No. 21-459

In The Supreme Court of the United States

JANE DOE,

Petitioner,

V.

FACEBOOK, INC.,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Texas

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER SUBMITTED ON BEHALF OF PRO-LIFE ACTION LEAGUE

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INTEREST OF THE AMICUS CURIAE[1]

Pro-Life Action League ("PLAL"), based in Chicago, Illinois, was founded by Joseph Scheidler ("Scheidler") and Ann Scheidler in 1980 with the aim of saving unborn children through non-violent direct action. A picture of a baby aborted late in pregnancy reminded Scheidler of his son, Eric's baby picture, and the abortion issue became personal for him. Shortly after the Supreme Court legalized abortion in *Roe v. Wade*, 410 U.S. 113 (1973), Scheidler became a full-time pro-life activist. PLAL was sued for alleged anti-trust and racketeering (RICO) violations by NOW and the abortion industry in 1986. The case lasted 28 years and led to three U.S. Supreme Court opinions, the last two in PLAL's favor by 8-1 and 8-0 margins.

PLAL is now led by Eric Scheidler. It conducts a broad spectrum of lawful educational and activist programs, including peaceful protest, sidewalk counseling of abortion-minded women regarding abortion alternatives and prayer, vigils, and Truth Tours. Among its other activities, PLAL seeks to advance its pro-life work and to encourage pro-life

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[1] Petitioner and Respondent consented to the filing of an amicus brief on behalf of Petitioner by the Pro-Life Action League ("PLAL"). Pursuant to S. Ct. Rule 37.2, PLAL states that the parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, PLAL further states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than PLAL or its counsel, has made a monetary contribution to this brief 's preparation or submission.

activism through the use of social media platforms, including Facebook and Twitter.

PLAL has been subject to censorship by both Facebook and Twitter. For example, notwithstanding the fact that PLAL paid significant amounts to Facebook in order to build a following, after the 2020 Presidential election, Facebook barred PLAL from publishing a Thanksgiving message that said simply, "Blessings to all the moms who are FEASTING FOR TWO this Thanksgiving!" Facebook also foreclosed PLAL from encouraging its supporters to support it on #GivingTuesday (December 1, 2020), which negatively impacted PLAL's fundraising in a significant way. Facebook further refused to allow PLAL to promote PLAL events such as its annual "Peace in the Womb" Christmas Caroling Day.

SUMMARY OF ARGUMENT

The exchange of ideas about matters of importance increasingly occurs online via social media platforms like Facebook. Unfortunately, free speech about even core ideas that receive First Amendment protection from government censorship is curtailed and manipulated by social media companies. In so doing, these social media companies rest heavily on the immunity granted to them by Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230 ("Section 230"). The current interpretation given to Section 230, however, is inconsistent with the text of Section 230 itself as well as the intentions of Congress at the time of its enactment.

More specifically, while the natural reading of Section 230's text protects an online platform, like Facebook, from liability for *another's* speech, the expansive interpretation of Section 230 that currently exists protects them from their *own* speech, as well as profit-motivated conduct (like encouraging young girls to form "connections" with sex traffickers). The effect is that Section 230 has been interpreted to allow social media companies to enjoy immunity for actions ranging from allegedly facilitating human trafficking to censorship of pro-life speech like that engaged in by PLAL. This broad and apparently unlimited immunity gives social media companies free rein to manipulate speech in the new public square that exists online. The current petition for writ of certiorari, though, affords the Court an opportunity to clarify the scope of Section 230's immunity and should therefore be granted.

ARGUMENT

Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("Section 230"), as interpreted by the Texas Supreme Court, permits Facebook to evade liability to which it would otherwise be subjected under generally applicable laws. Wielding a never expiring "get out of jail free card" in the form of Section 230, Facebook uses its power to manipulate the new public square created online by social media companies, without any fear for the consequences of its actions.

The time to rein in Section 230, by limiting it to its intended purposes and text and, consequently, the misconduct of social media companies, has arrived. Social media companies should be shielded

from liability only from the imposition of publisher liability in the instances actually targeted by the intention and text of Section 230.

