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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN JOSE DIVISION**

16 NETCHOICE, LLC d/b/a NetChoice,

17 Plaintiff,

18 v.

19 ROB BONTA, ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA, in his
20 official capacity,

21 Defendant.

Case No. 5:22-cv-08861-BLF

**AMICI CURIAE BRIEF OF CHAMBER OF
PROGRESS, LGBT TECH, THE
INFORMATION TECHNOLOGY AND
INNOVATION FOUNDATION, AND THE
WOODHULL FREEDOM FOUNDATION
IN SUPPORT OF NETCHOICE**

Judge: Hon. Beth Labson Freeman

Action Filed: December 14, 2022

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Interest of Amici Curiae

Amici are nonprofit organizations committed to promoting a society in which all people benefit from technology and interconnectivity and all people enjoy the speech opportunities available through a safe, open, and equitable internet.

Chamber of Progress is a tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. It backs public policies that will build a fairer, more inclusive country in which all people benefit from technological advances. Its work is supported by corporate partners, many of whom will be subject to the law at issue.

LGBT Tech encourages the continued early adoption and use of cutting-edge, new and emerging technologies by providing information, education, and strategic outreach for LGBTQ+ communities. LGBT Tech empowers LGBTQ+ communities and individuals, and ensures that media, telecom, and high technology issues of specific concern to LGBTQ+ communities are addressed in public policy conversations and engages in research, education, volunteerism, and partnerships to provide cutting-edge technology and resources to improve the lives of LGBTQ+ individuals. LGBT Tech strives to ensure that LGBTQ+ communities have safe and affirming spaces online. This law poses significant challenges and unintended consequences for LGBTQ+ individuals seeking crucial support and community online.

The Information Technology and Innovation Foundation is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute that has been recognized repeatedly as the world’s leading think tank for science and technology policy. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress.

The Woodhull Freedom Foundation is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and free expression. Woodhull is particularly concerned with governmental attempts to censor or burden access to online speech, as sexual expression is often a target of such efforts. Woodhull believes that if this Court upholds the constitutionality of the challenged law, other jurisdictions will be incentivized to pass similar

1 statutes threatening the ability of its members to effectively advocate for sexual freedom and
2 communicate about sexually oriented topics online.

3 Amici therefore submit this brief in support of Plaintiff NetChoice. No counsel for a party
4 authored this brief in whole or in part, and no person other than amici and their counsel made a
5 monetary contribution to fund the preparation or submission of this brief.

6 **Introduction and Summary of Argument**

7 User-generated content platforms are central to the Internet as we know it. From
8 Wikipedia to YouTube, Reddit to Yelp!, these platforms are where we go to learn, access
9 resources, be entertained, form and share ideas and opinions about everything from politics to
10 religion to restaurants, and “explor[e] the vast realms of human thought and knowledge.”
11 *Packingham v. North Carolina*, 582 U.S. 98, 99 (2017). People of all ages rely on these platforms
12 to find and build community and connect with others who share common interests, life stages, or
13 struggles, despite geographical distance.

14 Because these platforms are generally open forums, content moderation is essential to
15 users’ ability both to speak and listen, for example without being shouted down by another user,
16 subjected to harassment by another user, or forced to view content posted by another user that
17 impedes their speaking or listening on topics that interest them. Because platforms have different
18 purposes and communities of users, they adopt different practices for content moderation; indeed,
19 these practices are at the core of users’ experiences with each platform.

20 The existence of online platforms would be untenable absent the protections of Section
21 230 of the Communications Decency Act, 47 U.S.C. § 230. Congress foresaw the need to protect
22 platforms’ content moderation decisions in order for the Internet to flourish. It therefore codified
23 protections from liability for user-generated content and content moderation, seeking to
24 encourage “good faith” content moderation and protect Internet platforms who choose to
25 moderate content from the impossible burden of screening all content shared through their
26 platforms. *See id.* § 230(c). And to be certain that its aims would be achieved, Congress also
27 preempted any state laws inconsistent with these protections—both explicitly and as made known

1 by the law’s purposes and objectives. *See id.* § 230(b) and (e)(3).

2 The Policy Enforcement Provision in California’s Age Appropriate Design Code Act
3 (CAADCA) would entirely subvert Section 230. This provision requires covered Internet services
4 to “[e]nforce [their] published terms, policies, and community standards,” terms that encompass
5 content moderation policies. CAADCA § 31(a)(9). It thus effectively imposes liability on
6 Internet platforms for any policy-violating content that is not removed or otherwise subject to
7 enforcement. Section 230(c)(1) and (e)(3) preempt laws imposing such liability expressly. Even
8 absent express preemption, Section 230 preempts the Policy Enforcement Provision under the
9 doctrine of conflict preemption because it “stands as an obstacle to the accomplishment and
10 execution of the full purposes and objectives of Congress” to encourage “good faith” content
11 moderation and protect Internet platforms who choose to moderate content from the impossible
12 burden of screening all content shared through their platforms. *Hines v. Davidowitz*, 312 U.S. 52,
13 61 (1941).

