech. (May 2021),¹⁷ and hosts typically cannot manually review all posts before making them available to users, hosts will inadvertently host material that is contrary to their stated content policies. *See* evelyn douek, *Governing Online Speech: From “Posts-As-Trumps” to Proportionality and Probability*, 121 Colum. L. Rev. 759, 792 (Apr. 2021).

Once content is identified as potentially violating a host’s rules, the host must evaluate the content and enforce its content policy. Enforcement is not just a binary decision to either take down content or accounts or allow them to remain on a service; depending on how they have designed their service, hosts can take a wide variety of actions against violative content. *See* Eric Goldman, *Content Moderation Remedies*, Mich. Tech. L. Rev. (Forthcoming 2021);¹⁸ Mike Masnick, *Platforms, Speech and Truth: Policy, Policing and Impossible Choices*, Techdirt (Aug. 9, 2018).¹⁹ Some hosts enforce their content policies through their decisions

¹⁷ <https://cdt.org/wp-content/uploads/2021/05/2021-05-18-Do-You-See-What-I-See-Capabilities-Limits-of-Automated-Multimedia-Content-Analysis-Full-Report-2033-FINAL.pdf> [<https://perma.cc/5SRB-R2KJ>].

¹⁸ <https://ssrn.com/abstract=3810580> [<https://perma.cc/G58Z-JGAP>].

¹⁹ <https://www.techdirt.com/articles/20180808/17090940397/platforms-speech-truth-policy-policing-impossible-choices.shtml> [<https://perma.cc/VM74-6FSA>].

about how to arrange and display content. For example, some hosts may decrease the availability of a post that violates or comes close to violating their content policies by downgrading its visibility in search results or users’ feeds or restricting forwarding or sharing of it. Goldman, *supra*. Hosts may also use their own affirmative speech to enforce their content policies, such as by adding a fact-check or a warning before users may access certain content. *Id.*

Enforcement decisions can require hosts to make difficult editorial judgment calls, particularly when user-generated content falls into a “gray area” that defies easy categorization. See *Nuts & Bolts of Content Moderation: A Primer for Policymakers on Content Moderation*, Engine & Charles Koch Inst. at 5, 7–8 (Sept. 2019).²⁰ For example, a host that prohibits users from posting forged or altered information must decide how to apply this policy to a news outlet that posts a clip of a “deepfake” video of a political candidate as part of a story about how this technology can spread misinformation. *Id.* at 7.

In short, content moderation is the process by which a host makes editorial judgments about what speech to include or exclude from its service and how to arrange or display it. A host’s content policy and the enforcement of that policy

²⁰ <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5d9629c7a8e74b6a817a9116/1570122188740/Aug+2019+Nuts+and+Bolts+REPORT.pdf> [<https://perma.cc/A3J3-L732>].

allow it to shape users' experiences, the messages that it will display, and the values a host wishes to convey through its service.

II. S.B. 7072 violates the First Amendment and harms internet users and the public by interfering with hosts' content moderation practices.

A. The First Amendment protects the exercise of editorial discretion, including by speakers that host others' speech.

In *Miami Herald*, the Supreme Court established that the First Amendment prohibits government interference with a private speaker's editorial control and judgment, *i.e.*, the decisions a speaker makes about what to include or exclude in her speech and how to arrange or distribute that speech. 418 U.S. at 258 (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”). As Justice White explained in his concurring opinion, the First Amendment protects private speakers' control of their editorial judgments because any system that supplants it with “the heavy hand of government intrusion” would “make the government the censor of what the people may read and know.” *Id.* at 261 (White, J., concurring).

Although the *Miami Herald* Court recognized the First Amendment's strong protection for the exercise of editorial judgment as a result of a print newspaper's challenge to a Florida “right of reply” statute, *id.* at 244, this protection does not

depend on whether a speaker operates in a manner similar or identical to a newspaper. Indeed, as the Court recognized in that very case, “[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.” *Id.* at 256.

