No. 22-277

In the Supreme Court of the United States

ATTORNEY GENERAL, STATE OF FLORIDA, ET AL.,
***Petitioners*,**
v.
NETCHOICE, LLC, D.B.A. NETCHOICE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF ALAN B. MORRISON IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The petition presents two questions based on the merits of the First Amendment claim raised by respondents. However, this case is only at the preliminary injunction stage and, as this brief shows, there are additional serious preemption and Dormant Commerce Clause reasons why the Florida statutes at issue here cannot be sustained. Accordingly, the question presented should be:

Did the Court of Appeals abuse its discretion in affirming most, although not all, of the preliminary injunction issued by the district court?

In addition, the Court should direct the parties to brief the preemption claim under 47 U.S.C. § 230 and the applicability of the Dormant Commerce Clause to the statutes at issue in this case, as raised by respondents and discussed in this amicus brief.

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INTEREST OF THE AMICUS CURIAE[1]

Alan B. Morrison is the amicus curiae. He is an associate dean at the George Washington University Law School where he teaches constitutional law. He has no economic or other interest in this case or the related case involving the Texas law that is similar to the Florida laws at issue in this case, and which was upheld by a divided Fifth Circuit. *NetChoice, L.L.C. v. Paxton,* 2022 WL 4285917 (5th Cir. 2022). He agrees with respondents and the Eleventh Circuit that there are significant First Amendment problems with the Florida laws, as well as any laws that Congress might enact either mandating or prohibiting certain Internet postings. However, he is taking no position on those issues except to agree that the constitutionality of the Florida law, insofar as it dictates to respondents and major Internet platforms their policies regarding the contents of their websites, is an issue worthy of full discussion and debate. *See* Gregory Dickinson, *Big Tech's Tightening Grip on Internet Speech,* 55 Ind. L. Rev. 101 (2022).

However, the effect of the Florida laws at issue in this case are not limited to Florida

[1] Notice pursuant to Rule 37.2(a) was provided to counsel of record for all parties more than 10 days before the brief in opposition is due, and counsel for all parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no party or other person has made a monetary contribution intended to fund the preparation or submission of this brief.

residents. Laws that decide what must be posted on the Internet do not respect state boundaries, and therefore the State of Florida has effectively decided these major policy and constitutional issues for the entire country. If this Court agrees with the Eleventh Circuit that the First Amendment prohibits all governments from regulating the content of the Internet, as Florida has done here, the debate will cease. On the other hand, if, as amicus urges, the Court were to examine these laws for their consistency with 47 U.S.C. § 230 and the Dormant Commerce Clause, no matter what the result, the debate could continue, this time before Congress, the body that represents everyone, unlike the Florida and Texas legislatures. This brief is being filed to assure that both the section 230 claim and the Dormant Commerce Clause issue are presented to the Court for its consideration.

INTRODUCTION AND SUMMARY OF ARGUMENT

When a question arises as to whether an Internet post should remain or be taken down, there are three mutually exclusive options. The host can decide on its own; the government can mandate that it be taken down; or the government can mandate that it must remain posted. With respect to the postings covered by the Florida law, Florida has decided that they must remain available to the public over the objection of the website's host. The problem is that Florida's choice is not limited to Florida, but binds everyone in the United States because access to platforms on the

World Wide Web does not respect state or even national boundaries. The same preclusive effect would apply if Florida had made the opposite choice by mandating that the same or some other material must be taken down.

The national impact of these decisions explains why only Congress can, consistent with our system of federalism and the First Amendment, make the choice on what can and cannot be posted on the Internet. And that is why this Court should direct the parties to brief the issue of the possible preemptive effect of 47 U.S.C. § 230 and whether the Dormant Commerce Clause and decisions such as *Wabash, St. L & P. Ry. Co. v. Illinois,* 118 U.S. 557 (1886), preclude Florida from imposing its values on what must (or must not) be posted on the Internet. No one doubts the authority of Congress under the Commerce Clause in Article I, section 8, clause 3 to regulate the Internet, subject to the First Amendment. If the Court grants the petition, the first question should be whether Florida also has that authority, and, in the view of amicus, the answer to that question is that Florida clearly does not have that power.