14 Allowing the Policy Enforcement Provision to take effect would introduce grave harms
15 that Congress sought to prevent. It will incentivize risk-averse platforms to take one of two
16 actions—abandon robust content policies and moderation in favor of vague standards or no
17 standards at all, or aggressively over-enforce their existing content policies, diminishing the
18 Internet as we know it in the process. Both strategies will harm marginalized communities already
19 vulnerable to harassment and censorship, marginalized youth most of all. And by leaving
20 undefined what it means for a platform to “enforce” its terms and policies, the CAADCA will
21 deter platforms from experimenting with novel solutions to address problematic content, chilling
22 innovation and discouraging the adoption of practices that could better support users.

23 Because the Policy Enforcement Provision is expressly preempted by Section 230 and
24 stands in the way of Section 230’s objectives and purposes—and to prevent the harms that
25 Section 230 is meant to guard against—the Court should grant NetChoice’s motion to
26
27

1 preliminarily enjoin this provision.¹

2 **I. Section 230 preempts the Policy Enforcement Provision.**

3 The Supremacy Clause of the U.S. Constitution “provides a clear rule that federal law
4 ‘shall be the supreme Law of the Land[.]’ *Arizona v. United States*, 567 U.S. 387, 398–99 (2012)
5 (quoting U.S. Const. art. VI, cl. 2). Congress may preempt state laws using “by enacting a statute
6 containing an express preemption provision.” *Id.* (internal citations removed). And even absent
7 express preemption, a state law is preempted if it “stands as an obstacle to the accomplishment
8 and execution of the full purposes and objectives of Congress.” *Crosby v. Nat’l Foreign Trade*
9 *Council*, 530 U.S. 363, 373 (2000) (quoting *Hines*, 312 U.S. at 67 (1941)). The Policy
10 Enforcement Provision is preempted under both standards.

11 **A. Section 230 expressly preempts the Policy Enforcement Provision.**

12 Section 230 provides that “[n]o provider or user of an interactive computer service shall
13 be treated as the publisher or speaker of any information provided by another information content
14 provider” or be “held liable on account of . . . any action voluntarily taken in good faith to restrict
15 access to or availability of material that the provider or user considers to be obscene, lewd,
16 lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such
17 material is constitutionally protected.” § 230(c)(1), (c)(2). Section 230 further explicitly preempts
18 state laws inconsistent with these provisions, stating that “[n]o cause of action may be brought
19 and no liability may be imposed under any State or local law that is inconsistent with this
20 section.” § 230(e)(3). Because the Policy Enforcement Provision treats platforms as engaging in
21 the kind of speech and publication activities protected by Section 230, it is expressly preempted.
22 *See HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 681–82 (9th Cir. 2019).

23 In interpreting Section 230, the Ninth Circuit has defined “publication” within the
24 meaning of the statute to include “reviewing, editing, and deciding whether to publish or to

25 _____
26 ¹ This brief focuses on the Section 230 issues raised in NetChoice’s motion with respect to the
27 Policy Enforcement Provision, but Amici also support NetChoice’s challenges to this and other
28 provisions of the CAADCA on other grounds as well, consistent with the briefs Amici have
previously filed in this litigation before this Court and the Ninth Circuit.

1 withdraw from publication third-party content.” *Id.* (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d
 2 1096, 1102 (9th Cir. 2009)). In evaluating whether a law is preempted by Section 230, the Ninth
 3 Circuit asks “whether the duty would necessarily require an internet company to monitor third-
 4 party content.” *Id.* at 682.

5 By mandating that platforms enforce “published terms, policies and community
 6 standards,”² the Policy Enforcement Provision does just that. To comply, platforms must
 7 necessarily monitor all user-generated content shared through their sites to avoid liability for
 8 failing to take action against policy violating content. *HomeAway.com*, 918 F.3d at 682.
 9 California itself has conceded that the Policy Enforcement Provision applies to a platform’s
 10 content moderation activities, stating in its opposition to NetChoice’s first motion for a
 11 preliminary injunction that the provision applies to a platform’s decision “to remove or allow
 12 content.” Defendant’s Opposition to Plaintiff’s Motion for Preliminary Injunction at 14,
 13 *NetChoice, LLC v. Bonta*, 692 F. Supp. 3d 924 (N.D. Cal. 2023) (No. 5:22-cv-08861).

