No. 22-393

In The
Supreme Court of the United States

NETCHOICE, LLC, and the COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,

Cross-Petitioners,

v.

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,

Cross-Respondents.

On Conditional Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF FLOOR64, INC. D/B/A THE COPIA INSTITUTE IN SUPPORT OF CROSS-PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Copia Institute is the think tank arm of Floor64, Inc., the privately-held small business behind Techdirt.com ("Techdirt"), an online publication that has chronicled technology law and policy for 25 years. In this time Techdirt has published more than 70,000 articles regarding subjects such as freedom of expression and platform liability, as well as copyright, trademark, patents, privacy, innovation policy, and more. The site often receives more than a million page views per month, and its articles have attracted nearly two million reader comments, which itself is user expression that advances discovery and discussion around these topics. The site itself then uses other Internet platforms to promote its own expression and engage with its audiences.

As a think tank the Copia Institute also produces evidence-driven white papers examining the underpinnings of tech policy.[2] Then, armed with its insight, it regularly files *amicus* briefs, regulatory comments, and other advocacy instruments on these subjects to help educate lawmakers, courts, and other regulators – as well as innovators, entrepreneurs, and the public –

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[1] All parties have consented to the filing of the brief. Notice was timely provided to cross-petitioners, and due to a recent death in undersigned counsel's family belatedly for cross-respondents. No counsel for any party authored this brief in whole or in part. Amicus and its counsel authored this brief in its entirety. No person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See*, *e.g.*, The Copia Institute, *The Sky Is Rising 2019*, *available at* https://skyisrising.com/TheSkyIsRising2019.pdf.

with the goal of influencing good policy that promotes and sustains innovation and expression. Many such filings have implicated the exact same issues as those at the fore of this litigation, including before this Court.[3]

As an enterprise whose business is built around engaging in expressive conduct, the law implicated by this litigation is itself highly relevant to its own endeavors. Any provision of the Florida statute at issue, S.B. 7072, that is allowed to stand will impact its business and ability to engage with audiences. The Copia Institute therefore submits this brief *amicus curiae* wearing two hats: as a longtime commenter on the issues raised by the underlying litigation at issue,[4] and as a small business whose expressive freedom is directly injured by the statute the parties have petitioned this Court to review.

SUMMARY OF ARGUMENT

Despite Florida's claims to the contrary, every provision of the statute implicated in this case impermissibly impinges on expressive freedom guaranteed by the Constitution. It is also not just the Cross-Petitioners' members whose rights are attacked but also those of

[3] *See* Brief *amicus curiae* of the Copia Institute, Andy Warhol Foundation for the Visual Arts v. Goldsmith, 21-869 (Jun. 17, 2022); Brief *amicus curiae* of the Copia Institute, NetChoice v. Paxton, 21A720 (May 17, 2022).

[4] See in particular posts collected at https://www.techdirt.com/tag/sb-7072/.

the Copia Institute, and so many other online platforms and online speakers, who depend on these rights to further their own expression and to facilitate others' online expression. If allowed to stand, each of these provisions – both those already enjoined, and those not yet – would threaten the continued operation of the Internet directly through their own onerous terms and by opening the door to unlimited legislation elsewhere that will now be unconstrained by the previously stalwart Constitutional principles protecting free expression that S.B. 7072 flouts. The Court of Appeals for the Eleventh Circuit correctly recognized the constitutional infirmity for some of the more egregious provisions but overlooked it with respect to others. *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196, 1232 (11th Cir. 2022) (articulating which provisions remain enjoined). *Certiorari* should therefore be granted so that this Court can fully vindicate the First Amendment rights this law offends and to make clear that no regulatory effort akin to anything S.B. 7072 attempts can be tolerated by the Constitution.