The First Amendment right to exercise editorial discretion extends to speakers who hosts others’ speech, to speakers who are far less selective about the speech they host than a typical print newspaper, and to speakers who have a less coherent or unified message than a traditional news outlet. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, for example, the Supreme Court held that the First Amendment protects a parade organizer’s decision about what marchers to accept, despite the fact that the organizer was “rather lenient in admitting participants” to its parade. 515 U.S. 557, 569–70 (1995). As the Court explained, “[A] private speaker does 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,” or by failing “to generate, as an original matter, each item featured in the communication.” *Id.* Lower courts have recognized that the First Amendment right to exercise editorial control and judgment extends to other speakers as well, including online intermediaries. *See Br. of Reporters Comm. for Freedom of the Press et al. as Amici Curiae in Support*

of Pls.’ Mot. For Prelim. Inj., *NetChoice, LLC et al. v. Moody*, 4:21-cv-00220-RH-MAF at 12–13 (June 14, 2021), ECF No. 71-1 (collecting cases).

S.B. 7072 impinges on covered social media platforms’ exercise of editorial control and judgment by interfering with their development and enforcement of their content policies. The First Amendment’s protection for a platform’s exercise of editorial judgment does not turn on whether the platform screens all of the third-party content it hosts or whether it makes decisions about what content to host based on viewpoint, like a newspaper.²¹ Rather, the relevant question is whether

²¹ While these factors are not determinative of the applicability of the *Miami Herald* standard to content moderation decisions by online hosts, some social media companies do screen all of the content they host before it is published, *see, e.g.*, Rachel Cericola, *Ring Neighbors is the Best and Worst Neighborhood Watch App*, N.Y. Times (June 3, 2021), <https://www.nytimes.com/wirecutter/blog/ring-neighbors-app-review/> [<https://perma.cc/5PDJ-QYTA>] (stating that all posts on the neighborhood watch app Neighbors “are ‘proactively moderated’ as [the company] makes sure they adhere to the company’s guidelines”), and many online intermediaries screen much if not all content using automated systems for detecting certain illegal content, like child sexual abuse material, *see* Justin Paine & John Graham-Cumming, *Announcing the CSAM Scanning Tool, Free for All Cloudflare Customers*, Cloudflare (Dec. 18, 2019), <https://blog.cloudflare.com/the-csam-scanning-tool/> [<https://perma.cc/6K77-2FV5>].

In addition, social media companies routinely make decisions about what content to host based on viewpoint. *See, e.g.*, *Dangerous Individuals and Organizations*, Facebook (last visited Nov. 12, 2021), https://transparency.fb.com/policies/community-standards/dangerous-individuals-organizations/?from=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards%2Fdangerous_individuals_organizations [<https://perma.cc/Y964-6W5S>] (prohibiting content that “praises” or “substantively supports” violent events or their perpetrators, including terrorist attacks or hate crimes, and content that “praises” or “substantively supports” certain hateful ideologies, such as Nazism and white supremacy); *Suicide & Self-Harm*, TikTok (last visited Nov. 12, 2021),

S.B. 7072 intrudes on a covered platform’s ability to choose what speech to host or not host and how to distribute and arrange the speech it hosts.

S.B. 7072 requires covered platforms to host content or accounts that they otherwise would not host in at least three ways. First, S.B. 7072 prohibits covered platforms from updating their content policies more than once every thirty days. Fla. Stat. § 501.2041(2)(c). By forbidding covered platforms from updating or refining their content policies at will, S.B. 7072 requires them to host content that they otherwise would not, at least for a time. Second, S.B. 7072 forbids covered platforms from barring for more than fourteen days an account by a person they know to be a candidate for political office in Florida²² or an account by certain journalistic enterprises,²³ based on the content of their publications or broadcasts.

<https://www.tiktok.com/safety/en/suicide-self-harm/> [<https://perma.cc/A2Y4-5BXS>] (prohibiting content promoting or glorifying suicide and self-harm).

²² For purposes of S.B. 7072, a “candidate” is defined as “[a] person who files qualification papers and subscribes to a candidate’s oath as required by law.” Fla. Stat. § 106.011(3)(e); Fla. Stat. § 106.072(1)(a).

