

No. 21-12355

**In the United States Court of Appeals
for the Eleventh Circuit**

NETCHOICE LLC, et al.,

Plaintiffs-Appellees,

v.

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
No. 4:21-CV-220-RH-MAF

**BRIEF OF AMICI CURIAE CHAMBER OF PROGRESS,
CONNECTED COMMERCE COUNCIL, CTA®, ENGINE ADVOCACY,
INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, LGBT
TECH INSTITUTE, NATIONAL BLACK JUSTICE COALITION,
PROGRESSIVE POLICY INSTITUTE, TECHNET, AND WASHINGTON
CENTER FOR TECHNOLOGY POLICY INCLUSION IN SUPPORT OF
PLAINTIFFS-APPELLEES**

Jacob A. Sommer
ZwillGen PLLC
1900 M Street NW, Suite 250
Washington, DC 20036
Telephone: (202) 296-3585
jake@zwillgen.com
Counsel for Amici Curiae

November 15, 2021

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

The undersigned counsel of record certifies that the following listed persons and entities as described in 11th Cir. R. 26.1-2(a) have an interest in the outcome of this case, and were omitted from the Certificates of Interested Persons in briefs that were previously filed per 11th Cir. R. 26.1-2(b).

1. Chamber of Progress, *Member of Amici Curiae*
2. Connected Commerce Council, *Member of Amici Curiae*
3. CTA®, *Member of Amici Curiae*
4. Engine Advocacy, *Member of Amici Curiae*
5. Information Technology & Innovation Foundation, *Member of Amici Curiae*
6. LGBT Tech Institute, *Member of Amici Curiae*
7. National Black Justice Coalition, *Member of Amici Curiae*
8. Progressive Policy Institute, *Member of Amici Curiae*
9. Sommer, Jacob, *Attorney for Amici Curiae*
10. TechNet, *Member of Amici Curiae*
11. Washington Center for Technology Policy Inclusion, *Member of Amici Curiae*

Information Technology & Innovation Foundation, LGBT Tech Institute, National Black Justice Coalition, Progressive Policy Institute, and Washington Center for Technology Policy Inclusion are not-for-profit corporations exempt from income

tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3).

Engine Advocacy is a not-for-profit organization exempt from income tax under section 501(c)(4) of the Internal Revenue Code, 26 U.S.C. § 501(c)(4). Chamber of Progress, TechNet, Connected Commerce Council, and CTA® are not-for-profit organizations exempt from income tax under section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. § 501(c)(6). None has a parent corporation, and no publicly held company has a 10 percent or greater ownership interest in any of these entities.

/s/ Jacob A. Sommer
Jacob A. Sommer
Attorney for Amici Curiae

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INTEREST OF AMICI CURIAE

Chamber of Progress is a tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. It is an industry organization that backs public policies that will build a fairer, more inclusive country in which all people benefit from technological leaps. Its work is supported by corporate partners, many of whom will be subject to the law at issue.¹

The Connected Commerce Council (3C) is a nonprofit membership organization with a single goal: to promote small businesses' access to essential digital technologies and tools.

As North America's largest technology trade association, CTA® is the tech sector. Its members are the world's leading innovators – from startups to global brands – helping support more than 18 million American jobs. CTA owns and produces CES® – the most influential tech event in the world.²

Engine Advocacy (“Engine”) is a nonprofit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government representatives and a community of high-

¹ Chamber of Progress' Partners are available at: <https://progresschamber.org/>. Chamber of Progress' partners do not sit on its board of directors and do not have a vote on or veto over its positions.

² A complete list of the Consumer Technology Association's members is available at: <http://cta.tech/Membership/Membership-Directory.aspx>.

technology, growth-oriented startups across the nation to support the development of technology entrepreneurship.

Founded in 2006, Information Technology & Innovation Foundation (ITIF) is an independent 501(c)(3) nonprofit, nonpartisan research, and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress.

LGBT Tech Institute is a national, nonpartisan group of LGBT organizations, academics, and high technology companies. It engages with critical technology and public policy leaders about media, technology, and telecommunications issues of specific concern to LGBTQ communities.

Since 2003, the National Black Justice Coalition (NBJC) has been America's leading national civil rights organization dedicated to the empowerment of Black lesbian, gay, bisexual, transgender, queer+, and same gender loving (LGBTQ+/SGL) people, including people living with HIV/AIDS through coalition building, federal policy change, research, and education.

