No. 23-647

In The

Supreme Court of the United States

ADRIENNE SEPANIAK KING
Petitioner,

v.

META PLATFORMS, INC., fka FACEBOOK, INC.,
a Delaware corporation,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeal
for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Introduction. This Supplemental Brief is submitted pursuant to Supreme Court Rule 15.8 in support of Petitioner's Petition for Writ of Certiorari filed with this Court on December 11, 2023. This Supplemental Brief seeks to bring to this Court's attention the intimate connection between the Petition filed in this case and the Petitions filed in Case No. 22-555 (*NetChoice, LLC v. Paxton*) and Case No. 22-277 (*Attorney General, State of Florida v. NetChoice, LLC*) (collectively hereafter referred to as "the *NetChoice* cases"). While the Petition in this case was pending a possible response by Respondent Meta Platforms, Inc. which could have been filed within thirty days of the filing of the Petition in this case, this Court, on January 5, 2024, ordered oral argument in the *NetChoice* cases for February 26, 2024. Based upon the connection between the issues raised in this Petition and the issues to be considered by this Court in the *NetChoice* cases as more fully explained below, if this Court decides to grant the Petition in this case, Petitioner humbly suggests that this Court consider resolving the issues raised in this Petition first before resolving the issues raised in the *NetChoice* cases for the reasons more fully explained below.

The* NetChoice *Cases Issues Before This Court. On September 29, 2023, this Court issued an order granting certiorari in the *NetChoice* cases but "limited to Questions 1 and 2 presented by the Solicitor General in her brief for the United States as *amicus curiae*." The *NetChoice* cases involve the statutes enacted by Texas and Florida to "regulate" to

a degree "major social media platforms like Facebook, YouTube, and X (formerly known as Twitter)." The Solicitor General's summary of the Questions Presented was:

> The two [state] laws differ in some respects, but both restrict platforms' ability to engage in content moderation by removing, editing, or arranging user-generated content; require platforms to provide individualized explanations for certain forms of content moderation; and require general disclosures about platforms' content-moderation practices.

The Solicitor General's Questions 1 and 2 which this Court has determined that it will consider on certiorari for the *NetChoice* cases are:

> 1. Whether the [state] laws' content-moderation restrictions comply with the First Amendment.
> 2. Whether the [state] laws' individualized-explanation requirements comply with the First Amendment.

These two issues have been presented to this Court in breathtaking and broadly sweeping scope involving Constitutional First Amendment Free Speech protections at the highest level and involving complex state statutes seeking complicated "regulation" of "platforms." There is one terrible flaw, one missing element, in the *NetChoice* cases which Petitioner in this case believes should be considered

and resolved first by this Court before considering the heady issues raised in the *NetChoice* cases – that is, no one is talking about the proper interpretation of the Communications Decency Act ("CDA"), and in particular the proper interpretation of 47 USC 230(c)(1) and 47 USC 230(c)(2)(A).

The Need to Interpret the CDA Before Considering Broad Constitutional Issues of Free Speech in the* NetChoice *Cases. The CDA was enacted in 1996, twenty-seven years ago, and in all this time, this Court has never engaged in a truly searching analysis of how to interpret 47 USC 230. The Petition in this case calls for just such a searching analysis, at least with respect to the proper interpretation of the extent of "immunity" provided by 47 USC 230(c)(1). It is not unreasonable to assume that a proper interpretation of 47 USC 230(c)(1) at least requires a serious determination of the relationship between 47 USC 230(c)(1) and 47 USC 230(c)(2)(A). The Petition in this case argues for an interpretation suggested by Justice Thomas in his concurrence to the denial of certiorari in *Malwarebytes v. Enigma Software Group USA, LLC*, 592 US ___, 141 S.Ct. 13, 208 L.Ed.2d 197 (2020). The interpretation is that 47 USC 230(c)(1) *only* applies to material which is uploaded or sought to be uploaded on to Big Tech platforms and that Big Tech platforms do not have any discretion on what to upload and what not to upload pursuant to 47 USC 230(c)(1); 47 USC 230(c)(2)(A), on the other hand, applies *only* to material which may properly be removed from or blocked from Big Tech platforms. The material which may be removed from or blocked from Big Tech platforms as set forth in 47

USC 230(c)(2)(A) is basically material that is offensive (in the "decency" sense) or not "constitutionally protected " (e.g., spam).

If the CDA is interpreted in the manner we argue in the Petition in this case, then, and only then, it seems to us, would the much broader constitutional and other issues being raised in the *NetChoice* cases be ripe for consideration. For example, does the CDA interpreted as we argue in this Petition preempt the states from enacting any statutes in the same area of law? If the CDA does not preempt state statutes, are the Texas and Florida statutes being considered in the *NetChoice* cases in conflict with the CDA or consistent with the CDA? Is the CDA interpreted as we argue in this Petition constitutional?

The military operates on a principle commonly referred to as "crawl, walk, run." Obviously, this principle means when a new and significant element of any kind is introduced, it is first best to "crawl" with it and test it out in "slow motion," so to speak. Once it has been tested, then the time has come to "walk" with it, walk it through more realistic scenarios at a "quicker" pace. Finally, the time comes to "run" with it – it has been tested, practiced, and proven. It seems to us that the important issues being considered in the *NetChoice* cases constitute "running" with those issues before "crawling" and "walking" with them. How can all the issues being raised in the *NetChoice* cases be resolved, even just the two issues being considered by this Court, without first resolving how the CDA should properly be interpreted? If it was not for the CDA, the Big Tech platforms would not even exist. The entire

house of Big Tech cards is built on the CDA. If this Court holds the Texas and Florida statutes are unconstitutional, does that mean that the CDA is unconstitutional? If the CDA is unconstitutional, is 230(c)(1) immunity severable or is it abolished along with the rest of the statute? Before resolving the *NetChoice* issues, we suggest that this Court "crawl" and "walk" with the CDA and test its limits and constitutionality first. The Petition in this case presents an opportunity to this Court to interpret the CDA before confronting the much more expansive issues raised in the *NetChoice* cases.