14 The Ninth Circuit Court of Appeals has repeatedly held that Section 230 precludes the
 15 imposition of liability for an online service provider’s failure to review or exclude user-generated
 16 content. “[A]ny activity that can be boiled down to deciding whether to exclude material that
 17 third parties seek to post online is perforce immune under [S]ection 230.” *Fair Hous. Council of*
 18 *San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008). That
 19 includes a platform’s failure to remove user generated content. *Barnes v. Yahoo!, Inc.*, 570 F.3d
 20 1096, 1103 (9th Cir. 2009), *as amended* (Sept. 28, 2009). “[R]emoving content is something
 21 publishers do, and to impose liability on the basis of such conduct necessarily involves treating
 22 the liable party as a publisher of the content it failed to remove.” *Id.* Critically, platforms are also

23
 24 ² The words “terms” and “policies” are broad and undefined, sweeping into scope any covered
 25 platforms’ content moderation policies, and the use of the term “community standards” makes
 26 clear the State’s intent to target platforms’ content moderation activities - Facebook calls its
 27 content moderation policies “community standards.”
 28 <https://transparency.meta.com/policies/community-standards/>. Other platforms use similar terms:
 Instagram calls its content policies “Community Guidelines,” as do Goodreads, Twitch, and
 Discord.

1 immune under Section 230 even when they fail to remove content that is “contrary to the
2 website’s express policies.” *Roommates*, 521 F.3d at 1171–72.

3 Thus, by treating platforms as publishers on “the basis of content [they] fail[] to remove,”
4 the Policy Enforcement Provision imposes liability on “precisely the kind of activity for which
5 Congress intended to grant absolution with the passage of Section 230.” *Roommates*, 521 F.3d at
6 1172. The provision treats platforms “as the publisher or speaker of [] information provided by
7 another information content provider,” and is thus expressly preempted by Section 230. *See* 47
8 U.S.C. § 230(c)(1) and (e)(3); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir.
9 2003); *Roommates*, 521 F.3d at 1171–72; *see also Backpage.com, LLC v. McKenna*, 881 F. Supp.
10 2d 1262, 1273 (W.D. Wash. 2012).

11 Imagine a platform that employs thousands of professionals to apply its content
12 moderation guidelines to millions of pieces of content posted each day. Although these
13 professional moderators often undergo months of training to learn how to enforce detailed
14 policies in practice, it is often still exceedingly unclear whether a given piece of content violates a
15 platform’s policy. Take, for example, Nick Ut’s famous Pulitzer prize winning photograph of a
16 young, naked girl running from a napalm attack during the Vietnam war. If that photograph is
17 uploaded to an Internet platform whose content policies prohibit nudity, should the photograph be
18 removed? Facebook dealt with just that situation in 2016, initially removing a post by the then
19 Norwegian prime minister sharing the photograph, but ultimately restoring it after public outcry.³
20 Likewise, how should a moderator treat a video depicting violence in Syria? Should they remove
21 the content for violating policies against extremist content, as YouTube did with thousands of
22 videos of the Syrian conflict?⁴ What if those videos provide vitally important evidence of human
23 rights abuses and are of immense public interest? Moderators typically only have a matter of

24 _____
25 ³ *See* Kate Klonick, *Facebook Under Pressure*, SLATE (Sept. 12, 2016),
<https://slate.com/technology/2016/09/facebook-erred-by-taking-down-the-napalm-girl-photo-what-happens-next.html>.

26 ⁴ *See* Abdul Rahman Al Jaloud et al., *Caught in the Net: The Impact of “Extremist” Speech*
27 *Regulations on Human Rights Content*, ELECTR. FRONTIER FOUND. (May 30, 2019),
<https://www.eff.org/wp/caught-net-impact-extremist-speech-regulations-human-rights-content>.

1 seconds to make these sorts of judgment calls as they remove hundreds of millions of policy-
2 violating content items each year. But CAADC’s Policy Enforcement Provision would punish
3 platforms for whatever content slips through the cracks, a penalty that contravenes the express
4 goal of Section 230 to promote “good faith” efforts to “restrict access to or availability of”
5 objectionable content. 47 U.S.C. § 230(c)(2)(A). Therefore, what the Policy Enforcement
6 Provision asks of platforms is not just impossible, it is preempted.

7 *Barnes* is of no help to California and in fact underscores this conclusion. California has
8 used *Barnes* to support its argument that the Policy Enforcement Provision “permissibly holds
9 online businesses accountable for doing what they say they are going to do” is misplaced.
10 Defendant’s Opposition to Plaintiff’s Motion for Preliminary Injunction at 14, *NetChoice, LLC v.*
11 *Bonta*, 692 F. Supp. 3d 924 (N.D. Cal. 2023) (No. 5:22-cv-08861). *Barnes* found that a
12 promissory estoppel claim “[d]id not seek to hold Yahoo liable as a publisher or speaker of third-
13 party content, but rather as the counter-party to a contract, as a promisor who has breached.” 570
14 F.3d at 1107. The promise at issue in *Barnes* was “Yahoo’s manifest intention to be legally
15 obligated to do something, which happen[ed] to be removal of material from publication.” *Id.*
16 Yahoo’s Director of Communications directly conveyed to the plaintiff that “she would
17 ‘personally walk the statements over to the division responsible for stopping unauthorized
18 profiles [on Yahoo] and they would take care of it,” a statement on which the plaintiff “claim[ed]
19 to have relied.” *Id.* at 1099.