The Progressive Policy Institute (PPI) is a catalyst for policy innovation and political reform based in Washington, D.C. Its mission is to create radically pragmatic ideas for moving America beyond ideological and partisan deadlock.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet’s diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over four million employees and countless customers.

The Washington Center for Technology Policy Inclusion (WashingTECH), a nonpartisan, nonprofit 501(c)(3) corporation, is an advocacy platform committed to civil rights, empowerment, justice, and inclusion in technology public policy making. As America’s “inclusive voice of tech policy,” WashingTECH’s mission is to convene diverse technology public policy professionals to defend America’s rich diversity with programs that promote an inclusive narrative about technology’s impact on society.

Amici³ have a substantial interest in ensuring that consumers can enjoy a healthy online environment where they can effectively and efficiently work, play, learn, shop, connect, and communicate without harassment, disinformation, and incendiary content. To ensure that online services are inclusive, useful, and safe,

³ The term “Amici” includes Chamber of Progress, 3C, CTA®, Engine, ITIF, LGBT Tech Institute, NBJC, PPI, TechNet, WashingTECH.

online providers⁴ take actions, often referred to collectively as “content moderation.”⁵ Online providers understand that these actions are necessary to support the innovation economy and promote equitable access to the benefits of technological innovations.

Florida’s S.B. 7072, 2021 Leg. (Fla. 2021) (“Act”) poses a direct threat to healthy and safe online communities by restricting and penalizing online providers’ efforts to exercise their First Amendment rights to moderate content on their private platforms. Laws, like S.B. 7072, that seek to regulate content moderation are extremely important to Amici, because the parties Amici represent routinely engage in or benefit from content moderation. Amici have substantial interests here as the outcome will impact the ability of providers to offer and consumers to access safe online platforms.

⁴ Sections 2 & 4 of S.B. 7072 apply to “social media platforms,” which are defined as “any information service, system, internet search engine, or access software provider that...enables computer access by multiple users to a computer server, including an Internet platform or a social media site.” Section 501.2041(1)(g). “Social media site” is merely an example of a covered service. Covered entities include virtually any online service provider that satisfies the other definitional requirements (*e.g.*, revenue or global users thresholds). *Id.* Instead of this misnomer, Amici refer throughout this brief to covered entities as “online providers” or “providers.”

⁵ “Content moderation” generally refers to how online providers “decide to publish or remove third-party content.” Eric Goldman, *Content Moderation Remedies*, Mich. Tech. L. Rev. (forthcoming 2021), Santa Clara Univ. Legal Studies Research Paper, at 6, <https://ssrn.com/abstract=3810580>.

Amici certify that (1) no party’s counsel authored the brief in whole or in part; (2) no party or a party’s counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person—other than the Amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief. Counsel for all parties have consented to the filing of this brief. Thus, amici have authority to file this brief.

SUMMARY OF ARGUMENT

Florida officials assert that S.B. 7072 benefits its residents.⁶ Amici strongly disagree. The Act will harm Floridians by exposing them to dangerous and objectionable content that today is screened out by provider content moderation efforts. The Act’s inevitable harm to consumers is directly relevant to the legal issues Appellants have identified for the court’s review, including the likelihood of success on the merits of Appellees’ claims, the risk of irreparable injury, the relative hardships the parties may suffer if the Act is or is not enjoined, and the public interests the Act impacts.

The Act impinges on the millions of content moderation actions that online providers take every day to enable consumers to effectively and safely use their services by: (1) forbidding moderation except under strict, content-based exceptions; (2) imposing undue burdens on moderation activity; and (3) subjecting

⁶ Appellant Br. 54.

providers to unreasonable legal risks and penalties for potential violations of the Act's draconian rules.

If the Act is enforced, consumers will lose the benefits of healthy, inclusive, and widely accessible online communities and services. Providers will be forced to change or significantly reduce their moderation practices to limit liability risk or change their products in ways that could transform the services they provide. As a result, consumers will be exposed to more scams, harassment, hate speech, explicit content, and misinformation, making online services more dangerous for vulnerable populations such as children, teens, and seniors, and inhospitable to frequently targeted communities. No benefit the state may assert can outweigh the countervailing public interest in protecting consumers. The Act must remain enjoined to avoid the inevitable incurable harm it will cause.