²³ S.B. 7072 defines “journalistic enterprise” as “an entity doing business in Florida that:”

1. Publishes in excess of 100,000 words available online with at least 50,000 paid subscribers or 100,000 monthly active users;
2. Publishes 100 hours of audio or video available online with at least 100 million viewers annually;
3. Operates a cable channel that provides more than 40 hours of content per week to more than 100,000 cable television subscribers; or

Fla. Stat. § 106.072(2); Fla. Stat. § 501.2041(1)(c), (2)(j). This too requires platforms to host speech from accounts that violate their content policies and that they would permanently ban if not for the law. Third, S.B. 7072 prohibits covered platforms from deleting or adding an addendum to content by journalistic enterprises based on the content of their publications or broadcasts, Fla. Stat. § 501.2041(1)(b), (2)(j), requiring them to host content that violates their content policies and that they otherwise would remove and prohibiting them from expressing their own opinions about the information in the form of a fact-check or label.

S.B. 7072 also chills covered platforms from enforcing their content policies, particularly in difficult or close cases. It requires covered platforms to moderate content “in a consistent manner among its users on the platform.” Fla. Stat. § 501.2041(2)(b). However, S.B. 7072 does not define “consistency.” This vagueness, coupled with the prospect that platforms’ enforcement decisions will be subject to government scrutiny, will cause some covered platforms to decide not to enforce their content policies against content they determine violates their policies, out of fear that the government will determine that other policy-violating content

4. Operates under a broadcast license issued by the Federal
437 Communications Commission.

Fla. Stat. § 501.2041(1)(d).

on their service escaped their enforcement, leaving them open to a charge of “inconsistency.” Other platforms may adopt black-and-white rules that ignore context, moderate content in an overbroad manner, or both, in hopes of adequately capturing every potential violation. S.B. 7072’s vague requirement for “consistent” content moderation fails to understand the nature of this editorial activity and will interfere with covered platforms’ exercise of their editorial discretion.

At bottom, perfect enforcement of content policies at scale is impossible for any online service; every host will exhibit some kind of inconsistency, whether because of barriers to their ability to detect violating content, *see* Section I, *supra*, or the difficulty of appreciating every relevant element of context and nuance for a given post, *see* Mike Masnick, *It’s Not Personal: Content Moderation Always Involves Mistakes, Including Suspending Experts Sharing Knowledge*, Techdirt (June 1, 2021).²⁴ The effect will be to give government authorities unbridled discretion in deciding which platforms to punish and which ones not to punish.

Finally, S.B. 7072 impinges on covered platforms’ decisions about how to arrange and display content on their services. It prohibits covered platforms from using an algorithm during an election to make content by or about political candidates more or less prominent than other content in a newsfeed, a feed, a view,

²⁴ <https://www.techdirt.com/articles/20210527/09423646884/not-personal-content-moderation-always-involves-mistakes-including-suspending-experts-sharing-knowledge.shtml> [<https://perma.cc/7PC8-EGJV>].

or in search results and from using an algorithm during an election to limit or eliminate the exposure of such content to other users. Fla. Stat. § 501.2041(1)(e), (1)(f), (2)(h). It also prohibits covered platforms from eliminating or limiting the exposure of content by journalistic enterprises to other users of the platform based on the content of their publications or broadcasts. Fla. Stat. § 501.2041(1)(f), (2)(j). Thus, S.B. 7072 prohibits a covered platform from making certain decisions about how to display content from political candidates or journalistic enterprises based on its judgment that particular content is more or less interesting or useful to its users, or that it violates or nearly violates its content policy.