The petition and the opinions below explain the relevant Florida statutes in detail. For purposes of evaluating the section 230 and Dormant Commerce Clause arguments, only a few elements of the laws need to be restated. Florida objects to the practices under which certain private Internet platforms decide to "censor" certain political expressions posted by individuals or news organizations. Those laws broadly define the prohibited practices so that the hosting entities

cannot evade them. The effect of those laws is that Internet hosts must continue to include on their websites the posts covered by these laws even though that the host's own standards requires it to take them down. And those mandatory postings continue for citizens of every other state, including in those states where the legislature might seek to require the host to take down the very posts that Florida insists must continue to be available. The result is that that Florida has established the law of Internet postings for the covered materials for every state, but that is a role that only Congress may undertake under the Constitution. Which is just what Congress did in enacting the "must-carry" provisions for the cable television industry that were upheld in *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997).

The exclusive role for Congress in the interstate regulation of the Internet is based on the Dormant Commerce Clause as evidenced by this Court's decision in *Wabash, supra.* The Court there struck down an Illinois law that forbad discrimination in rates charged by a railroad because the law extended to interstate commerce, which this Court held Illinois had no power to regulate. Subsequent to *Wabash,* this Court reached similar results on similar facts in *Covington & C Bridge Co. v. Commonwealth of Kentucky,* 154 U.S. 204 (1894), and *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of the County of Hudson,* 234 U.S. 317 (1914).

In the Internet era, *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997),

is illustrative of how the Dormant Commerce Clause imposes limits on the power of the states seeking to control the content of Internet websites. In that case, New York sought to criminalize any Internet posting that "depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors," *id* at 163, and the court granted a preliminary injunction against enforcing the law, relying on the Dormant Commerce Clause. It did so because New York had impinged on the rights of other states to make their own decisions and the authority of Congress to enact a rule for everyone. Other cases involving different statutes dealing with statements made on the Internet have taken a narrower view of the impact of the Dormant Commerce on those laws, but even they have recognized the potential for overreaching by the states in this area because of the impact of their laws on residents of other states with different views on what should and should not be allowed or be required on the Internet.

Section 230 supports the conclusion that Congress intended, with limited exceptions, that website hosts, not the government, including a state government, should determine what may be posted on their websites. It is a closer question whether the operative language of section 230 is specific enough to overcome the presumption against preemption and forbids Florida from enforcing some or all of the provisions at issue here. At the very least, its statement of policy in subsection 230(b)(2) – "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"

– strongly reinforces the Dormant Commerce Clause argument and the dangers of state regulation.

Because the Dormant Commerce Clause and section 230 provide additional support for the preliminary injunction granted by the Eleventh Circuit, they are further reasons why the judgment below should be affirmed.

ARGUMENT

IF THE COURT GRANTS THE PETITION, IT SHOULD DIRECT THE PARTIES TO BRIEF THE APPLICABILITY OF SECTION 230 AND THE DORMANT COMMERECE CLAUSE AND SHOULD AFFIRM THE PRELIMINARY INJUNCTION ENTERED BELOW.

The petition focuses solely on the First Amendment claims, and because this brief is being prepared before respondents are expected to be file, amicus does not know if respondents will rely on section 230 although the district court agreed that section 230 supported its preliminary injunction. Pet App 79a-81a. In Count IV of their complaint,[2] respondents relied on the Dormant Commerce Clause, but the district court did not discuss that claim, and respondents did not rely on it in their briefing in the Eleventh Circuit. However, because both claims are presented in this case, and because respondents and this Court may rely on any legal theory presented that supports the grant of the preliminary injunction below, if the Court grants

[2] 2021 WL 2176255 (N.D.Fla. 2021) (count IV).

the petition, it should direct the parties to brief both the section 230 and the Dormant Commerce Clause issues.

