Nos. 22-277, 22-555

IN THE
Supreme Court of the United States

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA, *ET AL.*,

Petitioners,

v.

NETCHOICE, LLC AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION,

Respondents.

NETCHOICE, LLC D/B/A NETCHOICE; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA,

Petitioners,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth and Eleventh Circuits

BRIEF OF FORMER REPRESENTATIVE CHRISTOPHER COX AND SENATOR RON WYDEN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 22-277 AND PETITIONERS IN NO. 22-555

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INTEREST OF *AMICI CURIAE*

Amici Christopher Cox (R-CA) and Ron Wyden (D-OR),[1] at the time both U.S. Representatives, co-authored Section 230 of the Communications Decency Act. From 1995 to 1996, Representatives Cox and Wyden shepherded Section 230 through near-unanimous, passage in the House of Representatives (420-4) and in the House-Senate conference for the Telecommunications Act of 1996. See Christopher Cox, *Section 230: A Retrospective* 5-9, Ctr. for Growth & Opportunity Working Paper (Nov. 2022).[2]

Since then, *amici* have closely followed judicial decisions interpreting and applying Section 230, and have publicly commented on their view of the provision's proper interpretation, including through *amicus* briefs in this Court. *Amici* are therefore well placed to draw attention to the ways that the plain meaning of Section 230 and the policy balance it reflects support the First Amendment protections that NetChoice and CCIA invoke in these cases.

SUMMARY OF ARGUMENT

A split panel of the Fifth Circuit erroneously invoked Section 230 in support of its conclusion that internet platforms are mere conduits without First Amendment rights to editorial discretion. *Paxton*

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] https://www.thecgo.org/wp-content/uploads/2022/11/Section-230-Retrospective-Cox.pdf (hereinafter, "*Section 230: A Retrospective*").

Pet. App. 48a-55a.[3] While the interpretation of Section 230 is not a question presented in this case, this brief clarifies that the enactment of Section 230—if relevant at all—reinforces platforms' First Amendment right to editorial control. The Fifth Circuit's contrary suggestion misreads the statute and defies basic constitutional limitations on congressional powers. Internet platforms are speakers with First Amendment rights to edit and moderate the third-party content they publish. That is why Congress enacted Section 230 in the first place.

ARGUMENT

I. These Cases Are About The First Amendment, Not Section 230.

The questions presented in these cases are whether the First Amendment prohibits Texas and Florida from restricting certain websites from making editorial choices about whether and how to host third-party speech. See *Paxton* Order i (Sept. 29, 2023) (granting certiorari on specified First Amendment issues); *Moody* Pet. i; *Paxton* Pet. i; *Paxton* Br. i. Although both courts of appeals below agreed that these cases are about the First Amendment, see *Paxton* Pet. App. 112a-113a; *Moody* Pet. App. 3a-4a, 65a, both referenced Section 230 in their opinions—with the Fifth Circuit majority stating that Section 230 "extinguish[es]" any "doubts that [the Texas law] is constitutional." *Paxton* Pet. App. 48a.

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[3] For ease of reading, this brief refers to docket entries in No. 22-277 as *Moody* [Item] [Page], and docket entries in No. 22-555 as *Paxton* [Item] [Page].

Congress cannot change the meaning of the Constitution, *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997), and thus any discussion of Section 230 is irrelevant to the First Amendment questions decided by the lower courts and the questions now presented to this Court. See *Paxton* Br. 33-34. The same is true of the arguments Attorney General Paxton raised in his BIO (at 17, 23-24). As explained in what follows, even if Section 230 were relevant to the First Amendment issues presented, the statute is entirely supportive of the First Amendment rights of platforms that are infringed by HB 20 (in Texas) and SB 7072 (in Florida).