Social media platforms inevitably make mistakes when engaging in content moderation at scale and make enforcement decisions that are controversial, at times resulting in criticism that their content moderation policies are not being applied consistently. Civil society organizations, including CDT, have criticized hosts when they engage in content moderation in ways that harm free expression and other human rights. *See, e.g.,* Emma Llansó & Mallory Knodel, *CDT Joins Article 19, Other Human Rights Orgs in Urging Instagram for Transparency About Content Moderation Changes in India*, Ctr. for Democracy & Tech. (May 21, 2021).²⁵ However, the First Amendment forbids the government from

²⁵ <https://cdt.org/insights/cdt-joins-article-19-other-human-rights-orgs-in-urging-instagram-for-transparency-about-content-moderation-changes-in-india/> [<https://perma.cc/EP6D-CCQ9>].

substituting its judgment for the judgment of private speakers about what editorial policies to put in place, how to apply and enforce those policies, and, ultimately, what speech to host or not to host. The district court correctly enjoined S.B. 7072 because it is unconstitutional.

B. S.B. 7072 harms the public interest.

S.B. 7072 also harms internet users and the public. Two provisions in S.B. 7072 are especially detrimental to the public interest: the prohibition on barring political candidates' accounts for more than fourteen days and the prohibition on removing or labeling content by journalistic enterprises.

S.B. 7072's prohibition on a covered platform suspending the account of a person it knows to be a candidate for office in Florida for more than fourteen days applies no matter how severely or persistently the candidate violates a platform's content policy or even the law. For example, even if a candidate for office in Florida used a covered platform's service to send sexually explicit images to children,²⁶ S.B. 7072 would prohibit the platform from permanently banning or suspending the candidate's account for more than two weeks even if the platform

²⁶ See, e.g., Benjamin Weiser & William K. Rashbaum, *Anthony Weiner Pleads Guilty to Federal Obscenity Charge*, N.Y. Times (May 19, 2017), <https://www.nytimes.com/2017/05/19/nyregion/anthony-weiner-guilty-plea-sexting.html> [<https://perma.cc/U4PU-LCWQ>] (reporting on the sentencing of former congressman and New York mayoral candidate Anthony Weiner, who sent explicit messages to a fifteen-year-old girl over social media).

would do so for any other type of user. S.B. 7072 would also prohibit a covered platform from permanently banning or suspending for more than two weeks the account of a candidate for office in Florida who violates its content policy by, for example, promoting a conspiracy theory that the September 11 attacks were faked,²⁷ making racist statements,²⁸ or impersonating someone else²⁹—again, even if those types of violations would result in a ban of any other user’s account.

²⁷ See, e.g., Alice Workman, *This One Nation Candidate Suggested the 9/11 Terror Attacks Were Faked*, BuzzFeed News (Feb. 1, 2017), https://www.buzzfeed.com/aliceworkman/this-one-nation-candidate-suggested-the-911-terror-attacks-w?utm_term=.daZPwN5emO#.ibmMjPRWor [<https://perma.cc/FW8Q-QJJP>] (reporting that an Australian political candidate “posted and endorsed conspiracy theories about the September 11 terror attacks on his Facebook page”); see also *False News*, Facebook (last visited Nov. 12, 2021), <https://transparency.fb.com/policies/community-standards/false-news/> [<https://perma.cc/3ST6-APMU>].

²⁸ Emily Sullivan, *Twitter Bans GOP Contender for Racist Tweet Targeting Meghan Markle*, NPR (Feb. 13, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/13/585339969/twitter-bans-gop-contender-for-racist-tweet-targeting-meghan-markle> [<https://perma.cc/8F9Z-Y4MB>] (reporting that Twitter banned a political candidate who had previously tweeted anti-Semitic remarks after he tweeted a racist remark about American actress and then-soon-to-be Duchess of Sussex Meghan Markle, who is biracial); see also *Hateful Conduct Policy*, Twitter (last visited Nov. 12, 2021), <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [<https://perma.cc/494T-BXSH>].