ARGUMENT

I. S.B. 7072 interferes with the Copia Institute's exercise of its First Amendment rights

Although S.B. 7072 may be directed at Cross-Petitioners' members, it does not leave others, including the Copia Institute, untouched. Not only may it reach the Copia Institute directly, *see* discussion *infra*

Section III, the way it interacts upon the expressive activities of the Copia Institute illustrates how unconstitutionally it interacts with Cross-Petitioners' members as well.

a. Its provisions interfere with its expression directly

The provisions of the Florida statute run headlong into the Copia Institute's media business. That business, focused primarily around the Techdirt.com website, dates back a quarter century[5] to around the birth of the commercially-popular Internet. As a media business, it depends on the First Amendment in numerous ways. Not only does it publish articles and commentary, but it also allows reader comments on its articles, thus itself acting as a platform facilitating other user expression. These comments add to the richness of the discourse found on its article pages and allows the Copia Institute to build a dialog around its ideas. The comments also often help the Copia Institute's own expression be more valuable, with story tips, error checking, and other meaningful feedback provided by the reader community.[6]

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[5] *See* Mike Masnick, *25 Years Ago Today . . . Techdirt Got Started!*, TECHDIRT (Aug. 23, 2022) https://www.techdirt.com/2022/08/23/25-years-ago-today-techdirt-got-started/.

[6] In fact, so productive is the Techdirt comment section that the Copia Institute has even hired onto staff someone who had previously been a regular contributor to the discussion there.

To keep the discussion in the comments meaningful, the Copia Institute employs a system of moderation. This particular system is primarily community-driven, and the reader community can affect what appears on Techdirt's pages in several ways. One way is through "boosting" comments, and one source of revenue for the Copia Institute is derived from people purchasing credits to be put towards this boosting.[7] Meanwhile all readers can rate comments as either insightful and/or funny, and for more than ten years Techdirt has published weekly summaries highlighting the most insightful or humorous comments that appeared on its stories for the previous week.[8] Crucially, readers can also rate comments as abusive or spam, which leads them to be removed from view.[9]

The Copia Institute chooses to host user comments, and moderate them in this way, because doing so fulfills its expressive objectives, including the goal of generating the revenue needed to underwrite its further expression. It could just as easily choose not to

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[7] *See* Mike Masnick, *First Word, Last Word And Letting Our Biggest Fans Help Shape The Conversation In Our Comments*, TECHDIRT (Aug. 18, 2012), https://www.techdirt.com/2012/08/16/first-word-last-word-letting-our-biggest-fans-help-shape-conversation-our-comments/.

[8] *See*, *e.g.*, Leigh Beadon, *Funniest/Most Insightful Comments Of The Week At Techdirt*, TECHDIRT (Nov. 13, 2022), https://www.techdirt.com/2022/11/13/funniest-most-insightful-comments-of-the-week-at-techdirt-35/.

[9] "Removed from view" generally means hidden but available to readers interested in seeing what had been demoted from automatic display with an extra click. But they may also subsequently be deleted from the system entirely by site operators.

host them, or to moderate them with a different system prioritizing different factors. The First Amendment ensures that it can make these editorial and associative choices however it feels best vindicates its expressive agenda.

Indeed, many publications have made different choices and opted to not host their own comments. However, studies have noted that by not doing so, they lose engagement with their readership. Elizabeth Djinis, *Don't read the comments? For news sites, it might be worth the effort*, POYNTER (Nov. 4, 2021), https://www.poynter.org/ethics-trust/2021/dont-read-the-comments-for-news-sites-it-might-be-worth-the-effort/. Having the ability to control how one interfaces with their readers therefore is key to advancing their own expressive agenda, and the decisions to close comment sections have frequently been driven by a sense of not having enough control over what users and user expression they associated with in their comment sections. *Id.* ("The language in these [closure] announcements was sometimes similar, portraying a small group of people taking over a forum meant for the public. They used words like 'hijack' and 'anarchy.'"). Because that basic ability to moderate that reader discourse is so critical to whether a publication can self-host that user engagement at all, it is critical that these moderation decisions remain legally protected so that these sites can be free to discover the most

effective way of doing so that best serves them and their readership.[10]

But the Florida statute takes direct aim at the ability of platforms to nurture these online communities of readers despite how important doing so is in furthering their expressive objectives. Indeed, that is the very point of the law, to take away platforms' ability to engage with audiences as they choose. Crucially, however, it isn't just the content-specific provisions that the Court of Appeals already recognized as being violative of the First Amendment that take away this discretion. Platforms still await injunctive relief from the other provisions whose practical effects also remove it as well.