Amici urge the Court to affirm the district court's judgment entering a preliminary injunction to prevent S.B. 7072 from taking effect. The court correctly determined that Plaintiffs NetChoice LLC and Computer & Communications Industry Association ("Plaintiffs") met the legal standard for a preliminary injunction given the serious constitutional concerns with the bill and imminent risks of irreparable harm to online providers and their customers.

ARGUMENT

Online providers set and enforce rules to serve and protect their consumers.

In this way, providers' rules are like a private university's honor code, with content moderation serving the role of sanctions that the university imposes for violations. Compliance with the honor code is a condition of admission and continued enrollment; as are a provider's rules for its users. Honor codes reflect judgments the institution has made to create an environment conducive to learning and consistent with the university's mission. So too, provider rules reflect similar judgments about the best way to ensure that their services may be used for their intended functions. Unlike the conduct at issue in *Rumsfeld v. FAIR*,⁷ which Appellants rely on heavily, an online provider's content moderation policies and enforcement decisions pervade every aspect of an online service,⁸ and they are expressive activities protected by the

⁷ Appellants rely heavily on *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), but that reliance is misplaced. *See, e.g.*, Appellant Br. 9, 22-23. The Supreme Court regarded the activity in *FAIR*, access to on-campus recruiting events, to be conduct rather than speech, as acknowledged by Appellant's brief. *Id.* at 22. Contrary to the state's assertion that "the hosting regulations are less intrusive" than the requirement in *FAIR*, the impact of that conduct was far more limited considering the importance content moderation has for the everyday operation of online services. *Id.* Appellant also argues that providers could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." *Id.* at 25 (citations omitted); *see also id.* at 27 ("platforms...have...an unlimited ability to respond with their own speech to counter any hosted user speech with which they disagree"). This ignores the Act's restrictions on providers' speech. *See* Section 501.2041(1)(b) (defining "censor" to include adding an "addendum") & *Id.* (2)(j)(restricting acts that "censor" journalistic enterprises).

⁸ Some providers differentiate themselves from competitors based on their approach to content moderation. *See, e.g.*, Press Release, TMTG (Oct. 20, 2021) (announcing Truth social network as an alternative to "liberal" big tech platforms

First Amendment.⁹

Content policies and enforcement are foundational to online services in other ways. Without the ability to create and enforce policies on their own, a provider's ability to generate revenue could decrease—because a poorly moderated service, with objectionable and unwanted content lessens their appeal to advertisers, content-creators, and other revenue-generating partners. Likewise, content moderation practices can be an important consideration for consumers in deciding whether to use, or continue to use, a service.¹⁰ Boycotts, petitions, shareholder proposals, employee protests, and high profile defections have all been used to criticize provider content moderation policies and practices.¹¹ Thus, by necessity, content

featuring “non-woke” video programming), <https://www.tmtgcorp.com/press-releases/announcement-10-20-2021/>.

⁹ See, e.g., *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017) (finding Google's decisions about the order of search results and whether sites violated their rules are protected by the First Amendment). See also, *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 440 (S.D.N.Y. 2014) (company's search engine results were protected by First Amendment).

¹⁰ See, *supra*, n. 8. Marketing statements by new entrants to the social media industry urge consumers to move to their platforms, because existing providers are so “anti-conservative” in their content moderation practices that they do not adequately serve non-liberals. Frank Witsel, *Parler's off-line, but CloutHub, Gab, MeWe and Rumble promoting apps as free speech zones*, Detroit Free Press, <https://www.freep.com/story/news/nation/2021/01/15/clouthub-gab-mewe-rumble-free-speech/4149176001/> (last visited Nov. 14, 2021).

¹¹ See, e.g., Damian J. Troise, *Social media companies face revenue hit from boycotts*, ABC News (July 2, 2020), <https://abcnews.go.com/Business/wireStory/social-media-companies-face-revenue-hit-boycotts-71574640>; The Action Network,

moderation policies also reflect carefully weighed judgements about what measures are essential to attract and retain consumers and advertisers and limit corporate risk and reputational damage.¹²

Consumers benefit from the many incentives to create healthy and trustworthy online communities because they reduce the amount of illegal, “lawful but awful,” and irrelevant content they must wade through in their daily activities, whether research for work or school or planning travel, a big purchase, or where to eat that night. For some communities, like the LGBTQIA+ community or communities of color, it may be the difference between using a service or being driven off by constant barrage of hate and harassment.¹³