The district court agreed with respondents that section 230 preempted Florida's efforts to forbid censoring certain postings, but the court of appeals did not reach that contention. Pet App 17a, note 4. The Eleventh Circuit recognized that courts should ordinarily decide potentially dispositive statutory issues before reaching constitutional claims. Indeed, in *Lowe v. SEC,* 472 U.S. 181 (1985), this Court found for the petitioners on statutory grounds even though their three questions presented were based solely on the constitution.[3] Here, the court of appeals concluded that, because the invalidity of the Florida statutes under section 230 would be the result of the operation of the Supremacy Clause in Article VI, section 2, and because both grounds were constitutional, there was no basis to prefer section 230 over the First Amendment.

That was error. If this Court agrees that section 230 is a barrier to enforcing these Florida laws, Congress will have an opportunity to enact a law that would cure any defect. The same logic applies to the Dormant Commerce Clause claim, which respondents also raised in their complaint, but which was not litigated below. As in all Dormant Commerce Clause cases, like all preemption cases, if Congress disagrees with this Court, it can legislate to overcome the objection.

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[3] Brief of Petitioners, 1984 WL 565502. Although the decision in *Lowe* was unanimous, three Justices concurred solely on First Amendment grounds. 472 U.S. at 211.

But if this Court accepts the First Amendment challenge, the door is closed to further deliberation in Congress or elsewhere, which is why this Court should first consider these non-First Amendment arguments under section 230 and the Dormant Commerce Clause. Only if it concludes that Florida has the legal authority to regulate content on the Internet, should it consider whether the First Amendment is an absolute bar to legislation mandating what may, must, or may not be carried on the Internet.

There can be no doubt that the Florida law, if upheld, will bind the rest of the country to its decision that certain materials may not be taken down by the hosts of the websites of the major social media in this country. As a practical matter, it would be the same as if Congress passed such a law under its Commerce Clause powers, except that only the Florida legislature and its Governor will have participated in the process. There is also no doubt that the Florida law has a substantial effect on interstate commerce, and so it must pass muster under the Dormant Commerce Clause and this Court's cases applying that doctrine.

Three cases dating back over one hundred years demonstrate why the Florida law is unconstitutional because of its effects well beyond Florida's borders. In *Wabash, St. L & P. Ry. Co. v. Illinois,* 118 U.S. 557 (1886), the state law forbad discrimination in railroad rates, and the railroad had charged significantly different rates to different shippers for transporting goods from two nearby places in Illinois to New York City. Relying on the Dormant Commerce Clause, this Court

ruled that Illinois had exceeded its authority by setting interstate rates to which other states might have objected even though there was no indication that any other state had set conflicting rates. This case presents a much stronger one than *Wabash* because no state other than Texas has imposed any similar "must carry" requirement, and yet, because of the all-or-nothing feature of posting on the Internet, Florida has made the law for the entire country.

Following *Wabash*, this Court held in *Covington & C Bridge Co. v. Commonwealth of Kentucky*, 154 U.S. 204 (1894), that Kentucky could not unilaterally set the tolls on a private bridge that connected it with Ohio, absent consent of the owner and Ohio. Once again, a unilateral action by a state that effectively bound another state was held to exceed its powers. A similar outcome occurred in *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of the County of Hudson*, 234 U.S. 317 (1914), where one state was prevented from unilaterally setting rates for a ferry running between it and another state. In explaining the result, the Court stated that the "principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive." *Id.* at 330.

If there were ever a subject on which national uniformity is necessary, the rule on whether an Internet posting may, may not, or must be taken down is it, which is why Florida's law cannot stand under this line of cases. Indeed, even when it was physically possible for a railroad to

comply with Arizona's rule and also abide by less restrictive rules in other states (unlike this and many other Internet cases), this Court relied on the Dormant Commerce Clause to set aside an Arizona law that placed a limit on the length of trains traveling across many states, which required trains to decouple when they passed through Arizona. *Southern Pac. Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761 (1945).