²⁹ Nelson Oliveira, *Man Behind Viral Cormac McCarthy Parody Account that Twitter Suspended is California Gubernatorial Candidate*, N.Y. Daily News (Aug. 9, 2021), <https://www.nydailynews.com/snyde/ny-man-behind-viral-cormac-mccarthy-parody-twitter-california-governor-candidate-20210809-njj2iff5c5kfnlfuuhhvzjite-story.html> [<https://perma.cc/A4UB-8RCY>]; see also *Impersonation Policy*, Twitter (last visited Nov. 12, 2021), <https://help.twitter.com/en/rules-and-policies/twitter-impersonation-policy> [<https://perma.cc/7JX8-DX2E>]. Although the fake Cormac McCarthy Twitter

S.B. 7072’s prohibition on deleting or labeling content by certain journalistic enterprises would prevent a covered platform from removing or fact-checking posts by fake or misleading websites masquerading as news sites, which could qualify as “journalistic enterprises” under the law. See PolitiFact Staff, *Politifact’s Guide to Fake News Websites and What They Peddle*, PolitiFact (Apr. 20, 2017).³⁰ It would prohibit covered platforms from removing or fact-checking certain foreign purveyors of disinformation about American politicians and elections,³¹ undermining trust in our democracy and the right to vote. Sylvia Albert et al., *As a Matter of Fact: The Harms Caused by Election Disinformation*, Common Cause

account was a parody, S.B. 7072 would prohibit a covered social media platform from permanently banning candidate for office in Florida even if she intentionally and maliciously impersonated another person, including, for example, her opponent.

³⁰ <https://www.politifact.com/article/2017/apr/20/politifacts-guide-fake-news-websites-and-what-they/> [<https://perma.cc/HQ2F-HJZK>].

³¹ See, e.g., Zana Cimili & Raphael Satter, *In Macedonia’s Fake News Hub, Teen Shows AP How It’s Done*, Assoc. Press (Dec. 2, 2016), <https://apnews.com/article/12fc49ad3b694f35b5c4a08513ec8d33> (reporting that a Macedonian teenager “managed to gather more than 685,000 page views a week” for his “fake news operation”); see also Emma Llansó & Ben Horton, *Online Voter Suppression: How to Spot It & How to Counter It*, Ctr. for Democracy & Tech. at 4 (Oct. 2020), <https://cdt.org/wp-content/uploads/2020/10/2020-10-14-Voter-Suppression-paper-FINAL.pdf> [<https://perma.cc/5DPR-XCN7>] (noting that inaccurate information about elections may appear to come from a trusted source).

Educ. Fund at 5 (Oct. 2021).³² S.B. 7072 would also prohibit a covered platform from labeling graphic or disturbing news content, to the detriment of users who want a warning to prepare them before viewing such content or do not want to view such content at all. See Samuel Gibbs, *Facebook Tackles Graphic Videos and Photos With 'Are You Sure?' Warnings*, Guardian (Jan. 13, 2015),³³ Teddy Wayne, *The Trauma of Violent News on the Internet*, N.Y. Times (Sept. 10, 2016).³⁴

These provisions of S.B. 7072 harm internet users and the public. They prevent covered platforms from effectively responding to illegal, offensive, misleading, or graphic content. They undermine internet users' ability to control whether and how they engage with particular types of content online or to choose platforms that would enable them to avoid types of content they find objectionable. These provisions are both unconstitutional and contrary to the public interest.

³² https://www.commoncause.org/wp-content/uploads/2021/10/CC_AsaMatterofFact_FINAL_10.27.21.pdf [<https://perma.cc/L3S5-WLTA>].

³³ <https://www.theguardian.com/technology/2015/jan/13/facebook-tackles-graphic-videos-and-photos-with-are-you-sure-warnings> [<https://perma.cc/J3JW-TPVK>].

³⁴ <https://www.nytimes.com/2016/09/11/fashion/the-trauma-of-violent-news-on-the-internet.html> [<https://perma.cc/HG56-NPQJ>].

CONCLUSION

For the foregoing reasons, amicus respectfully urges this Court to affirm the district court's grant of a preliminary injunction enjoining enforcement of S.B. 7072.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations contained in Federal Rule of Appellate Procedure 29(a)(5) because, excluding the portions exempted by Rule 32(f), the brief contains 4,757 words, as determined by the Microsoft Word program used to prepare it.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: November 15, 2021

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CERTIFICATE OF SERVICE

I certify that on November 15, 2021, I electronically filed the foregoing brief with the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. Plaintiffs-Appellees and Defendant-Appellants are registered CM/ECF users, and service upon them will be accomplished by the appellate CM/ECF system.

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