20 Significantly, *Barnes* did not imply that a general statement of policy would be sufficient
21 to support a promissory estoppel claim. On the contrary, the court expressly stated that “a general
22 monitoring policy, or even an attempt to help a particular person, on the part of an interactive
23 computer service such as Yahoo does not suffice for contract liability.” *Id.* at 1108.

24 Unsurprisingly, applying *Barnes*, other judges on this Court have since held that a platform’s
25 content policies do not give rise to “any promise . . . to enforce its terms.” *Goddard v. Google,*
26 *Inc.*, 640 F. Supp. 2d 1193, 1201 (N.D. Cal. 2009). Accordingly, as in *Goddard*, California’s past
27 argument “rests not on any promise, but on a ‘general [content] policy . . . on the part of’ an

1 online platform . . . , a theory of liability that *Barnes* expressly precludes.” *Goddard*, 640 F. Supp.
2 2d at 1201 (quoting *Barnes*, 570 F.3d at 1108).

3 **B. Section 230 also preempts the Policy Enforcement Provision because the**
4 **provision interferes with congressional purposes and objectives.**

5 Even absent express preemption, the Policy Enforcement Provision is preempted because
6 it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives
7 of Congress.” *Arizona*, 567 U.S. at 406 (2012) (quoting *Hines*, 312 U.S. at 67 (1941)); *see also*
8 *Backpage*, 881 F. Supp.2d at 1273.

9 To determine when a state law presents a “sufficient obstacle,” courts look to “the federal
10 statute as a whole” and “identify[] its purpose and intended effects.” *Crosby*, 530 U.S. at 373. “If
11 the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field
12 else must be frustrated and its provisions be refused their natural effect—the state law must yield
13 to the regulation of Congress within the sphere of its delegated power.” *Id.* (quoting *Savage v.*
14 *Jones*, 225 U.S. 501, 533 (1912)).

15 Enforcement of the Policy Enforcement Provision impermissibly frustrates Section 230’s
16 purposes and objectives, as made plain by the context for its passage. Section 230 was
17 “prompted” by a New York Supreme Court decision. *See Roommates*, 521 F.3d at 1163 (citing
18 *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y.S.2d May 24, 1995)). In
19 that case, Internet platform Prodigy was held liable as the “publisher” of libelous content posted
20 by a user “because it voluntarily deleted some messages on its message boards . . . and was
21 therefore legally responsible for the content of defamatory messages that it failed to delete.” *Id.* In
22 making that determination, the court specifically cited the fact that Prodigy had adopted “content
23 guidelines.” *Stratton Oakmont*, 1995 WL 323710, at *4.

24 According to Section 230’s original authors, “[t]he *Stratton Oakmont* decision . . .
25 penalized an Internet platform for engaging in less-than-perfect content moderation—that is, for
26 failing in its attempt to remove every piece of potentially unlawful content from its site.”⁵

27 ⁵ Brief Senator Ron Wyden and Former Representative Christopher Cox as Amici Curiae in
28 Support of Respondent at 7, *Gonzalez v. Google LLC*, 598 U.S. 617, 620 (2023) (No. 21-1333).

1 *Stratton Oakmont* thus “created a perverse incentive” for Internet platforms to “avoid open-ended
2 liability” by “adopt[ing] . . . the ‘anything goes’ model for user-created content.”⁶ Congress
3 therefore adopted Section 230 to encourage “good faith content moderation” and immunize
4 Internet platforms “for whom the burden of screening billions of digital messages, documents,
5 images, and sounds would be unreasonable.”⁷

6 Damningly, the Policy Enforcement Provision would reinstate precisely the same perverse
7 incentive that Congress sought to eradicate with Section 230, imposing liability like in *Stratton*
8 *Oakmont* on platforms that enforce content policies and moderate user-generated content but that
9 do so imperfectly. Consequently, the Policy Enforcement Provision would frustrate Congress’s
10 goal of “establish[ing] a uniform federal policy, applicable across the internet, that avoids such
11 results as the state court decision in [*Stratton Oakmont*].”⁸

12 Following this same reasoning, in *Backpage.com*, Section 230 was found to preempt a
13 proposed state law criminalizing the “knowing” distribution of certain sexually explicit content.
14 In addition to finding that Section 230 expressly preempted the law, the Court found that the state
15 law also presented an “obstacle to the accomplishment and execution of the full purposes and
16 objectives of Congress.” 881 F. Supp. 2d at 1273 (quoting *Arizona*, 567 U.S. at 406).
17 Specifically, by requiring that online service providers have knowledge of a violation, the law
18 “reinforce[d] [providers’] incentives to restrict speech and abstain from self-regulation.” *Id.*
19 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997)). Consequently, the law
20 impermissibly sought to “drastically shift[] the unique balance that Congress created [in Section

21 _____
22 ⁶ Christopher Cox, *The Origin and Original Intent of Section 230 of the Communications*
23 *Decency Act*, RICHMOND J.L. & TECH. BLOG ¶ 2 (Aug. 27, 2020),
24 <https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act/>.