How all these provisions impact the Copia Institute and a site like Techdirt, compromising its ability to maintain its online presence and engage with its audiences as it has up to now so chosen, illustrates how much this relief is needed to prevent Florida's incursion on protected First Amendment activity. Because even if Techdirt wanted to comply with these myriad requirements, it could not. For one thing, Techdirt does not even offer some of the basic functionality the Florida law demands. As one example, Techdirt does not provide a tool for commenters to see how many people

[10] The irony of course is that, without comment sections, what reader engagement there is tends to go to the larger social media sites that have attracted the Florida legislature's ire. Dijinis ("[W]hether or not news outlets choose to play the commenting game, that game will still go on without them. Conversations on Twitter, Facebook and Instagram won't stop.").

have read their comments, as the statute would require. FLA. STAT. § 501.2041(2)(e).[11] Nor does it have a mechanism for users to export their data, as the statute further requires. FLA. STAT. § 501.2041(2)(i).[12] It also has no practical way to identify, favor, or even deter postings by political candidates, as the law would require platforms to privilege. FLA. STAT. § 501.2041(2)(h); *see also* FLA. STAT. § 106.072.[13] Even if the Copia Institute might see value in providing some of these faculties, they can be expensive to engineer, and being compelled to build them would come at the expense of other expressive activities it would rather choose to spend its resources on.

As for the many disclosure obligations required by the statute, Techdirt would have problems there too. For instance, the law requires that platforms disclose their moderation standards. FLA. STAT. § 501.2041(2)(a)[14] (requiring platforms "publish the standards . . . used for determining how to censor" and incorporating by reference FLA. STAT. § 501.2041(1)(b) (defining "censor" as "any action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a right to post,

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[11] This provision has not yet been enjoined despite its burden on platforms' expressive activity.

[12] This provision has not yet been enjoined despite its burden on platforms' expressive activity.

[13] This provision has not yet been completely enjoined despite its burden on platforms' expressive activity.

[14] This provision has not yet been enjoined despite its burden on platforms' expressive activity.

remove, or [. . .] inhibit the ability of a user to be viewable by or to interact with another user of the social media platform.")). But Techdirt does not have anything to disclose because its moderation system is primarily community-driven[15] and subject to the community's whims and values of the moment, which also means it could not meet the consistency requirement. FLA. STAT. § 501.2041(2)(b).[16] Furthermore, in the event that Techdirt editors might overrule the community, they may be doing so due to exigent circumstances which can neither wait for the next monthly opportunity to change the moderation practices, FLA. STAT. § 501.2041(2)(c)[17] (limiting changes to moderation practices to no more than every 30 days), nor be for a reason that can be publicly disclosed. The reasons may also not be any business of the government to know.[18]

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[15] And implemented with some algorithmic logic, which the Florida law would also potentially prohibit. *See*, *e.g.*, FLA. STAT. § 501.2041(1)(e); *see also* FLA. STAT. § 501.2041(2)(f)(2).

[16] As the Copia Institute has also long chronicled, content moderation at scale is always impossible to deliver consistently. *See* Mike Masnick, *Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, TECHDIRT (Nov. 20, 2019), https://www.techdirt.com/articles/20191111/23032743367/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well.shtml; https://www.techdirt.com/blog/contentmoderation/ (collecting case studies of moderation challenges).

[17] This provision has not yet been enjoined despite its burden on platforms' expressive activity.

[18] Indeed, the more that laws like this one create legal risk for platforms, the more likely it will be that platforms will be removing content on the advice of counsel, which should be privileged from disclosure.

Moreover, even if any of this moderation were to be driven by bias, the existence of expressive bias is not something for regulation to "correct"; on the contrary, it is something for regulation to *protect*. Expressive bias is evidence of expressive freedom, that we could be at liberty to have preferences, which we can then express. This law intentionally targets that freedom by denying platform operators the ability to express those preferences.[19] While it may be good policy to encourage a diversity of ideas online, or even certain ideas in particular, the First Amendment bars the government from conscripting anyone, including online platforms, to demand it. Yet such is what this law openly aims to do.[20]

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[19] Ironically, to the extent that this bill was driven by animus towards Facebook, Techdirt has articulated its own displeasure towards the company's practices. *See*, *e.g.*, Mike Masnick, *Facebook Banning & Threatening People For Making Facebook Better Is Everything That's Wrong With Facebook*, TECHDIRT (Oct. 12, 2021), https://www.techdirt.com/articles/20211009/01035347721/facebook-banning-threatening-people-making-facebook-better-is-everything-thats-wrong-with-facebook.shtml. But this law is about more than Facebook; it is about the entire ecosystem of online platforms that this law threatens to devastate.