<https://actionnetwork.org/petitions/tell-twitter-covid-button/thankyou> (last visited Nov. 10, 2021); Nitasha Tiku, *Investors Join Calls for Facebook, Twitter to Take More Responsibility*, Wired (Jan. 11, 2018), <https://www.wired.com/story/investors-join-calls-for-facebook-twitter-to-take-more-responsibility/>; Paige Leskin, *Facebook Content Moderators Join Revolt Over Handling of Trump Posts*, Business Insider (June 8, 2020), <https://www.businessinsider.com/facebook-content-moderators-protest-virtual-walkout-donald-trump-posts-2020-6>; Maria Yagoda & Sophie Dodd, *23 Stars Who Quit Social Media ... and How Long They Stayed Away*, People (updated Mar. 25, 2021), <https://people.com/celebrity/stars-who-quit-social-media-justin-bieber-leslie-jones/>.

¹² In a Business Insider survey 96% of users said decisions about whether to engage with paid content on social media are impacted by whether they felt safe to participate on a platform. *Facebook ranks last in digital trust among consumers*, Business Insider (Sept. 24, 2020), <https://www.businessinsider.com/facebook-is-consumers-least-trusted-social-media-platform-2020-9>.

¹³ See, e.g., LGBT Tech, Declaration in Support of Motion for Preliminary Injunction, ¶13, *NetChoice v. Paxton*, No. 21-cv-00840-RP (W.D. Tex. Oct. 1, 2021), ECF No. 12-5.

To create a healthy, safe, and trustworthy environment that fosters these goals, some of the policies and practices providers may adopt include:

- screening for spam, viruses, malware, phishing, scams, child sexual abuse material, terrorist propaganda, and other policy violations;
- responding to reports from the public, consumers, and trusted partners about hate speech; harassment; impersonation; posting non-consensual intimate images; doxxing; deadnaming; and promotion of suicide and self-harm;
- labeling, restricting, or rating content that may not be appropriate for certain audiences (such as graphic violence) or that is regulated (such as tobacco or alcohol ads); and
- removing, demoting, or limiting the spread of content that disrupts or degrades the online experience, including disinformation, abusive language, and content that may be simply irrelevant to the function of the service.¹⁴

I. THE ACT HARMS CONSUMERS

If allowed to take effect, the Act will be detrimental to consumers of online services. The Act will cause this harm in three, immediate ways by: (1) prohibiting provider actions that protect consumers; (2) interfering with provider actions to

¹⁴ See, e.g., Tripadvisor, Traveler Review Guidelines (last updated Oct. 22, 2021), <https://www.tripadvisor.com/hc/en-us/articles/200614797-Traveler-review-guidelines> (TripAdvisor's Traveler Review Guidelines requiring that reviews are relevant).

protect consumers and improve services; and (3) chilling content moderation activity by imposing litigation risk with potentially crippling damages and penalties on providers' efforts to protect consumers.

A. THE ACT PROHIBITS ACTIONS THAT PROTECT CONSUMERS

Several provisions of the Act directly prohibit online providers from engaging in content moderation.¹⁵ The most blatant of the prohibitions on content moderation are the Act's provisions limiting enforcement of content policies against candidates for public office and "journalistic enterprises."¹⁶ The Act essentially renders providers powerless to moderate these two categories of speakers—no matter what they say or do, giving these speakers a virtual free pass to do as they like on any service that qualifies as a "social media platform."¹⁷

For example, the Act would require child-friendly online services, such as Roblox or YouTube Kids, to treat certain pornographic sites as "journalistic enterprises" subject to only limited moderation. This is because the Act defines "journalistic enterprise" according to the amount of content a site publishes and the

¹⁵ *See, e.g.*, Section 106.072(2); Section 501.2041(2)(b)-(d), (h) & (j).

¹⁶ *See* Section 106.072(2), Section 501.2041(2)(h) & (j). Section 106.72(5) limits enforcement of the law when it conflicts with federal law. The only other exceptions are for obscenity. *See, e.g.*, Section 501.2041(2)(j) (allowing deplatforming a journalistic enterprise for obscenity); *cf.* Section 106.072(2) (not applying an obscenity exception to political candidates).