Moreover, this Court has under advisement in *National Pork Producers Council v. Ross,* No. 21-468, (argued Oct. 11, 2022), a Dormant Commerce Clause challenge based on the extraterritorial impact of California's law regulating the conditions under which pigs are bred for all pork sold in California. In contrast to Florida's law, under which the host has no choice but to maintain the post, out-of-state pork producers would have the "choice" between incurring very significant costs or not selling in California. They allege that those costs are excessive in light of the benefits of the law, and therefore the law is also invalid under *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970).

The Internet case that most closely resembles this one (and was cited by respondents in their complaint) is *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). New York sought to prevent certain sexual materials that were alleged to be harmful to minors from being posted on the Internet. The statute, which was specifically added to include Internet posts, was not directed at website hosts, but rather at persons who posted on their own websites or elsewhere. The district court in *American*

Libraries granted a preliminary injunction, which New York did not appeal, and its opinion contains many insightful statements regarding Dormant Commerce Clause challenges to efforts by states to regulate Internet content. A few seem particularly relevant to this case:

- courts have long held that state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause. *Id.* at 169, citing *Wabash*.

- The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global, cooperation. Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations. Without the limitation's imposed by the Commerce Clause, these inconsistent regulatory schemes could paralyze the development of the Internet altogether. *Id.* at 181, Citing *Wabash*.

- Regulation on a local level, by contrast, will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities. *Id. at* 182.

In one sense *American Libraries* is the opposite of this case. New York had mandated that certain materials must be removed, but here Florida seeks to require hosts to retain materials on their websites that the host wants to take down. However, for Dormant Commerce Clause purposes, they present almost the same problem because in both cases the state is seeking to usurp a function for itself that belongs to all of the states by mandating conduct that decides the post or not post question for everyone. Both are like the interstate rate-setting context where it did not matter whether the state sought to impose rates that are lower or higher than other states, or to leave the matter to the free market: states simply have no interstate rate-setting authority where the effect is to lock other states out of the process.

Jack L, Goldsmith & Alan O. Sykes in their article, *The Internet and the Dormant Commerce Clause,* 110 Yale L.J. 785 (2001), take issue with some of the factual assertions and certain statements in *American Libraries,* but they recognize the potential Dormant Commerce Clause problems that have arisen and will continue to arise when states attempt to regulate content on the Internet. The authors focused in particular on laws that ban the posting of sexual materials directed at minors and that require disclosures that mass emails are advertisements. Among their concerns are that *American Libraries* incorrectly concluded that there were not technical means by which out-of-state viewers or recipients could be excluded, thereby limiting the effect of the law to in-state residents, and significantly diminishing the Dormant Commerce Clause problem. But

nothing in that article undermines the interstate concerns in this case where there are no work-arounds to lessen the impact of Florida's requirement that social media hosts must post materials that contradict their own policies and, in some cases, the policies and laws of other states.

Other opinions have raised questions about some statements in *American Libraries* and suggested that it may be too broad in parts. But those cases, such as *Hatch v. Superior Court*, 80 Cal.App.4th 170, 94 Cal.Rptr.2d 453 (Cal. Ct. App. 2000), are readily distinguishable on two somewhat overlapping grounds. First, the defendant in *Hatch* was charged under a general statute making it a crime to send sexually-oriented materials to a minor with intent to seduce the recipient. Both parties there were in California, and the defendant used the Internet to communicate with an underage woman. The court declined to strike down that general law on Dormant Commerce Clause grounds, finding that, as applied to those facts, it raised no constitutional concerns. Second, the statute did not mandate that any Internet host do or not do anything. Rather, it was directed at the sender (poster) not the host, which makes it readily distinguishable from the Florida statutes at issue in this case.