[20] This law tries to force platforms to do its expressive bidding in at least one other key way, by forbidding platforms from ever adding an addendum to a user-provided comment. FLA. STAT. 501.2041(1)(b). While it has generally not been Techdirt's practice to do so, this prohibition stands a prior restraint against such speech it might like to express in the future.

b. Its provisions interfere with its expression indirectly

The Internet is a unique communications medium: for expression to get from one person to another it needs systems and services to help it move there through computer to computer. We call these helpers many things – service providers, intermediaries, or, as commonly used in this litigation, platforms – and they come in many shapes and sizes, providing all sorts of intermediating services, from network connectivity to messaging to content hosting, and more. What is common to all of them, however, is the need to feel legally safe to provide that help, or else they won't be able to.

Laws like Florida's make it unsafe to provide that help because it imposes liability on how they do that helping if they do it in a way that the government does not approve of. In fact, this governmental disapproval is at the root of the law, which was passed because the expressive choices certain platforms were making about which user expression to help facilitate was in conflict with the preferences of the Florida legislature. *See* S.B. 7072 § 1. But the First Amendment exists because such disagreement between governmental powers and private individuals is inevitable, and so it prohibits the government from taking sides and punishing anyone for expressing views that it disfavors in order not to chill that expression. Which is what it does here by chilling platforms' helping tasks – facilitating and moderating user expression – because it will become too legally risky for them when they inevitably won't be able to achieve the impossible and do it all in

the way the Florida government demands. If the Florida statute is allowed to stand the result will be to drive them out of the helping business, which will result in less online expression with fewer helpers available to help facilitate it, as it will just be too legally dangerous to them to try.

And that's a problem for online speakers like the Copia Institute, which does not just provide a platform for hosting third-party expression in the form of Techdirt comments but also is the *user* of others' platforms and thus needs these other platforms to remain sufficiently protected to be able to offer it those services. Even to the extent that it may be an open question whether the express terms of S.B. 7072 in fact reach the Copia Institute, *see* discussion *infra* Section III, it would be of little comfort or utility to the Copia Institute if the Florida law spared it but drove offline any of the platforms it currently uses to support its own expressive activities.

As with any online speaker, the Copia Institute needs other platforms to help it deliver its expression to audiences. Sometimes these are backend platforms, like web hosts and domain registrars. Other times they are specialized platforms that host other forms of content the Copia Institute produces, such as SoundCloud and the Apple Podcasts, which serve its podcasts to listeners. In the past, the Copia Institute has also used ad platforms to monetize its Techdirt articles, and in general its monetization activities themselves require the support of payment providers and other platforms like Patreon that help facilitate the monetization of

expression in innovative ways. In fact, one way the Copia Institute makes money is by allowing readers to become "Insiders" in exchange for certain perks, including being part of an exclusive reader community, and the Copia Institute is currently using the Discord platform to provide that community a forum to interact. But none of these platforms could exist to support the Copia Institute's expressive business were it not for the First Amendment enabling them to provide these services. Affecting their right to provide it will inevitably affect the Copia Institute as well.

And such is the case even for the "social media" platforms the Copia Institute uses to promote its expression, find audiences, and enable the easy sharing of its ideas. FLA. STAT. § 501.2041(g). Naturally, thanks to the discretion the First Amendment affords these platforms, there is no guarantee that they will be available to the Copia Institute to use to share its expression. But at least they would be free to be available if they so chose. Whereas the Florida law threatens that choice and therefore that availability. Despite its stated intentions to promote the expressive interests of the Copia Institute, the Florida law ultimately does it no favors. While S.B. 7072 attempts to require platforms to favor the content of journalistic enterprises, FLA. STAT. § 501.2041(2)(j), and Techdirt could potentially qualify given its number of articles and monthly readership, FLA. STAT. § 501.2041(1)(d), it is a false promise devoid of any actual benefit, because no expressive endeavor is ever helped by eroding the First Amendment – especially not by interfering with social

media platforms' First Amendment-protected discretion, as this law does. Just as the Copia Institute depends on its First Amendment rights protecting its editorial discretion to make it possible to facilitate user expression, so do social media outlets. By undermining that editorial discretion the Florida law will make it hard for them to remain available for the Copia Institute to use to spread its own expression.