25 ⁷ *Id.* ¶28; see also 141 CONG. REC., 22046 (1995) (Remarks of Rep. Goodlatte) (“We have the
26 opportunity for every household in America, every family in America, soon to be able to have
27 access to places like the Library of Congress, to have access to other major libraries of the world,
28 universities, major publishers of information, news sources. There is no way . . . that any of those
entities, like Prodigy, can take responsibility to edit out information that is going to be coming in
to them from all manner of sources.”).

⁸ Cox *supra* note 7, ¶48.

1 230] with respect to the liability of online service providers that host third party content.” *Id.* at
2 1274.

3 **II. This Court can and should grant a preliminary injunction based on a facial**
4 **Section 230 preemption challenge.**

5 Although this Court previously concluded that “a facial challenge to the CAADCA is not
6 the appropriate context in which to consider the applicability of § 230,” *see NetChoice, LLC v.*
7 *Bonta*, 692 F. Supp. 3d 924, 963 (N.D. Cal. 2023), *aff’d in part, vacated in part*, 113 F.4th 1101
8 (9th Cir. 2024)), doing so would promote judicial economy and be consistent with the decisions
9 of numerous other courts. In many other cases, courts have found Section 230 to preempt
10 inconsistent state laws at the preliminary injunction stage based on facial arguments. *See, e.g.,*
11 *Backpage.com*, 881 F. Supp.2d; *Backpage.com, LLC v. Hoffman*, No. 13-CV-03952 (DMC)
12 (JAD), 2013 WL 4502097, at *5 (D.N.J. Aug. 20, 2013); *Backpage.com, LLC v. Cooper*, 939 F.
13 Supp. 2d 805, 823 (M.D. Tenn. 2013); *Airbnb, Inc. v. City of Bos.*, 386 F. Supp.3d 113, 123-24
14 (D. Mass. 2019); *Computer & Commc’ns Indus. Ass’n v. Paxton*, No. 1:24-CV-849-RP, 2024 WL
15 4051786, at *19 (W.D. Tex. Aug. 30, 2024). A determination that the Policy Enforcement
16 Provision is facially preempted by Section 230 would not only spare future defendants from
17 litigating costly enforcement actions, but it would also serve the interests of judicial economy,
18 “saving both parties from wasting valuable resources on doomed litigation” and “freeing up the
19 courts to handle other cases more carefully or quickly.”⁹

20 **III. If allowed to subvert Congress, the Policy Enforcement Provision would harm**
21 **marginalized users and chill innovation in content moderation.**

22 For major online platforms with billions of users, perfect enforcement of content policies
23 is impossible. Therefore, in contrast to the goals envisioned by Section 230, the Policy
24 Enforcement Provision will incentivize platforms to either aggressively overpolice or altogether
25 abandon existing efforts to moderate content hosted on their sites. This outcome will
26 disproportionately harm marginalized groups and create a disincentive against further
27 experimentation and innovation in approaches to content moderation.

28 ⁹ Eric Goldman, *Why Section 230 is Better Than the First Amendment*, 95 NOTRE DAME L. REV. 33, 41 (2019).

1 **A. Content moderation is inevitably imperfect.**

2 The ability to set and implement content policies for user-generated content is key to
 3 platforms’ abilities to establish competitive identities, respond to harmful content, ensure
 4 financial viability, and meet evolving needs and changing norms of their user communities. But
 5 even for platforms with extensive resources devoted to enforcement of their content policies,
 6 mistakes and omissions are inevitable. If it was unreasonable to require the Internet platforms of
 7 the 1990s to assess every piece of user-generated content, “when internet traffic was measured in
 8 the tens of millions,”¹⁰ it is even more unreasonable now. 100 billion messages and 350 million
 9 photos¹¹ are shared across Facebook every day. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2395
 10 (2023). “In the face of that deluge,” the Supreme Court has observed, “major platforms cull and
 11 organize uploaded posts in a variety of ways . . . remov[ing] some content entirely; rank[ing] or
 12 otherwise prioritiz[ing] what remains; and sometimes add[ing] warnings or labels.” *Id.* at 2395.
 13 Even if Facebook’s content policy enforcement had a 99.9% accuracy rate, “it’s still going to
 14 make ‘mistakes’ on 350,000 images. Every. Single. Day. So, add another 350,000 mistakes the
 15 next day. And the next. And the next. And so on.”¹² At the scale at which Internet platforms
 16 operate, perfect enforcement of content policies is impossible.