II. Section 230 Confirms That Online Platforms Are Speakers With First Amendment Rights.

Section 230 provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).[4] It expressly provides liability protection for "any action" taken by an internet platform to restrict access to material that the platform or its users consider objectionable. *Id.* § 230(c)(2). Standing this clear language on its head, the Fifth Circuit majority claimed that instead of protecting internet platforms when they publish or moderate others'

[4] Federal and state courts have consistently held that an "interactive computer service" includes the millions of websites available to U.S. consumers. See*, e.g.*, *Batzel* v. *Smith*, 333 F.3d 1018, 1030 n.16 (9th Cir. 2003) ("[S]everal courts to reach the issue have decided that a website is an 'interactive computer service.'" (collecting cases)). For simplicity, this brief uses the term "internet platforms" to refer to websites covered by HB 20 and SB 7072.

content, Section 230 transforms platforms into mere "passive conduits" without First Amendment editorial rights.

In fact, Section 230 plainly confirms that internet platforms are publishers and speakers that select, arrange, edit, and moderate third-party content. The statute's legislative history, including floor debate during which members of both parties made the same arguments in support—and no member argued to the contrary—demonstrates that Section 230 was enacted for the very purpose of protecting internet platforms' exercise of their First Amendment rights to editorial control in moderating user speech. *Section 230: A Retrospective*, at 8. The fact that the immunity provision extends only to *third-party* content, leaving services open to liability for publishing *their own* content, further demonstrates that under Section 230, internet platforms possess and exercise their First Amendment rights as publishers.

A. By codifying protections against publisher liability, Section 230 enables internet platforms to exercise their First Amendment rights to moderate user speech.

The First Amendment protects the rights of internet platforms to exercise editorial control over what they publish. When they are sued for publishing content created by others, or for moderating that content in any way, Section 230 immunizes them from liability based on their status as the publisher of that third-party content or their editorial choices in moderating it. This immunity is entirely consistent with general First Amendment doctrine. It reinforces the First Amendment right of

publishers to editorial discretion, on the one hand, and it supports First Amendment protections against intermediary liability, on the other hand. Section 230 allows internet platforms to moderate user speech as they see fit without the threat of liability for their moderation decisions.

1. Like other publishers, internet platforms have a First Amendment right to select and promote third-party content. See *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (newspaper had First Amendment right to exclude some politicians' expression from its editorial page, even when it published others' views about them). When a private party disseminates content, the First Amendment protects its decisions about what speakers and statements to publish even if the private party does not "generate, as an original matter, each item featured in the communication" or "isolate an exact message as the exclusive subject matter of the speech." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569-70 (1995). Private media "do[] not forfeit constitutional protection simply by combining multifarious voices" or exercising editorial discretion in a manner that does not meet the subjective standards of others. *Id.* at 569. The "compilation of the speech of third parties" is itself a "communicative act[]" protected by the First Amendment. *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 674 (1998); see also *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 737-38 (1996).

Congress enacted Section 230 to encourage internet platforms to exercise this preexisting right to editorial control. The statute was enacted in response to *Stratton Oakmont, Inc.* v. *Prodigy*

Services Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), which held that the online platform Prodigy could be liable for defamation based on statements posted by an anonymous user on one of Prodigy's bulletin boards. See H.R. Rep. No. 104-458 (1996) (Conf. Rep.).

The *Stratton Oakmont* court reasoned that Prodigy should be subject to liability because it had made a "conscious choice" to exercise editorial control over the user-generated content posted on its service by removing or editing some offensive content. *Id.* at *3-5. The decision thus penalized an internet platform for engaging in less-than-perfect content moderation—that is, for failing to remove every piece of potentially unlawful content from its site. See *Section 230: A Retrospective*, at 6-7. The court distinguished an earlier decision that had refused to impose defamation liability on another platform, CompuServe, on the ground that CompuServe had not even attempted to moderate the content on its site. See *Cubby, Inc.* v. *CompuServe, Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991); *Section 230: A Retrospective*, at 7.

Congress, recognizing the differing treatment of CompuServe and Prodigy in the common law, sought to remove incentives for platforms to "abandon any attempt to maintain civility on their sites." *Section 230: A Retrospective*, at 7. To impose liability for those attempts, even if they were imperfect, was, in Representative Cox's words at the time, "backward." 141 Cong. Rec. 22,045 (1995) (statement of Rep. Cox). The very purpose of Section 230 was to reinforce platforms' right to editorial control.