II. The interference will not end with the Florida law

The Florida law is not the only attempt by a state to regulate how inherently interstate Internet services provide those services. At least 30 state legislatures have proposed some sort of content moderation bill. Jennifer Huddleston & Liam Fulling, *Examining State Tech Policy Actions in 2021*, AM. ACTION FORUM (Jul. 21, 2021), https://www.americanactionforum.org/insight/examining-state-tech-policy-actions-in-2021/. Of note, the law passed by Texas has so far been upheld by the Court of Appeals for the Fifth Circuit, despite it having similar First Amendment infirmities that Florida's law has, by directly targeting the editorial discretion Internet platforms must be able to exercise over their services in order to further their own expressive freedom. *NetChoice, LLC v. Paxton*, No. 21-51178, 2022 WL 4285917 (5th Cir. Sept. 16, 2022). As Cross-Petitioners correctly argue, that Fifth Circuit decision alone, and the resulting circuit split it revealed, make review here by this Court appropriate, because without this Court speaking to vindicate the First Amendment rights

these laws violate, such laws will only proliferate. Brief for Cross-Petitioners at 32. And that proliferation represents an existential threat to the basic function of the Internet and, with it, all the expressive activity it enables. Far from advancing online expression as these laws may claim to, they will ultimately only inhibit it.

And not just because of the substance of their laws, but because the basic mechanical reality of how local regulation over Internet platforms upends the system of helpers that makes up the Internet. *See* discussion *supra* Section I.B. If states could independently attempt to shape Internet services through their own regulation it would be a problem, even if none of their rules specifically offended the First Amendment. Because the Internet inherently transcends state boundaries and therefore exposes an Internet platform to regulators in every local jurisdiction, platforms would instead have to try to adjust their platforms to accommodate the most restrictive rules, regardless of whether those rules were in the interests of the other jurisdictions also seeking to regulate them Often there is simply no practical or cost-effective way for a platform to cabin compliance with a specific jurisdiction's rules, much less the potentially countless specific rules of potentially countless jurisdictions who could imagine them.

In other words, if it were possible for a law like Florida's to reach Internet platforms, then it would be possible for any other state, or even any one of the infinite local jurisdictions within each state, to reach them as well, regardless of how well each jurisdiction

would choose to regulate them, or what sort of challenges platforms would face in complying with such local regulation, or whether the requirements among all these regulations from all the many jurisdictions were even consistent with each other. Even if it were practical for platforms to comply with the rules of one jurisdiction, they could easily find themselves with the impossible task of having to please multiple masters potentially in conflict with each other, as is likely to be the case of these laws that are so viewpoint-driven. State governments across the United States today vary significantly in their political control, and the regulatory policy favored by some may not be the regulatory policy favored by others, particularly when it comes to preferring certain viewpoints. Thus, if one jurisdiction can effectively chill certain types of speech facilitation with the threat of potential liability, it will effectively chill it for every jurisdiction everywhere, even in places where that speech may be perfectly lawful or even desirable. *See* Huddleston ("[T]he interstate nature of most user interactions on platforms raises concerns about the extra-territorial implications of these policies.").

Even if such viewpoint favoritism were not at issue, local regulation of the Internet would be disfavored by Section 230, whose pre-emption provision was expressly passed by Congress to prevent state and local jurisdictions from getting into the Internet regulation business. 47 U.S.C. § 230(e)(3) ("[N]o liability may be imposed under any State or local law that is inconsistent with this section."). It is also disfavored by

dormant Commerce Clause doctrine, which seeks to prevent any one state from having undue influence on interstate commerce, which is better left to Congress to regulate (as it has, with Section 230). *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

But the Eleventh Circuit did not need to consider either of those legal bases to find the Florida law problematic, *see NetChoice*, 34 F.4th at 1209, and neither does this Court, because the heart of the statute at issue is such a direct attack on expressive freedom protected by the First Amendment. The fracturing of the Internet that local regulation would lead to can be largely deterred simply by finding unconstitutional what these efforts are intended to accomplish in overriding the freedom this Court has long recognized private entities have to choose what speakers and speech they wish to associate with.