¹⁷ Section 501.2041(1)(g); *See supra* n. 4.

number of users it has, not by any activity associated with journalism. The pornography site Pornhub appears to meet the criteria for a “journalistic enterprise,” and would likely be protected from content moderation under the Act.¹⁸

This prohibition directly interferes with the ability of providers to set and enforce rules for adult content and creates immediate harm for the millions of parents and caregivers who seek out safe spaces online that children can visit without constant supervision or worry about exposure to content that may not be appropriate for the child’s age.¹⁹ The Act prevents sites geared toward children from screening out pornographic content posted by a “journalistic enterprise,” unless it qualifies under state or federal law as “obscenity”—leaving “R” or “mature” rated content that does not rise to that high standard safe from moderation on children’s sites.²⁰

¹⁸ An entity qualifies as a journalistic enterprise if it “publishes 100 hours of...video...with at least 100 million viewers annually.” Section 501.2041(1)(d)(2). Pornhub has an estimated 7,000 years of video and 130 million users. <https://www.pornhub.com/insights/tech-review>.

¹⁹ See Aaron Smith, Skye Toor & Patrick Van Kessel, *Many Turn to Youtube for Children’s Content, News, How-To Lessons*, Pew Research Ctr. (Nov. 7, 2018), <https://www.pewresearch.org/internet/2018/11/07/many-turn-to-youtube-for-childrens-content-news-how-to-lessons/>; *Factbox: The Nuts and Bolts of Roblox*, Reuters (Nov. 19, 2020), <https://www.reuters.com/article/us-gaming-roblox-factbox/factbox-the-nuts-and-bolts-of-roblox-idUSKBN27Z1FZ>.

²⁰ Section 501.2041(2)(j) (providing an obscenity exception to prohibitions on content moderation); *Miller v. California*, 413 U.S. 15, 24-25 (1973) (setting out test for obscenity); Fla Stat. § 847.001(10) (defining obscenity under Florida law).

Foreign state-controlled media²¹ are sure to exploit this special treatment for journalistic enterprises to sow discord and spread disinformation.²² The Act will require providers to suspend measures they currently take to label, fact-check, demote, and remove disinformation coming from state-controlled media.²³ In addition, providers will be wary of acting against potential journalistic enterprises and thus may not remove profiles and content from state-sponsored disinformation campaigns masquerading as U.S. media entities.²⁴

The restriction on deplatforming a candidate for office poses similar dangers. Many users simply seeking to avoid moderation could exploit this exception. The requirements to be a candidate in Florida are minimal²⁵ and the restriction on deplatforming is not explicitly limited to candidates who notify providers through

²¹ Section 501.2041(d). Only one of the four criteria for a journalistic enterprise contains a U.S. nexus.

²² *See, e.g.*, Select Committee on Intelligence, S. Rep. No. 116-290: Russian Active Measures Campaigns And Interference In The 2016 U.S. Election, Volume 2: Russia's Use Of Social Media (Nov. 10, 2020), https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf

²³ *See, e.g.*, Twitter Help Center, *About government and state-affiliated media account labels on Twitter*, <https://help.twitter.com/en/rules-and-policies/state-affiliated> (last visited Nov. 10, 2021).

²⁴ *See* S. Rep. No. 116-290, Vol. 2 at 55.

²⁵ *See* Fla. Stat. § 99.061.

the mechanism mandated in the Act.²⁶ A user claiming to be a candidate will likely be given a wide berth because of fear of triggering penalties of up to \$250,000 per day.²⁷ The Act also gives special protections to posts *about* a political candidate.²⁸ These provisions create significant openings to spread lies about candidates that cannot be undone later—depriving the public of fair and honest elections.

B. THE ACT BURDENS ACTIONS THAT PROTECT CONSUMERS

The Act has several provisions that amount to constructive prohibitions on content moderation by imposing unreasonable burdens, making it impossible for providers to engage in the full range of policy enforcement necessary to protect consumers. For example, the Act imposes a host of notice,²⁹ post-removal,³⁰ and disclosure requirements³¹ on a broad set of content moderation activities.³² These are

²⁶ Section 106.072(2). The Act mandates that providers make the mechanism available, but not that candidates use it to receive preferential treatment.

²⁷ Section 106.072(3).

²⁸ Section 501.2041(2)(h).