I. THE NATION'S LEGAL TRADITION GENERALLY VALUES AND PROTECTS ROBUST DEBATE ON PUBLIC ISSUES.

"[Our Founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth[.]" *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). "[F]ree speech is 'essential to our democratic form of government.' Without genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish." *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (Thapar, J.) (quoting and citing *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018)). Thus, in the contest of ideas, "the remedy . . . is more speech, not enforced silence." *Whitney*, 274 U.S. at 377; *see Citizens United v. FEC*, 558 U.S. 310, 361 (2009) ("[I]t is our law and our tradition that more speech, not less, is the governing rule.").

The rights of both speakers and listeners must be protected for a true marketplace of ideas to exist. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyer." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (citations omitted).

It has also been long recognized that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *New York Times v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (quoting John Stuart Mill, *On Liberty* (Oxford: Blackwell 1947), at 15, and citing John Milton, *Areopagitica*, in *Prose Works* (Yale 1959), Vol. II, at 561).

Consistent with these principles, it is beyond dispute that the Constitution generally prevents the government from interfering with "the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see, e.g., Martin v. Struthers*, 319 U.S. 141, 143 (1943); *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear."). At least as to forums under governmental control then, the Constitution "maintain[s] a free marketplace of ideas, a marketplace that provides access to 'social, political, esthetic, moral, and other ideas and experiences.'" *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 583 (2011) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, (1969) and citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

Though these principles are usually interposed against attempts by governments to censor speech due to the State Action Doctrine, the American intellectual tradition sweeps far more broadly in its condemnation of censorship, even by private entities. "A state of things in which a large portion of the

most active and inquiring intellects find it advisable to keep the general principles and grounds of their convictions within their own breasts . . . cannot send forth the open, fearless characters, and logical, consistent intellects who once adorned the thinking world." John Stuart Mill, *On Liberty*, 32(1859; Batoche Books ed., 2001), *available at* https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf. "[T]he price paid for this sort of intellectual pacification is the sacrifice of the entire moral courage of the human mind." *Id.* ; *cf. Marsh v. Alabama*, 326 U.S. 501, 507 (1946) ("Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."); *Robins v. Pruneyard Shopping Center,* 592 P.2d 341, 347 (Cal. 1979) ("[S]ections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.").

Additionally, as recently noted by Justice Thomas in questioning the legitimacy of censorship by social media platforms, "our legal system and its British predecessor have long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring) (citing Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale J. L. & Tech. 391, 398, 403 (2020) and Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, Pt. 1, 11 Colum.

L. Rev. 514 (1911)). Justice Thomas further noted that social media platforms resemble common carriers in many ways and that there exists a "long history in this country and in England" whereby common carriers, as well as places of public accommodation, could be required to make themselves available to all members of the public. *Id.* at 1224 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part and dissenting in part) and *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980)).

II. INSTEAD OF PROMOTING FREE AND ROBUST DISCUSSION, SOCIAL MEDIA COMPANIES HAVE CENSORED TRADITIONAL POLITICAL SPEECH, THEREBY MANIPULATING PUBLIC DEBATE ON IMPORTANT ISSUES.

The public square has changed from what it once was. *Cf. Hague v. Comm. For Indus. Org.,* 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). With the advent of social media platforms like Facebook, Twitter, and YouTube, the locus for much—if not most—debate among citizens about issues of public significance now occurs in these online forums.

And the power that social media companies can exercise over what information the public receives is not insignificant. "Google is the gatekeeper between that user and the speech of others 90% of the time. It

can suppress content by deindexing or downlisting a search result or by steering users away from certain content by manually altering autocomplete results . . . Facebook and Twitter can greatly narrow a person's information flow through similar means." *Biden*, 141 S. Ct. at 1224 (Thomas, J., concurring).

Exploiting their status as private companies, Facebook and its fellow social media outlets have in recent years commenced a campaign of aggressive censorship. This is perhaps seen most prominently in Twitter's permanent banning of a sitting President of the United States from its platform. *See, e.g.,* Twitter, Inc., "Permanent suspension of @realDonaldTrump," Jan. 8, 2021, https://blog.twitter.com/en_us/topics/company/2020/suspension; *see also Biden*, 141 S. Ct. at 1220 ("Twitter has permanently removed [Donald Trump's] account from the platform."). Facebook followed suit by banning the former President for two years. *See* Nick Clegg, Facebook, "In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated if Conditions Permit," June 4, 2021, https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump/.