When platforms can find themselves facing existential legal risk for non-compliance with any of these regulations, they will find themselves having to make some hard choices. Faced with potentially irreconcilable compliance obligations, Internet platforms will either have to (a) choose to obey only the jurisdiction whose penalties for non-compliance are most untenable, even if at the expense of any other jurisdiction's policies or priorities, (b) try to block serving users in certain locations, which diminishes the value of the Internet as a communications network that can unite people across geography, or (c) give up and stop providing platform services anywhere. None of these

outcomes are good for enabling online expression for anyone.

III. There is no limiting principle to justify why Florida can impact the expressive rights of certain platforms and not have every platform's be vulnerable to government interference

The Florida law is either one of narrow applicability, in which case it will reach few platforms but be facially unconstitutional for singling out an arbitrary population of platforms to apply to, or its criteria for enforcement is broad and impinges on the rights of all too many platforms. Of course, in the case of the Copia Institute, or another similarly situated platform, both situations may apply. Because while today the law may not reach the Copia Institute, tomorrow it might.

Although a platform like the Copia Institute may be beyond the intended reach of the Florida statute, there is no guarantee that it would never reach it. The Florida statute purports to apply only to entities with either "annual gross revenues in excess of $100 million" or "at least 100 million monthly individual platform participants globally." FLA. STAT. § 501.2041(1)(g). Per this criteria, as of today, the Copia Institute might be beyond its reach. But tomorrow that status could easily change. Perhaps it is unlikely that the company will suddenly attain that much revenue, but every platform aspires to grow, and terms like these create policy pressure deterring growth. Especially because

there are ways to grow other than in revenue, which puts platforms like Techdirt and others with relatively small revenue streams but potentially large user bases on a collision course with the law, especially as they grow more popular.

Even small sites like Techdirt can easily attract large audiences.[21] Indeed, the very point of the Copia Institute enterprise is to reach and influence people. Moreover, the whole point of the Florida law is ostensibly to help connect online speakers to online audiences. Its requirements that platforms favor "journalistic enterprises," suggest that sites like Techdirt, which would appear to meet their criteria, are supposedly being helped. But they are not, because the reward for their popularity is that they may now fall within the crosshairs of the Florida law and be subject to the terms the Florida legislature has dictated for how Techdirt may continue to engage with its readership on its site.

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[21] Any site can of course aspire to virality. But for the Copia Institute it is not an immodest pipe dream to have such reach. For instance, in 2005 company founder and Techdirt editor Michael Masnick coined the term, "the Streisand Effect," as part of his commentary. It is a term that has had significant staying power, remaining in common parlance as a term for discussing the unwanted attention ill-considered attempts at censorship might unleash. It even has its own Wikipedia page. *See* https://en.wikipedia.org/wiki/Streisand_effect. But should a comment in a future post similarly capture the public's attention, and the Florida law be in force, it would risk significant legal trouble to achieve such popularity. Thus the Florida law has the perverse effect of discouraging sites from reaching wider audiences, which is both anathema to its stated purpose and the First Amendment.

Because Techdirt would otherwise seem to meet the law's other criteria for being subject to its enforcement. The law's definition of the artificial construct "social media platform" is certainly broad enough to encompass Techdirt; after all, it is an "information service" or "system" that "enables computer access by multiple users to a computer server." FLA. STAT. § 501.2041(1)(g). It also is a "sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity" that does business in the state by virtue of having readers, and likely also commenters, based there. *Id.*[22]