²⁹ *See id.*(2)(d) (requiring notices to be provided when content is “censored”); *Id.*(2)(a) & (c) (requiring notices of rules and rule changes).

³⁰ *See id.*(2)(e) (requiring disclosure of the number of viewers of user content); *Id.*(2)(i) (requiring services to allow terminated users 60 days to download their content).

³¹ *See* Section 501.2041(2)(g) (requiring annual notice of post-prioritization algorithms); *See also id.*(3) (describing required disclosures for notices under subparagraph (2)(d)).

³² *See, e.g., id.*(2)(d) (applying requirements to decisions to “censor” and “shadow ban”).

in addition to the implicit requirement that *every* time a provider considers acting against content, it must assess whether the user involved is a candidate or journalistic enterprise under the Act and whether enforcement would subject the provider to liability.³³

These new burdens on content moderation activity will force providers to make stark choices, the consequences of which will flow to consumers. Confronted with the high costs of compliance or limited capacity to satisfy the procedural requirements to moderate content,³⁴ providers may choose to stop moderating content altogether unless required by law, scale down their content moderation policies to limit enforcement to the worst of the worst violations, or change aspects of how their services operate to try to promote safety without triggering the Act. For example, providers may start collecting more personal information from consumers for identity verification or charging fees to discourage inappropriate behavior or cover increased costs.³⁵

³³ See *id.*(2)(h) & (j). It is unclear whether moderators could determine through research whether entities, particularly private entities, qualify as a “journalistic enterprise.”

³⁴ See, e.g., Myths & Facts About Section 230, <https://www.theinternet.works/wp-content/uploads/2020/12/Myths-Facts-About-Section-230-Full-InternetWorks.pdf> (costs of content moderation).

³⁵ These solutions have recently been suggested to curb online abuse. See, e.g., Andrew Woodcock, *Priti Patel considering removing right to anonymity on social media to stop ‘relentless’ abuse of MPs*, Independent (Oct. 17, 2021), <https://www.independent.co.uk/news/uk/politics/priti-patel-david-amess-social->

These consequences disadvantage consumers in multiple ways, such as by limiting or disrupting the:

- variety of online services that they can choose as a result of the new barrier to entry for smaller services that will have to comply once they meet revenue or usership thresholds;³⁶
- low friction to using online services with minimal registration requirements helping a more diverse set of communities have access to online services than would if providers verify identities through credit cards or government-issued identification;³⁷

[media-b1939775.html](#); Sara Brown, *Social media is broken. A new report offers 25 ways to fix it*, MIT Sloan School of Management (June 30, 2021), <https://mitsloan.mit.edu/ideas-made-to-matter/social-media-broken-a-new-report-offers-25-ways-to-fix-it>.

³⁶ The Act will impact small and medium-sized companies that can meet one of the thresholds. Though the Act targets “big tech,” the chosen thresholds cover many companies. For example, Wikipedia identifies 32 social networking sites that have 100 Million or more users. Wikipedia, List of social media platforms with at least 100 million active users, https://en.wikipedia.org/wiki/List_of_social_platforms_with_at_least_100_million_active_users (last visited November 2, 2021). High compliance costs and significant legal risks make it harder for these sites to continue to operate and create a barrier to entry for new services that will have to comply once they meet revenue or usership thresholds.

³⁷ See, e.g., Derek du Preez, *ID verification for social media as a solution to online abuse is a terrible idea*, diginomica (July 13, 2021), <https://diginomica.com/id-verification-social-media-solution-online-abuse-terrible-idea> (explaining the risks of identity verification requirements).

- wide access to free services vital to ensuring online services are broadly accessible and not merely available to those who can afford to pay.³⁸

In addition, the compelled disclosures in the Act will also increase consumer exposure to potentially dangerous content. Section 501.2041(3)(d), requiring disclosure of details on how policy-violating content was identified, will aid all manner of bad actors, including spammers and scammers, in evading provider detection. If a post is tagged as spam because it is directed at 50 users, the spammer will know to only send it to 49 users next time. Given that providers identify and remove billions of pieces of spam in a quarter, even if only some of the offending content evades detection, it will have a measurable adverse impact on both services and consumers.³⁹

The Act also explicitly limits the use of various safety tools, such as downranking, interstitials, and labels.⁴⁰ This will impede a broad range of actions taken to benefit consumers, such as:

³⁸ Free services will become less common as companies seek to cover the costs of compliance and address the increased risk of business-ending litigation.