17 Whether or not a particular piece of content violates a platform’s content policies is
 18 moreover a matter of interpretation, and one that is inherently subjective and often dependent on
 19 context and culture.¹³ In many cases, it may not be easily ascertainable based on the face of a
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21 _____
 22 ¹⁰ Cox, *supra* note 7, ¶61.

23 ¹¹ Mike Masnick, *Masnick’s Impossibility Theorem*, TECHDIRT (Nov. 20, 2019),
<https://www.techdirt.com/2019/11/20/masnick-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well/>.

24 ¹² Masnick, *supra* note 12.

25 ¹³ Masnick, *supra* note 12 (“By definition, content moderation is always going to rely on
 26 judgment calls, and many of the judgment calls will end up in gray areas where lots of people’s
 27 opinions may differ greatly. Indeed, one of the problems of content moderation that we’ve
 28 highlighted over the years is that to make good decisions you often need a tremendous amount of
 context, and there’s simply no way to adequately provide that at scale in a manner that actually
 works.”).

1 piece of content whether it violates an applicable content policy.¹⁴ In such cases, an
 2 understanding of the content’s context may be necessary to make an appropriate determination.
 3 Platforms must make quick decisions about potential content violations, and often “without fully
 4 understanding the factual and social context.”¹⁵ Automated systems fare no better than human
 5 moderators at this task.¹⁶

6 However, under the Policy Enforcement Provision, each mistake could give rise to a
 7 penalty of \$2,500 per affected child—or \$7,500 based on a theory that a mistake was
 8 intentional.¹⁷ Using the previous example of 350,000 mistakes out of 350 million photos, at the
 9 lower “negligence” threshold, liability could ratchet up to over 8 trillion dollars—and that’s
 10 assuming there is just one “affected child” per mistake.

11 **B. The Policy Enforcement Provision will disproportionately harm marginalized**
 12 **users.**

13 Faced with the risk of punishing fines for errors in content policy enforcement or
 14 interpretations that differ from the state attorney general, platforms will be pressed to adopt one
 15 of two strategies, both of which will have a significant negative impact on speech online and
 16 disproportionately harm marginalized groups.

17 First, platforms will be incentivized to abandon robust content moderation policies,
 18 leading to lower standards for online content or vague or opaque standards that they cannot be
 19 accused of failing to enforce. Research on early content moderation practices, which took the
 20 form of generalized “standards” as opposed to detailed “rules,” shows that vague content policy
 21 increases the risk of arbitrary enforcement based on cultural or personal biases. For example, in
 22 the early days of Facebook’s community standards development, “a group of [content

23 ¹⁴ Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. 1, 43 (2021) (“It will
 24 not always be clear that a rule violation occurred. [Child sexual abuse material] is comparatively
 25 unique in this regard; violations usually can be confirmed by reference to the content item. In
 26 contrast, in many circumstances, a rule violation cannot be definitively determined.”).

27 ¹⁵ Eric Goldman and Jess Miers, *Online Account Terminations/Content Removals and the Benefits*
 28 *of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 205 (2021).

¹⁶ Daphne Keller, *Internet Platforms: Observations on Speech, Danger*, HOOVER INST. 1, 7
 (2018).

¹⁷ Cal. Civ. Code § 1798.99.35.

1 moderation] workers [in India] were given a list of observable rules about a picture that made it
 2 impermissibly sexual, but at the bottom of the rules there was a general ‘Feel Bad’ standard: if
 3 you feel like something is otherwise sexual or pornographic, take it down. That standard when
 4 applied to global content by a small group of moderators was predictably overrestrictive” leading
 5 to takedowns of “content that portrayed open-mouthed kissing.”¹⁸

6 The Policy Enforcement Provision would encourage platforms to return to these sorts of
 7 “[i]mprecise and broad” content policies. Not only do such policies give enforcers considerable
 8 discretion, but they are especially harmful to marginalized groups because “platforms regularly
 9 use this discretion to delay action against powerful figures, whereas they seem to apply a trigger-
 10 happy approach to speech from marginalized groups using aggravated language to speak out
 11 against injustice.”¹⁹

12 As Twitter’s previous General Counsel has explained, a lack of robust content moderation
 13 can also allow abusive content to flourish, to the detriment of marginalized voices:

14 “I’ve also been seriously troubled by the plight of some of our users who are completely
 15 overwhelmed by those who are trying to silence healthy discourse in the name of free
 16 expression. At times, this takes the form of hateful speech in tweets directed at women or
 17 minority groups; at others, it takes the form of threats aimed to intimidate those who take
 18 a stand on issues.”²⁰

19 For many users, content moderation is what makes the Internet a tolerable space, and
 20 when platforms are protected from liability for their enforcement decisions, they have a greater
 21 incentive to take action against harmful content.²¹

22 ¹⁸ Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online*
 23 *Speech*, 131 HARV. L. REV. 1598, 1642-1643 n.308 (2017).