While dramatic and notable, the banning of a U.S. President is far from an isolated exercise of the power to censor by these social media titans. "'Facebook,' as Jeffrey Rosen has said, wields 'more power [today] in determining who can speak . . . than any Supreme Court justice, any king or any president.'" Marjorie Heins, *The Brave New World of Social Media Censorship*, 27 Harv. L. Rev. F. 325 (June 20, 2014), https://harvardlawreview.org/

2014/06/the-brave-new-world-of-social-media-censorship/#_ftnref4 (quoting Miguel Helft, *Facebook's Mean Streets*, N.Y. Times, Dec. 13, 2010, at B1.); *see, e.g., Prager Univ. v. Google LLC*, 951 F.3d 991, 995-96 (9th Cir. 2018) (permitting conservative educational platform to have its content restricted by YouTube, a subsidiary of Google, LLC). In a 2016 article, it was reported that a former worker at Facebook, who had been employed by the platform as a so-called "news curator," regularly observed manipulation of news content on the site. Michael Nunez, "Former Facebook Workers: We Routinely Suppressed Conservative News," *Gizmodo*, May 9, 2016, https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006. "Among the deep-sixed or suppressed topics on the list: former IRS official Lois Lerner, who was accused by Republicans of inappropriately scrutinizing conservative groups; Wisconsin Gov. Scott Walker; popular conservative news aggregator the Drudge Report; Chris Kyle, the former Navy SEAL who was murdered in 2013; and former Fox News contributor Steven Crowder." *Id.*

As previously discussed, PLAL has had its own experiences with censorship by social media entities. See *supra*, pp. 1-2. PLAL thus urges that Section 230 be returned to its proper, more limited, scope.

III. SECTION 230 HAS PERMITTED SOCIAL MEDIA SITES TO EXERCISE BAD FAITH DUE TO COURTS GRANTING THEM IMMUNITY FAR GREATER THAN INTENDED BY CONGRESS.

While touting their status as private companies to defend their censorship, the truth is that social

media platforms rely heavily on the governmental beneficence enshrined in Section 230 immunity (as currently interpreted) to silence expression of certain viewpoints.

There are two major aspects to Section 230 immunity. On the one hand Section 230(c)(1) grants protection from being treated as a publisher of information "provided by *another* information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). On the other hand, Section 230(c)(2) protects against civil liability for voluntary actions taken in "good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" and for providing "the technical means to restrict access to [such] material." *Id.* at 230(c)(2)(A)-(B); *see Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (statement of Thomas, J., respecting the denial of certiorari). Last year, Justice Thomas pointed out that the interpretation given to Section 230 by the lower courts has departed radically from the text and intent of the statute Congress enacted in 1996. "Taken together, both provisions in §230(c) most naturally read to protect companies when they unknowingly decline to exercise editorial functions to edit or remove third-party content, § 230(c)(1), and when they decide to exercise those editorial functions in good faith, § 230(c)(2)(A). But by construing § 230(c)(1) to protect any decision to edit or remove content, . . . courts have curtailed the limits Congress placed on decisions to remove content." *Id.* at 16-17 (internal citation omitted). PLAL, like so many private citizens, organizations, elected officials, political candidates, and others, have been restricted in their

online speech because of the unfettered discretion of social media platforms to censor at will. This negatively affects not only the speaker, but the potential listeners as well, and the ultimate "marketplace of ideas," *Sorrell*, 564 U.S. at 583, is distorted into something other than a place for meaningful discourse and dialogue.

Moreover, while social media sites suppress core First Amendment speech, like that of PLAL, "[a]n overbroad reading of the [Communications Decency Act] has given online platforms a free pass to ignore illegal activities, to deliberately repost illegal material, and to solicit unlawful activities while ensuring that abusers cannot be identified." Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 413 (2017).

The petition before the Court concerns just such allegations—facilitating human trafficking. Granting the petition would thereby allow the Court to return the focus of Section 230 jurisprudence to protecting online platforms from liability for *another's* speech, but not their *own*. *See Malwarebytes*, 141 S. Ct. at 14 ("Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content."). Such a determination would be an important step toward protecting the modern public square that exists online.

Amicus PLAL, therefore, respectfully asks this Court to grant certiorari to consider and articulate legal principles limiting the scope of Section 230 immunity for social media platforms like Facebook consistent with its text and Congressional intent.

CONCLUSION

For the above-stated reasons, this amicus respectively submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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