2. Section 230 provides protections for internet platforms' exercise of their First Amendment rights.

Although longstanding First Amendment doctrine protects internet platforms from liability for publishing third-party speech, see, *e.g.*, *Smith* v. *California*, 361 U.S. 147 (1959), Section 230 was enacted in recognition of the unique characteristics of the internet that make online platforms especially vulnerable to collateral censorship via litigation.

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court identified the risk that intermediary liability "would discourage" publishers "from carrying" controversial content and thus "shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities." *Id.* at 266. Such "self-censorship" is especially pernicious since it functions as "a censorship affecting the whole public." *Id.* at 279 (quoting *Smith*, 361 U.S. at 154). In other words, the danger posed by intermediary liability is that it silences all speakers. "Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them." *McConnell* v. *FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part and dissenting in part).

The potential chilling effect of collateral censorship online is greater by orders of magnitude because internet platforms curate such massive amounts of speech for publication in real time. Unlike print, radio, and television editors, many internet platforms routinely publish billions of pieces of content daily. (Even in the 1990s, when Section 230 was enacted, Prodigy and CompuServe had millions of users.) Congress viewed it as unreasonable for the law to hold internet platforms

liable for reviewing and approving all such content in advance and chose to place that liability on the content creators themselves. To do otherwise would be to render internet platforms helpless against an avalanche of hecklers' vetoes. See *Reno* v. *ACLU*, 521 U.S. 844, 880 (1997). As it is, internet platforms often respond to complaints by deleting speech or even eliminating an entire forum, as it would be unduly burdensome to investigate the merits of every complaint—making the risk of collateral censorship especially dangerous for online speech. See *ibid.*

Section 230 protects against this effect by creating a prophylactic statutory "immunity" that "shields" internet platforms from having to either "remove the content" complained about "or face litigation costs and potential liability." *Jones* v. *Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407-08, 417 (6th Cir. 2014) (explaining, correctly, that the immunity "is an immunity from suit" intended to cut off protracted litigation at the start "rather than a mere defense to liability"). As Judge Wilkinson explained in *Zeran* v. *America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), "Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect."

By offering internet platforms protections from lawsuits based on their moderation of the user content they publish, by freeing them from liability for making the wrong editorial choice, and by immunizing them from liability for making a moderation decision "too late" to avert some alleged content-based harm, Section 230 enables them to exercise their First Amendment right to editorial control.

B. Under Section 230, platforms are liable when publishing their own content.

Section 230 provides internet platforms immunity only when they publish content created by others. They remain liable for their *own* content. Congress chose this allocation of liability because *first-party* online content is not susceptible to the same collateral censorship risks as third-party online content. The unique nature of the internet, with the publication in real time of content created by millions or billions of others, creates the possibility of immense liability to online platforms in their role as publishers. The same risks do not exist when the platform itself is creating the content.

In the words of the statute, Section 230 immunizes an internet platform from suit only when the content at issue is "provided by *another* information content provider." But if the platform itself is "responsible, in whole or in part, for the creation or development of" the allegedly unlawful content, the liability protection does not apply. 47 U.S.C. § 230(c)(1), (f)(3) (emphasis added). This ensures that internet platforms have adequate leeway to moderate third-party content, but limits Section 230's statutory immunity to those suits that seek to impose liability on platforms for publishing content provided by others. It also makes clear that Congress viewed internet platforms as publishers, not mere conduits.

A platform can be liable when it has even a partial role in the "creation or development" of another's speech. In *Fair Housing Council of San Fernando Valley* v. *Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc), for example, the Ninth Circuit correctly found that Section 230

immunity did not apply to a roommate-matching website that specifically elicited user-generated content that violated anti-discrimination law. *Id.* at 1169-72. But providing a generally available "means by which third parties can post information of their own independent choosing online" does not constitute "developing" the third-party information. *Marshall's Locksmith Serv., Inc.* v. *Google, LLC*, 925 F.3d 1263, 1270-71 (D.C. Cir. 2019) (quoting *Klayman* v. *Zuckerburg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014).