24 ¹⁹ Ángel Díaz & Laura Hecht-Felella, *Double Standards in Social Media Content Moderation*,
 25 BRENNAN CTR. JUSTICE, 3 (2021), https://www.brennancenter.org/sites/default/files/2021-08/Double_Standards_Content_Moderation.pdf.

26 ²⁰ Vijaya Gadde, *Twitter executive: Here’s how we’re trying to stop abuse while preserving free*
 27 *speech*, WASH. POST (Apr. 16, 2015),
 28 <https://www.washingtonpost.com/posteverything/wp/2015/04/16/twitter-executive-heres-how-were-trying-to-stop-abuse-while-preserving-free-speech>.

²¹ Jess Miers, *Five Section 230 Cases That Made Online Communities Better*, Chamber of
 Progress, MEDIUM (May 21, 2024), <https://medium.com/chamber-of-progress/five-section-230-cases-that-made-online-communities-better-92ccba6a8a7b>.

1 Second, platforms may also respond to the Policy Enforcement Provision by aggressively
 2 overenforcing their content policies, increasing the use of automated detection tools and removing
 3 any content flagged, increasing the risk of “collateral censorship” of marginalized voices.²² For
 4 example, racial minorities may find that their speech is quashed because it is deemed hate speech,
 5 harassment, or abuse.²³ Girls and young women may struggle to access information about sexual
 6 assault, reproductive healthcare, and other issues due to how their bodies have been sexualized.²⁴
 7 Women may find themselves banned from social media for sharing their stories about workplace
 8 sexual harassment and abuse.²⁵ Aggressive overenforcement also poses a risk to vitally important
 9 documentation of human rights abuses as platforms’ incentive to broaden policing of “extremist”
 10 content may inadvertently result in the mass removal of activist counterspeech against human
 11 rights violations.²⁶

12 These real-world effects will be particularly harmful to the very youth California seeks to
 13 protect. Many teens rely on user-generated content platforms, like social media, to connect with
 14 friends, share creative content, get support in difficult times, and find communities that help them
 15 feel accepted.²⁷ Such platforms also “provide access to important information” and “promot[e]

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 18 ²² See Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2046–47 (2018)
 19 (citing research indicating that “marginalized communities” are “particularly vulnerable to the
 20 collateral censorship” that results from chilling an intermediary’s speech).

21 ²³ See Maarten Sap et al., *The Risk of Racial Bias in Hate Speech Detection*, *Proceedings of the*
 22 *57th Annual Meeting of the Association for Computational Linguistics*, 1668, 1671 (2019),
 23 <https://bit.ly/3ODPs8S>.

24 ²⁴ See Savannah Kuchar, *When social media censorship gets it wrong: The struggle of breast*
 25 *cancer content creators*, USA TODAY (Sept. 12, 2023), <https://bit.ly/49sRReA>.

26 ²⁵ Samuel Gibbs, *Facebook Bans Women for Posting ‘Men Are Scum’ After Harassment*
 27 *Scandals*, GUARDIAN (Dec. 5, 2017), <https://bit.ly/49sRWio>.

28 ²⁶ See Abdul Rahman Al Jaloud et al., *supra* note 5.

²⁷ Monica Anderson et al., *Connection, Creativity and Drama: Teen Life on Social Media in*
 2022, PEW RSCH. CTR. (Nov. 16, 2022), <https://pewrsch.ch/3whSY2z> (“Eight-in-ten teens say that
 what they see on social media makes them feel more connected to what’s going on in their
 friends’ lives[;] . . . 71% say it makes them feel like they have a place where they can show their
 creative side[;] . . . 67% say these platforms make them feel as if they have people who can
 support them through tough times[;] . . . a majority [] say the same for feeling more accepted.
 These positive sentiments are expressed by teens across demographic groups.”).

1 help seeking behaviors . . . serving as a gateway to initiating mental health care.”²⁸ Marginalized
 2 youth often rely on online platforms to find communities where they can engage in open dialogue
 3 in ways that may not be possible offline. For example, LGBTQ+ youth find solace in online
 4 spaces, reducing feelings of isolation, anxiety, and suicidal ideation.²⁹ Recent studies show that
 5 transgender and gender diverse youth increasingly depend on online communities to access key
 6 resources that help them explore, develop, and affirm their identities, including during times of
 7 crisis.³⁰ The directors of leading gender and sexuality clinics believe that online platforms “can be
 8 a lifesaver” for LGBTQ+ youth by enabling them to “find[] communities of people who will
 9 accept them and not judge them.”³¹

