No. 22-375

In The
Supreme Court of the United States

WORD OF GOD FELLOWSHIP, INC.,
d/b/a DAYSTAR TELEVISION NETWORK,

Petitioner,

v.

VIMEO, INC., VHX CORPORATION,
and LIVESTREAM, LLC,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of New York, Appellate Division

BRIEF IN REPLY

JOHN H. CAYCE
Counsel of Record
MICHAEL D. ANDERSON
CAITLYN E. HUBBARD
JACOB A. DEKERATRY
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
john.cayce@kellyhart.com
michael.anderson@kellyhart.com
caitlyn.hubbard@kellyhart.com
jacob.dekeratry@kellyhart.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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Vimeo's Brief in Opposition presents a textually-detached, logically unsound, and dangerous legal theory that underscores the need for this Court's review. The Court should grant this petition to enforce the straightforward interpretation of 47 U.S.C. § 230 that Congress intended—an interpretation necessary to prevent the illegitimate censorship of viewpoint-based speech on matters of public concern under the guise of "misinformation" when the speech is neither facially obscene, immoral, excessively violent, nor harassing.

ARGUMENT

I. The petition presents an issue of indisputable national importance.

The stakes of online censorship are patent and profound. Vimeo's unbounded interpretation of Section 230(c)(2)(A) extends a government-endorsed privilege to providers that allows them to suppress "objectionable" viewpoints in the modern public square. Resp. at 11. Thus "at stake is viewpoint discrimination by vast companies that are akin to common carriers, whose operations function as public forums, and that are carrying out government speech policy." Philip Hamburger, The Constitution Can Crack Section 230, Wall St. J. (Jan. 29, 2021), https://www.wsj.com/articles/the-constitution-can-crack-section-230-11611946851. If private actors enjoy the government's blessing to remove "misinformation," the result would be deputized censorship that allows tech companies to dictate and shape public opinion. This fear is neither fanciful nor

ill-founded. *E.g.*, Matt Taibbi (@mtaibbi), Twitter, *The Twitter Files, Part 6: Twitter, the FBI Subsidiary* (Dec. 16, 2022, 3:00 PM), https://twitter.com/mtaibbi/status/1603857534737072128; Nicole Sganga, *What is DHS' Disinformation Governance Board and why is everyone so mad about it?*, CBS News (May 6, 2022, 1:33 PM), https://www.cbsnews.com/news/what-is-dhs-disinformation-governance-board-and-why-is-everyone-so-mad-about-it/.

Yet, under Vimeo's self-serving theory, speakers have no avenue to avoid this grave and consequential act of censorship. Indeed, Vimeo contends that Section 230 immunity extends *even to* breach of contract claims, irrespective of the contract's terms. Adopting Vimeo's *Ulysses* example, Vimeo's interpretation of Section 230 would allow a provider to contractually agree to host James Joyce's *Ulysses*, subsequently remove the work on the ground that it is "obscene," and then enjoy immunity under the statute for breaching its agreement. The notion that Congress intended such an outcome is nonsense.

The frivolousness of Vimeo's attempts to minimize the gravity of the petition are exposed when viewed against this realistic backdrop. The issues are obviously *not* "practically *de minimus*";[1] they are integral to the free speech and debate necessary to a well-functioning society.[2]

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[1] Resp. at 11.

[2] Daystar has not forfeited these arguments. Daystar has consistently maintained that Vimeo is not entitled to immunity under Section 230. App. 6. Vimeo's contention that Daystar

II. The petition presents an opportune vehicle for review.

A. The petition allows for a comprehensive review of the law governing online censorship.

The petition affords the Court an opportunity to address a range of consequential issues involving "Big Tech" censorship alongside other pending petitions that implicate similar interrelated issues. *See NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022), *pet. filed* (No. 22-555); *NetChoice, LLC v. Attorney Gen., Fla.*, 34 F.4th 1196 (11th Cir. 2022), *pet. filed* (No. 22-277). While the *NetChoice* cases tangle indirectly with Section 230's terms, this case raises them directly, and all three cases require the statute's reasoned construction.