This aspect of the Section 230 architecture demonstrates that Congress understood that internet platforms often act as publishers of their own content—including when they moderate others' content, which is itself an exercise of editorial discretion. The statute immunizes some, but not all, of that editorial activity through its protections. But irrespective of whether Section 230 immunity is available, platforms always have their First Amendment rights as publishers—and that is true whether or not the content that is published is created by the platform or by its users.

III. The Fifth Circuit Majority Was Wrong To Suggest That Section 230 Conflicts With The First Amendment's Protection Of Platforms' Editorial Speech.

In dicta, the Fifth Circuit majority suggested that Section 230 supports the constitutionality of HB 20 by (in its view) statutorily deeming internet platforms to be passive conduits. *Paxton* Pet. App. 47a-48a (quoting 47 U.S.C. § 230(c)(1)). That is, literally, the opposite of what Section 230 does. Section 230 protects internet platforms from liability for content moderation, as its plain language makes clear. Active content moderation, which can include

editing, blocking, or removing third-party content, or indeed "any action" to restrict access to content deemed objectionable by the platform or its users, 47 U.S.C. § 230(c)(2), is what distinguished Prodigy from CompuServe in the 1990s. Section 230 would not have been necessary to protect platforms from liability if they were definitionally conduits. In that case, they would have been eligible for the blanket immunity granted by the New York court in *CompuServe*.

In support of its erroneous dicta, the Fifth Circuit majority claimed to find a "factual determination" by Congress that internet platforms are not publishers or speakers. Therefore, it concluded, they do not have First Amendment rights. *Paxton* Pet. App. 51a. But nothing in Section 230's text supports that conclusion. Manifestly, internet platforms *are* publishers, and if they were not, Section 230 would not have been needed. Section 230(c)(1) states that platforms shall not be "treated" as publishers or speakers of third-party content for liability purposes, and Section 230(c)(2) contains additional express protection for content moderation. The statute thus underscores the fact that content moderation *is* an exercise of the platforms' speech rights, and they *are* publishers, both when they publish content created by others and when they make moderation decisions concerning that content.

The Eleventh Circuit understood this, correctly concluding that Section 230's "recognition and protection of social-media platforms' ability to discriminate among messages—disseminating some but not others—is strong evidence that they are not common carriers with diminished First Amendment rights." *Moody* Pet. App. 43a. Precisely because

Section 230 "explicitly protects internet companies' ability to restrict access to a plethora of material that they might consider 'objectionable,'" the Eleventh Circuit found the statute aligned with their First Amendment right to editorial control. *Ibid.*

The Fifth Circuit's contrary reasoning also defies basic constitutional law. Congress lacks the power to "alter[] the meaning" of constitutional rights through legislation. *City of Boerne*, 521 U.S. at 519. Section 230 thus could not have limited internet platforms' First Amendment rights to editorial discretion. Yet even while conceding that "a legislature can't define what speech is or is not protected by the First Amendment," *Paxton* Pet. App. 50a, the Fifth Circuit suggested Congress did exactly that. *Id.* at 50a-51a.

Section 230 has no bearing on the First Amendment questions in this case, which concern online platforms' editorial rights to curate and moderate the content they publish. If the statute were relevant at all, it would be as evidence that platforms possess and routinely exercise those rights. The editorial judgments inherent in content moderation are not only given protection in litigation by Section 230, but they are also more broadly protected by the First Amendment independent of the statute. Though the Court need not address Section 230 at all in resolving this litigation, if the Court elects to comment, it should correct the Fifth Circuit's error.

CONCLUSION

The protections created by Section 230 do not suggest that internet platforms are mere conduits for speech rather than publishers of others' and their own content. Congress enacted Section 230 precisely

because platforms are publishers with the capacity to "speak" through their exercise of editorial discretion and specified the circumstances in which they would not be held liable for that speech. Far from bolstering the constitutionality of the Texas and Florida laws, Section 230 reflects congressional policy to protect platforms in the exercise of their First Amendment rights to editorial control—rights that these laws deny.

Respectfully submitted.

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