In the *NetChoice* cases, there are roughly ninety briefs that have been filed with this Court – about two-thirds in support of *NetChoice* and one-third in support of Texas and Florida. Of all the briefs filed on the *NetChoice* side, there is rarely any discussion or even mention of the CDA – any mention of the CDA that does occur is usually a passing reference on one or two pages or in a footnote or two. The Solicitor General's brief mentions the CDA in passing on two pages. The longest discussion we were able to find in all these briefs was a five page discussion about the CDA in the Reason Foundation *amicus* brief filed on December 7, 2023.

Not surprisingly, the CDA is mentioned much more often in the briefs supporting Texas and Florida. In our opinion, the most compelling argument about the CDA was contained in the Keep the Republic *amicus* brief filed January 22, 2024. Like us, this brief called for a proper interpretation of "Section 230" at p. 23: "This case [the *NetChoice* cases] can cease at any

time, without altering what a social media carrier is and does. It *will* cease if the Court properly interprets Section 230 as protecting only neutral conduits." [Keep the Republic's emphasis on the word "will"]. In other words, this Court should consider Big Tech platforms as "neutral conduits" for uploaded material and not "editors" who can take down or block content at will. It is cases like *Barnes v. Yahoo!, Inc.*, 570 F.3d 1102 (9th Cir. 2009), which interpret Big Tech platforms as "editors" pursuant to 47 USC 230(c)(1) who have a "constitutional right" to take down or block any content they please. We argue in this Petition, as does Justice Thomas in *Malwarebytes*, that the holding in *Barnes* constitutes an improper interpretation of 47 USC 230(c)(1). This Court should "crawl" with this issue regarding the proper interpretation of the CDA before it "runs" with the sweeping constitutional issues involved in the *NetChoice* cases.

The Keep the Republic *amicus* brief has the longest discussion of Section 230 of any brief filed with this Court – six pages in length (pp. 30-35). Keep the Republic engages in its analysis of Section 230 while at the same time admitting at p. 30, "The issue of Section 230 is outside the questions presented in the instant case, but it might still be raised, and the Court should keep its implications in mind while developing a doctrine for Internet public free speech carriage." Keep the Republic has the same sense of the *NetChoice* cases that we have – how can all the issues being considered in the *NetChoice* cases not "raise" the proper interpretation of Section 230? This is the reason this Court should interpret Section 230 first, then consider how that interpretation affects the

issues being considered in the *NetChoice* cases.

Ironically, even though Keep the Republic argues for a proper interpretation of Section 230, consistent with our interpretation of Section 230 in this case, which will cause the litigation in the *NetChoice* cases to "cease," Keep the Republic is pessimistic at pp. 35-36 about Section 230's ultimate ability to protect Free Speech of users of Big Tech platforms:

> Although if properly interpreted Section 230 functions as a common carrier [statute], the Court should not consider falling back on it to save freedom of speech in the United States. Its mechanism for preventing censorship is indirect and difficult to enforce. Its liability protection may become unnecessary with artificial intelligence able to predict tort litigation outcomes. Most fundamentally, as a statute that can be revoked by Congress at any time, it is no bedrock for constitutional democracy of the 21st century to stand upon.

We are not as pessimistic as Keep the Republic. We believe that, "properly interpreted," Section 230 goes a very long way toward protecting Free Speech in the United States in the 21st century. At least, we believe that this Court should interpret the CDA first before it "runs" headlong into constitutional arguments in the *NetChoice* cases which may not be necessary to consider depending on how this Court interprets the

CDA. Congress created Big Tech with the CDA. Once this Court properly interprets the CDA as we believe the CDA should be interpreted, let Congress take up the task of changing the CDA if Congress believes the CDA needs changing.

Conclusion. We argue here that the issues raised in the *NetChoice* cases should be resolved only *after* this Court takes up the task of a proper interpretation of 47 USC 230. This Petition directly requests that this Court interpret 47 USC 230 as suggested by Justice Thomas in *Malwarebytes*. Once this Court has interpreted the CDA for the first time since it was enacted, then it would be appropriate to take up the greater constitutional task facing this Court in the *NetChoice* cases. As Keep the Republic argues, it is difficult to believe that issues about the proper interpretation of the CDA will not be "raised" in the *NetChoice* cases, yet no one is arguing in the *NetChoice* cases, except Keep the Republic, how the CDA should be interpreted. The cart is before the horse.

Right now, it may be appropriate to argue the *NetChoice* cases as argument is already set for February 26, but we suggest that it would also be appropriate to grant certiorari in this case, resolve the issue of the proper interpretation of the CDA raised in this case before issuing a decision in the *NetChoice* cases, and then relate the interpretation of the CDA from this case to the issues raised in the *NetChoice* cases. It may even be necessary to reargue the *NetChoice* cases in light of the resolution of the interpretation of the CDA raised in this case.

Respectfully submitted,

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