Vimeo seeks to diminish the petition's relationship to the *NetChoice* cases, arguing that the latter are merely "conflicting decisions on whether state laws restricting platforms' editorial decisions over user speech abridge the First Amendment." Resp. at 11. But this argument is seriously misleading. While it is true that the *NetChoice* cases involve state laws prohibiting viewpoint-based censorship, the providers argue in those cases that Section 230(c)(2)(A) confers a "free-standing right to censor" based on "viewpoint" because

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somehow waived this issue—or subsidiary arguments that support it—contravenes this Court's precedent. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994).

of the term "otherwise objectionable." *See NetChoice*, 49 F. 4th at 468. According to the providers, this supposed federal privilege either reinforces that their censorship is protected speech, or at a minimum preempts contrary state laws. *See id.* at 468-69 & n.23.

While neither circuit court reached the providers' preemption claims, *both* courts scrutinized Section 230(c)(2)(A) to support their conflicting constitutional outcomes. The Fifth Circuit rejected the providers' claimed "unqualified right" to censor under Section 230(c)(2)(A)—the same argument that Vimeo champions here:

> To the extent the Platforms try to extract an unqualified censorship right from the phrase "otherwise objectionable" in isolation, that's foreclosed by the Supreme Court's repeated reliance on the canon of *ejusdem generis*.

Id. The Eleventh Circuit, on the other hand, endorsed an opposite reading as "strong evidence" that the providers "are not common carriers with diminished First Amendment Rights." *NetChoice*, 34 F.4th at 1221 (referencing providers' statutory right to "restrict access to a plethora of material that they might consider 'objectionable' ").

Vimeo's contention that "*NetChoice* is a First Amendment case, not a Section 230 case," Resp. at 13, is therefore misguided. Section 230 is plainly part and parcel of the Fifth and Eleventh Circuit's analyses—and additional "Section 230 question[s] lurk[ ] in the background[.]" Reply at 3, *Moody v. NetChoice, LLC*,

No. 22-277 (U.S.). Should this Court address the high stakes of online censorship and uphold the state statutes, the providers' Section 230 preemption defense waits in the wings. The petition allows the Court to timely address the Section 230 issues now because it raises them directly.

B. The petition squarely raises the proper interpretation of Section 230(c)(2)(A).

Vimeo seeks to de-emphasize the petition's Section 230 issues by recharacterizing the First Department's holding. Resp. at 15-16. Contrary to Vimeo's suggestion, the petition raises questions of statutory, *not* contract, construction.

Vimeo removed Daystar's Vaccine Programming because it viewed the Programming as "false or misleading" and then claimed immunity under Section 230. Resp. at 18. Unlike litigants in other Section 230 cases,[3] Vimeo relied exclusively on an interpretation of the term "otherwise objectionable" that was not limited to content that is "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing." Vimeo, in fact, never claimed that the Programming was any of those things. *See* Resp. at 18. Nonetheless, the First Department held that Vimeo was immune under Section 230 because (1) "otherwise objectionable" encompasses a subjective belief that content is "false or misleading,"

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[3] *E.g.*, *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052 (9th Cir. 2019); *Holomaxx Techs. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011).

and (2) statutory immunity applies to contract claims. App. 6-7. These are the sole questions for review before this Court. The First Department did not (and could not)[4] hold that Daystar's Programming is *in fact* false and misleading material that Vimeo allegedly could remove under the parties' contract, and that issue is not before this Court. The Court should resolve the immunity issue to "give [Daystar] a chance to raise [its] claims in the first place." *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S. Ct. 13, 18 (2020) (Thomas, J., concurring in the denial of certiorari).

III. Vimeo's substantive argument is legally wrong and makes for bad policy.

A. *Ejusdem Generis* limits the reach of Section 230(c)(2)(A).

Contrary to Vimeo's argument, Resp. at 19, the meaning of "otherwise" does *not* preclude application of *ejusdem generis*. As this Court has held, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (cleaned up). This canon applies to "otherwise objectionable," which refers only to content regulated elsewhere in Title V of the Communications Decency Act

[4] *Roni LLC v. Arfa*, 18 N.Y.3d 846, 848 (2011) (courts must accept a litigant's well-pleaded allegations as true).

of 1996—an argument Vimeo completely ignores.[5] The lone authority on which Vimeo cites for the proposition that this interpretive canon does not apply to "otherwise" actually applies the canon to a statute involving that very term. *Begay v. United States*, 553 U.S. 137, 142 (2008) ("any crime . . . that . . . or *otherwise* involves conduct that presents a serious potential risk of physical injury to another"), *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591 (2015).