³⁹ See, e.g., Facebook Transparency Report, https://transparency.fb.com/data/community-standards-enforcement/spam/facebook#CONTENT_ACTIONED. See also, Jean Whitmore, *The Arms Race of Models: Complexify or Die* (June 24, 2021), <https://ssrn.com/abstract=3867464> (describing the “arms race” between spammers and spam filter-builders).

⁴⁰ Section 501.2041 of the Act regulates providers who “censor,” “shadow ban” or engage in “post-prioritization.” The definitions of these terms capture actions taken

- Screening, labeling, or providing an interstitial before sensitive content, such as excessively violent media, including terrorist beheadings.⁴¹
- Flagging content that has been determined by a fact-checking organization to be false or inserting helpful resources for users who search for content about drug addiction or suicide.⁴²
- Downranking low quality content. For example, Google Search downranks sites that fail to satisfy quality factors by having issues like intrusive interstitials, a lack of security, or a history of copyright complaints.⁴³
- Labeling certain commercial content to help users shop for items they want or showing customer ratings for sellers.

to protect users from potentially sensitive or abusive content, such as warning labels, restricting access through filters, and downranking. *See* Section 501.2041(1)(b) & (e)-(f).

⁴¹ Twitter Help Center, Sensitive media policy (Nov. 2019), <https://help.twitter.com/en/rules-and-policies/media-policy>.

⁴² The Act regulates placing content “above” other content. *See* Fla. Stat. § 507.2014(1)(e).

⁴³ Google Search Central, Webmaster guidelines (last updated Oct. 28, 2021), <https://developers.google.com/search/docs/advanced/guidelines/webmaster-guidelines>.

Under the Act, these activities are “censorship” or “shadow banning” and are subject to many of the same burdensome obligations as for other content moderation decisions, like content removal.⁴⁴

C. THE ACT INTRODUCES RISK THAT CHILLS ACTIONS INTENDED TO PROTECT CONSUMERS

The Act’s “consistent” moderation requirement further chills provider speech and actions that safeguard consumers. Sec. 501.2041(2)(b) requires, but then fails to define what constitutes “consistent” moderation. In practice, it may require nothing short of perfection.⁴⁵ The Act subjects a provider to potential liability any time an adverse content moderation action is taken against a user if—whether it was known to the provider—another user has similarly violated the provider’s rules, but has not

⁴⁴ It is ironic that a law designed to discourage content removal may encourage it. For example, use of filters to screen out objectionable user-generated content is a requirement for Apple’s App Store. Apple App Store Review Guidelines, Section 1.2 (last updated Oct. 22, 2021), <https://developer.apple.com/app-store/review/guidelines/> (allowing incidental “not safe for work” content if hidden by default). Without the ability to “hide” content, providers may choose to prohibit and delete content to maintain the ability to distribute their app to iOS users.

⁴⁵ This is likely an unattainable goal, yet the state attempts to characterize the consistency requirement as an “incidental burden.” This fails to understand the challenges of content moderation at scale. See Katie Schoolov, *Why content moderation costs billions and is so tricky for Facebook, Twitter, YouTube and others*, CNBC (Feb. 27, 2021), <https://www.cnbc.com/2021/02/27/content-moderation-on-social-media.html>; Timothy Geigner, *Facebook, AI Moderation Continues to Suck because Moderation At Scale is Impossible*, techdirt (Oct. 20, 2021), <https://www.techdirt.com/articles/20211020/13270147784/facebook-ai-moderation-continues-to-suck-because-moderation-scale-is-impossible.shtml>.

yet been subject to enforcement. This seemingly requires a provider to identify *all* similar violations and take the same enforcement action every time it discovers a specific violation.⁴⁶ Given the penalties, the Act turns the millions of content moderation decisions providers make every day into potential multi-million dollar gambles where the house always wins.

The Act also poses a serious risk of harm to consumers by potentially interfering with critical safety tools that online services offer to users. Providers would face legal risk for offering tools that allow users to customize settings for what they see on a platform, as well as who may view their profile or messages. For example, Twitter allows users to “mute” a person or a topic. Facebook similarly allows users to “unfollow” another user or a group.⁴⁷ Users make these moderation decisions, but providers execute them. This may violate the Act, because tailoring user experiences with these tools requires that providers restrict the visibility of

⁴⁶ The provider will also need to make a judgment call about what kind of violations must be treated consistently and what enforcement actions are consistent, as the Act provides no guidance. For example, it is unclear if it would be “consistent” for a provider to deplatform a user with a history of violations and simply warn a user with no prior history if in a particular instance their violations are similar.