In *National Federation of the Blind v. Target Corp.,* 452 F.Supp.2d 946 (N. D. Cal. 2006), the complaint alleged that both federal and state disability laws were violated because Target's website was inaccessible to the blind. In the course of its opinion, the district court expressed concerns that some statements in *American Libraries* were

too broad, although in the end it postponed ruling on the Dormant Commerce Clause defenses until there was a more complete record. Two aspects of that case make it distinguishable from this one. There was a federal law that was adopted by the state laws, thereby minimizing federal-state conflicts. Second, the plaintiffs alleged that there were technical means by which the remedies that the plaintiff sought could be limited to California residents who sought to use Target's website. Neither of those factors applies to this case. Thus, while some judges have questioned some aspects of *American Libraries,* no case has questioned its conclusion that state efforts to regulate the content of what must be posted on the Internet raise serious questions under the Dormant Commerce Clause and, in most cases, are unconstitutional.

A forthcoming article by Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 Texas L. Rev 101 (2023), argues that geolocation can provide a technological solution where state laws impact parties who are located outside the state by confining the reach of the law to interactions among instate parties. Whether that solution will make it possible for hosts not to violate state law, and for only in state parties to be affected can only be established at trial, and there has been none in this case. In any event, the Florida law makes no effort to limit its reach to Floridians attempting to communicate with Floridians: its rules result in everyone in the United States, and so a geolocation solution will not solve the problem.

There is another interstate problem with the Florida statute that underscores why geolocation will not eliminate the dormant commerce clause problem. The law only allows persons who are users to demand that a host not censor that person's posting, which includes putting back up materials that have been taken down. The term user is defined in Fl Stat. § 501.2041(1)(h) and is limited to a person "who resides or is domiciled in this state and who has an account on a social media platform." Pet App 99a. At first glance, the limit of the law to Floridians might appear to be an effort to narrow its reach and thus make it less of an interference with the lives or businesses of non-residents. But because only Florida users can demand that a host must comply with the statutory obligations under Fl Stat. § 501.2041(2)(c)-(i), Pet App 100a-101a, the result is that Florida residents can prevent censorship of their political speech, whereas non-residents cannot.

Another feature of the Florida statutes makes this resident vs non-resident distinction of considerable potential significance. Fl Stat § 106.072(2), Pet App 107a, provides special protections for "candidates" for elected office by forbidding social media hosts from "deplatforming" them during an election campaign, a term which means to "permanently delete or ban a user or to temporarily delete or ban a user from the social media platform for more than 14 days." Fl Stat. § 501.2041(1)(c). Pet App 97a. In addition, the term candidate is defined in Fl Stat § 106.011(3)(e) in a broad way, but to determine its scope, it is necessary to examine the definition of "election"

(which is used to define candidate) in Fl Stat § 106.011(7):

> "Election" means a primary election, special primary election, general election, special election, or municipal election **held in this state** for the purpose of nominating or electing candidates to public office, choosing delegates to the national nominating conventions of political parties, selecting a member of a political party executive committee, or submitting an issue to the electors for their approval or rejection (emphasis added).

The emphasized phrase appears to limit the prohibition to Florida elections, but that would still include presidential primary and general elections, such as those that will occur in 2024. Two prominent Florida residents – the current Governor and a former President – are at least undeclared candidates, and because they are users under the definition in subsection (1)(h) above, they – but not their opponents, including President Joe Biden if he runs – could take advantage of the ban on deplatforming candidates. Whether this discrimination against non-residents of Florida is an independent basis for striking down these laws, in whole or in part, it once again underscores the constitutional dangers of allowing individual states to legislate with respect to the content on the Internet.

CONCLUSION

If the Court grants the petition, it should direct the parties to brief the application of the Dormant Commerce Clause and section 230 to the Florida statutes at issue in this case, and on the merits it should affirm the preliminary injunction entered by the Eleventh Circuit against petitioners.

Respectfully submitted,

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