Vimeo also misunderstands Volokh and Candeub's thesis on the meaning of "otherwise objectionable." The common link in Section 230(c)(2)(A)'s enumerated list does not depend on whether Congress had "the power to censor" the speech in any context. *See* Resp. at 21. Instead, the enumerated terms "[a]ll refer to speech regulated in the very same Title of the [Communications Decency] Act," because they all had historically been seen by Congress as regulable *when distributed via electronic communications*—thus supplying the common link. Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175, 181 (2021) (emphasis added); App. 132-33. The reason these types of content appeared in Title V of the CDA is because Congress perceived them

[5] If Vimeo is correct that providers may "remove and restrict any materials that they consider to be objectionable," Resp. at 19, then Congress had no need to enumerate particular content at all. *See Yates v. United States*, 574 U.S. 528, 545 (2015). Vimeo's construction, not Daystar's, "delete[s]" words from the statute. Resp. at 21.

to be regulable when expressed through telecommunications media—even if they are constitutionally protected in other contexts. App. 133-35. Daystar's argument fully accords with the grant of immunity "whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2)(A).[6]

Vimeo's comment that "[f]alse and misleading statements have long been regulated" misses the point for the same reason. Resp. at 22. Again, Daystar is not arguing that Section 230(c)(2)(A)'s common link is regulable material. The common link is Congress's regulation of material in Title V of the CDA itself. And Congress did not purport to regulate "false" or "misleading" speech under Title V—presumably because Section 230(c)(2)(A) was intended to be viewpoint-blind.[7]

In sum, Vimeo's objection to the *viewpoints* expressed in Daystar's Vaccine Programming is worlds apart from the *content* in Section 230's enumerated material. As others have correctly observed, the enumerated list refers to objectionable *content*. Vimeo's objection to what it claims to be "misinformation" in the

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[6] For this reason, Vimeo's argument that "violent" material "has never been regulable" misunderstands Daystar's argument. Resp. at 22. The Constitution indeed protects violent speech in certain contexts—as Congress knew. App. 134-35. Still, Congress believed it had the power regulate violent speech when expressed through telecommunications media when it passed the CDA.

[7] Even Vimeo's non-CDA examples do not involve regulation based on viewpoint (or alleged falsity) alone; some other element (*e.g.*, malice) is required. Resp. at 23-24.

programming is *not* content-based; its objection stems from its disagreement with Daystar's *viewpoint*. Br. of Amicus Curiae Professor Philip Hamburger at *24-25, *NetChoice v. Paxton*, No. 21-51178 (5th Cir.), *available at* 2022 WL 803461. This Court recognizes such a distinction—one of which Congress presumably was aware when it passed the CDA. *Id.*; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 697 (1979). Vimeo's objection to Daystar's *viewpoint—i.e.*, its *epistemic* beliefs—bears no resemblance to the sexually-charged, indecent *content* expressly enumerated in the statute. Rather, "at the end of a list of types of content, 'otherwise objectionable' means otherwise objectionable content." 2022 WL 803461, at *24.

B. Vimeo's construction of Section 230 raises serious constitutional problems.

Vimeo's desired extension of Section 230(c)(2)(A) would raise significant constitutional concerns by granting a unique immunity to suppress viewpoint-based speech. A statute that grants power to private actors may implicate the Constitution when it uniquely disadvantages a particular form of otherwise-protected activity. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 782 (1996) (Kennedy, J., concurring). Vimeo's statutory construction does precisely that. By granting providers a privilege to censor viewpoints, the government has singled out such speech—*a tacit encouragement of the*

suppression of speech on matters of public concern. And if Vimeo is correct that providers cannot bargain away immunity under Section 230, the First Amendment is all the more implicated. *See Skinner*, 489 U.S. at 615.

Relatedly, Vimeo's broad construction of "otherwise objectionable," which would preempt state laws forbidding viewpoint-discrimination, reveals the government's "strong preference" for the suppression of "misinformation." *See id*; *Ry. Emp. Dep't v. Hanson*, 351 U.S. 225, 232 (1956) ("If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded."). Indeed, Section 230's stated goal was "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material"—which Vimeo lobbies extends to material expressing "objectionable" viewpoints on matters of public concern. 47 U.S.C. § 230(b)(4). And the statute's context—enacted in response to *Stratton Oakmont*—removes any doubt that Congress worked to *encourage* content moderation. Because Congress endorsed privatized suppression, state action is present.

In short, Vimeo's construction reflects the government's desire to restrict speech of public importance—one that raises constitutional concerns of deputizing censorship. *See* Hamburger, Wall St. J. ("If the statute is constitutional, it can't be as broad as [tech companies] claim, and if it is that broad, it can't be constitutional."). The more logical, textually-faithful, and

constitutionally-consistent reading is that the statute regulates objectionable *content*, not objectionable *viewpoints*—particularly those on matters of public concern.