⁴⁷ Facebook Help Center, How do I unfollow a person, Page or group on Facebook?, <https://www.facebook.com/help/190078864497547>.

content—triggering the Act’s rules and requirements for “censor[ing]” and “shadow ban[ning].”⁴⁸

The effects of interfering with safety tools or settings could be catastrophic. Technology-enabled abuse has a profound impact on victims and there is a link between online stalking and offline violence.⁴⁹ Because many survivors must be online for work or school, experts on domestic violence recommend use of the tools available on platforms to minimize the safety risks. For example, the National Network to End Domestic Violence has partnered with Twitter and Facebook to publish guides to educate survivors on how to use the services’ safety tools.⁵⁰ Blocking, for example, can prevent abusers from seeing a survivor’s content which may be critical to prevent the abuser from discovering the survivor’s location. Without safety tools, survivors may be deprived of options to protect themselves while using online services or, worse, confronted with serious risks to their physical and emotional safety.

⁴⁸ Section 501.2041(1)(b) & (e)-(f).

⁴⁹ See Nat’l Inst. of Justice, “Ranking Needs for Fighting Digital Abuse: Sextortion, Swatting, Doxing, Cyberstalking, and Nonconsensual Pornography” (Nov. 20, 2020), <https://nij.ojp.gov/topics/articles/ranking-needs-fighting-digital-abuse-sex-tortion-swatting-doxing-cyberstalking>.

⁵⁰ See Nat’l Network to End Domestic Violence, *Technology Safety & Privacy: A Toolkit for Survivors*, <https://www.techsafety.org/resources-survivors> (last visited Nov. 10, 2021).

The Act's restrictions and burdens on content moderation are mostly enforced through both private rights of action and state enforcement actions, backed by harsh penalties including under the private right of action with statutory damages of \$100,000 per violation with the potential for additional actual damages, punitive damages, and attorneys' fees and costs of the plaintiffs.⁵¹ These outsized penalties only heighten the Act's chilling effect on providers.

II. AN INJUNCTION IS NECESSARY TO PROTECT CONSUMERS

If allowed to take effect, the Act is very likely to quickly change the way hundreds of millions consumers experience the internet, exposing them to scams, fraud, hate speech, harassment, and other harmful content which is now subject to provider content moderation efforts.

An injunction preserves the current state of the internet, including all the actions that providers currently take and the benefits they have for consumers, at least until the district court can determine whether the Act passes Constitutional muster.

⁵¹ See Section 501.2041(6).

CONCLUSION

For these reasons, Amici urge the Court to rule for Appellees and affirm the decision of the federal district court to enter a preliminary injunction against S.B. 7072.

Dated: November 15, 2021

Respectfully submitted

/s/ Jacob A. Sommer

Jacob A. Sommer
ZWILLGEN PLLC
1900 M Street NW, Suite 250
Washington, DC 20036
Telephone: (202) 296-3585
Facsimile: (202) 706-5298
Email: nury@zwillgen.com

Attorney for Amici Curiae Chamber of Progress, Connected Commerce Council, CTA®, Engine Advocacy, Information Technology & Innovation Foundation, LGBT Tech Institute, National Black Justice Coalition, Progressive Policy Institute, TechNet, Washington Center for Technology Policy Inclusion

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,937 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f).

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/s/ Jacob A. Sommer

Jacob A. Sommer

Attorney for Amici Curiae Chamber of Progress, Connected Commerce Council, CTA®, Engine Advocacy, Information Technology & Innovation Foundation, LGBT Tech Institute, National Black Justice Coalition, Progressive Policy Institute, TechNet, Washington Center for Technology Policy Inclusion

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on November 15, 2021. I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jacob A. Sommer

Jacob A. Sommer

Attorney for Amici Curiae Chamber of Progress, Connected Commerce Council, CTA®, Engine Advocacy, Information Technology & Innovation Foundation, LGBT Tech Institute, National Black Justice Coalition, Progressive Policy Institute, TechNet, Washington Center for Technology Policy Inclusion