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[22] Its parent company also does not own a theme park, which at the time of the law's passage was a delineating factor in defining a "social media" platform subject to this law. Mike Masnick, *Disney Got Itself A 'If You Own A Themepark . . . ' Carveout From Florida's Blatantly Unconstitutional Social Media Moderation Bill*, TECHDIRT (Apr. 30, 2021), https://www.techdirt.com/2021/04/30/disney-got-itself-if-you-own-themepark-carveout-floridas-blatantly-unconstitutional-social-media-moderation-bill/. That provision was subsequently removed from the law after litigation challenging it began. Mike Masnick, *It Can Always Get Dumber: Ron DeSantis Moves To Eliminate The Ridiculous Disney Exemption To His Unconstitutional Social Media Bill Because He's Mad At Disney*, TECHDIRT (Apr. 19, 2022), https://www.techdirt.com/2022/04/19/it-can-always-get-dumber-ron-desantis-moves-to-eliminate-the-ridiculous-disney-exemption-to-his-unconstitutional-social-media-bill-because-hes-mad-at-disney/. Although no longer in force, the existence of that provision at passage, which sought to favor certain platforms, helps illuminate the censorial motives behind this law and with it the unconstitutionality, although the overall unconstitutionality of the law does not alone pivot on this factor. *See* Mike Masnick, *How Disney Got That 'Theme Park Exemption' In Ron DeSantis' Unconstitutional Social Media Bill*, TECHDIRT (Feb. 3, 2022), https://www.techdirt.com/2022/02/

The danger to all platforms, including the Copia Institute, is that even if by its terms this particular law may never reach them, if such a law could be permitted then any other state could issue their own, with their own arbitrary enforcement criteria, which may well apply to Techdirt or other similarly-situated platforms. And that reach matters, especially if one agrees that the platforms the Florida law targets are in some way problematic in their moderation practices.

The Internet ecosystem has changed dramatically in the past 25 years, and it is capable of changing rapidly even within one year. For instance, even in the short time since briefs in this case began to be docketed before this Court, one major social media platform, Twitter, has undergone a wholesale change in ownership with indications of a developing corresponding change in editorial agenda.[23] But perhaps more saliently, within this short period there has been an explosion in the "fediverse,"[24] with individual instances of platforms cropping up everywhere to now host the online discourse of millions of users.[25] Commonly referred to as "Mastodon instances"[26] these are essentially open

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03/how-disney-got-that-theme-park-exemption-ron-desantis-unconstitutional-social-media-bill/.

[23] *See* Tim Cushing, *Elon Musk's Twitter Moderation Flags Article About Elon Musk's Twitter As Dangerous*, TECHDIRT (Nov. 14, 2022), https://www.techdirt.com/2022/11/14/elon-musks-twitter-moderation-flags-article-about-elon-musks-twitter-as-dangerous/.

[24] *See* https://en.wikipedia.org/wiki/Fediverse.

[25] *See* https://joinmastodon.org/about.

[26] *See* https://en.wikipedia.org/wiki/Mastodon_(software).

source software packages that allow individuals and entities to provide the same sort of microblogging support for cross-instance interconnected expression that Twitter did on a large scale self-contained commercial basis. The operator of each Mastodon instance exercises its own editorial control over whom to allow onto their platform, with some opting to host all journalists,[27] others hosting members of an offline institution,[28] and others hosting users with a particular interest in certain subject matter.[29] And each can come up with its own rules about which users to host, and which platforms to interconnect with, because this is the associative and editorial liberty that the First Amendment affords, and must afford.

But laws like Florida's could smother these services in the cradle if allowed to be enforced. Because even if these laws' statutory terms did not reach these new platforms today, they could tomorrow, as could any other state laws making editorial demands on content moderation. There is simply no assurance to be derived from the fact that Florida's law might not reach all platforms today because there is no rationale that could justify why the constitutional rights of platforms can be extinguished when they make the arbitrary amount of money or attract the arbitrary size of audience that this law targets. If the First Amendment rights of platforms are ever to be

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[27] *See*, *e.g.*, https://journa.host/about.

[28] *See, e.g.*, https://mastodon.mit.edu/about (hosting MIT grad students).

[29] *See*, *e.g.*, https://techpolicy.social/about.

trumped, then there has to be some rationale that could survive at least some raised level of scrutiny. Yet the Florida legislature has provided none; it has simply decided that sites meeting these terms are too wealthy or too popular for their constitutional or statutory rights to remain protected, without articulating any sort of state interest, let alone a compelling one, to warrant this abrogation.

CONCLUSION

For the forgoing reasons, *certiorari* should be granted to emphasize that platform moderation is protected by the First Amendment.

Respectfully submitted,

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