C. Section 230 does not apply to claims for breach of contract.

The First Department's holding that Section 230 applies to contract claims separately justifies this Court's intervention.[8] Under Vimeo's interpretation, Section 230 extinguishes private agreements to host content and allows recourse only if a provider removes content in bad faith. Neither Section 230's text nor this Court's authorities support that novel outcome.

Section 230(e) governs the Act's "[e]ffect on other laws" and nowhere purports to preempt breach of contract claims. Subsection (e)(3) provides that "[N]o cause of action may be brought and no liability may be imposed under any *state or local law* that is inconsistent with this section." 47 U.S.C. § 230(e)(3) (emphasis added). As this Court has held before, such language connotes "official, government-imposed policies" or laws, "not the terms of a private contract." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-230 & n.5 (1995). Vimeo's passing effort to distinguish Section 230(e)(3) simply ignores the sound logic found in this Court's precedent. *Compare* Resp. at 28 (arguing that

[8] The Court need not reach this issue if it agrees that the term "otherwise objectionable" provides no shelter for Vimeo's viewpoint-based censorship.

Section 230(e)(3) preempts breach of contract claims because they are "brought" and "imposed" "under state law"), *with Wolens*, 513 U.S. at 228-29 ("terms and conditions . . . are privately ordered obligations and thus do not amount to a State's . . . enforcement of any law," even if enforced via a state law contract claim) (cleaned up), *and Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526 (1992) (plurality) ("[A] common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . imposed under state law' ").

Perhaps recognizing Section 230(e)'s limits, Vimeo sidesteps, claiming that the "real preemptive action takes place in Section 230(c)(2)(A)." Not so. By its terms, Section 230(e) supplies the Act's primary preemptive force. Regardless, Section 230(c)(2)(A) insulates only "Good Samaritans"—providers who screen content "voluntarily" without any attendant legal obligation. But once a provider contracts to host content, it is acting not as a merciful passerby who volunteers aid, *compare Luke* 10:25-37 (NIV) *and* 47 U.S.C. § 230(c)(2)(A) (applicable to an "action voluntarily taken"), but as a private party who must act—or not—in accordance with its contractual bargain. Stated otherwise, once a provider agrees to host particular content, it may not claim the mantle of a "Good Samaritan."

Vimeo's contrary argument renders private hosting contracts a useless gesture. While Vimeo dismisses this outcome as a "policy argument," it ignores that

any assessment of a preemption statute's scope rests primarily on "a fair understanding of *congressional purpose*." *Cipollone*, 505 U.S. at 529 n.27 (emphasis added). As this Court has recognized in other contexts, no textual or other evidence suggests that Congress intended to strip private contracts of legal force, especially when no such intent is expressly stated. *See supra*; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("Congress does not cavalierly pre-empt state-law causes of action.").

Vimeo nonetheless suggests that its construction is benign because "Section 230(c)(2)(A) requires that suppression be done in 'good faith.'" Resp. at 29. Setting aside that Section 230(c)(2)(A) does not apply, Vimeo's supposed limiting principle offers cold comfort. Intent is not an element of a breach of contract claim. A party is thus entitled to enforce its freely-negotiated agreement as written, without any requirement that it establish an extra-contractual and fact-intensive element of bad faith. By replacing parties' private bargains with an amorphous "good faith" standard, Vimeo's position *at minimum* makes it more difficult for entities to enforce their freely-negotiated agreements. And because a party may breach even in *good faith*, Vimeo's position will often nullify the agreements altogether—undermining freedom of contract.

CONCLUSION

"Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez*, 567 U.S. 709, 723 (2012). Under Vimeo's view, the federal government has embraced such epistemic paternalism by granting private actors a *statutory privilege* to remove perceived false content. But "[s]ociety has the right and civic duty to engage in open, dynamic, rational discourse." *Id.* at 728. An unbridled reading of "otherwise objectionable" that frees parties from their voluntary agreements would undercut these pursuits and do violence to the statute's text. The Court should grant review.

Respectfully submitted,

JOHN H. CAYCE
Counsel of Record
MICHAEL D. ANDERSON
CAITLYN E. HUBBARD
JACOB A. DEKERATRY
KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
john.cayce@kellyhart.com
michael.anderson@kellyhart.com
caitlyn.hubbard@kellyhart.com
jacob.dekeratry@kellyhart.com