10 Over-enforcement will likely chill online speech that is crucial to LGBTQ+ youth,
 11 especially in light of political efforts to limit access to such information. Indeed, LGBTQ+
 12 content is already under attack by those who would paint even the most innocuous LGBTQ+
 13 positive content as “highly sexualized” and age-inappropriate.³² “[I]t is inordinately LGBTQIA+
 14 community resources, activist groups, and sex educators that are getting censored by the
 15 overbroad content moderation algorithms and human reviewers.”³³ Aggressive overenforcement
 16

17 ²⁸ *NetChoice, LLC v. Reyes*, No. 2:23-CV-00911-RJS-CMR, 2024 WL 4135626, at *12 (D. Utah
 18 Sept. 10, 2024) (quoting United States Surgeon General Advisory, *Social Media and Youth
 19 Mental Health*, U.S. DEP’T HEALTH AND HUM. SERVS. (2023),
 20 <https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf>).

21 ²⁹ Ashley Austin et al., *It’s My Safe Space: The Life-Saving Role of the Internet in the Lives of
 22 Transgender and Gender Diverse Youth*, 21 INT’L J. TRANSGENDER HEALTH 33 (2020); see also
 23 Human Rights Campaign Foundation, *2023 LGBTQ+ Youth Report*, (Aug. 2023),
 24 <https://bit.ly/3UCHIYO> (“Over 8 in 10 . . . LGBTQ+ youth have ever used the internet to seek
 25 out LGBTQ+ specific sexual health and behavior information, and well over 9 in 10 . . . have
 26 used the internet to seek out information about LGBTQ+ identities, and their own identity as an
 27 LGBTQ+ person . . .”).

28 ³⁰ Austin et al., *supra* note 30.

³¹ Julie Jargon, *When Teens Question Their Gender, Social Media Can Provide Support—and
 Pressure*, WALL ST. J. (Oct 23, 2021), <https://tinyurl.com/44sp5rx7>.

³² See, e.g., Jared Eckert & Makenna McCoy, *Young Children Are Being Targeted With Sexual
 Content. The Equality Act Would Make It Worse*, HERITAGE FOUND. (June 11, 2021),
<https://herit.ag/49v3aD7>; Tom Tapp, *GOP Senators Call For Warning Label On “Disturbing”
 LGBTQ Content In Kids’ TV Shows*, DEADLINE (Mar. 6, 2022), <https://bit.ly/3wk58Yu>.

³³ Alexander Monea, *THE DIGITAL CLOSET: HOW THE INTERNET BECAME STRAIGHT* 179 (2022).

1 by platforms looking to limit their potential liability for failing to enforce their content policies
2 will only exacerbate these harms.

3 **C. The Policy Enforcement Provision could chill innovation in content
4 moderation.**

5 Where the CAADC fails to define “enforce” in the Policy Enforcement Provision, it may
6 also chill platforms’ ability to innovate and tailor their remedial actions to current events and
7 evolving community norms. It is often assumed that “enforcement” requires platforms to remove
8 or block access to content. In reality, absent liability for publishing user generated content,
9 platforms have a near-infinite range of actions they can employ, depending on the unique
10 circumstances of each platform and the user communities they support.³⁴ Common alternative
11 actions include reducing visibility through automated ranking and recommendations systems,
12 adding interstitial warnings, blocking or adding friction to content sharing, removal from search
13 indexes, demonetization, banning certain hashtags, and adding additional context or
14 information.³⁵ Platforms with unique infrastructure can implement remedial actions specific to
15 their products. Reddit, for example, places communities containing “highly offensive or
16 upsetting” content and those “dedicated to promoting hoaxes” into “quarantine”—requiring users
17 to opt in to view the community’s content, deindexing the community from search results, and
18 restricting monetization and visibility.³⁶ Alternative remedial actions may help platforms better
19 balance their users’ competing interests³⁷ or tailor their responses to harms faced by marginalized
20 communities.³⁸ The Policy Enforcement Provision risks undermining these efforts and chilling
21 future experimentation.
22

23 ³⁴ Eric Goldman, *supra* note 15, at 6.

24 ³⁵ *Id.* at 24-39.

25 ³⁶ Reddit, *Quarantined Communities*, <https://support.reddithelp.com/hc/en-us/articles/360043069012-Quarantined-Communities>.

26 ³⁷ Goldman, *supra* note 15.

27 ³⁸ See generally, Sarita Schoenebeck et al., *Drawing from Justice Theories to Support Targets of Online Harassment*, 23 NEW MEDIA & SOC’Y 1278 (2020) (discussing different marginalized user communities’ preferences regarding remedial actions for online harassment.)
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Conclusion

For the foregoing reasons, Amici urge the Court to grant NetChoice’s motion for a preliminary injunction.

Date: November 15, 2024

Respectfully submitted,

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