ORAL ARGUMENT NOT YET SCHEDULED

NO. 16-5341

In the

United States Court of Appeals for the District of Columbia Circuit

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; ROBERT SPENCER; JIHAD WATCH,
Plaintiffs-Appellants,

v.

JEFF SESSIONS, in his official capacity as Attorney General of the United States,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HONORABLE JAMES E. BOASBERG
CASE NO. 1:16-cv-01437-JEB

APPELLANTS' REPLY BRIEF

ROBERT JOSEPH MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MICHIGAN 48113
(734) 635-3756

DAVID YERUSHALMI, ESQ.
AMERICAN FREEDOM LAW CENTER
1901 PENNSYLVANIA AVENUE NW
SUITE 201
WASHINGTON, D.C. 20006
(646) 262-0500

Counsel for Appellants

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GLOSSARY OF TERMS

AFDI	American Freedom Defense Initiative
CDA	Communications Decency Act

SUMMARY OF ARGUMENT

Plaintiffs have standing to challenge the constitutionality of § 230 of the Communications Decency Act ("CDA"), an Act of Congress which alters the legal relations between persons and which poses a significant threat to the First Amendment. Plaintiffs have suffered a cognizable injury that is fairly traceable to § 230 and likely to be redressed by the requested relief, which would render this provision unconstitutional and thus unenforceable. Under the circumstances of this case—a constitutional challenge to an immunity provision of federal law—the Attorney General, in his official capacity, is the proper party.

ARGUMENT IN REPLY

This case presents a constitutional challenge to a federal law[1] which alters the legal relations between Plaintiffs on the one hand and Facebook, Twitter, and YouTube on the other such that these social media giants are permitted to engage in discriminatory business practices against Plaintiffs based on the content and viewpoint of Plaintiffs' speech. These social media companies can engage in their discriminatory practices with impunity because the challenged federal statute deprives Plaintiffs of the right to pursue any legal recourse. (*See* Gov't Br. at 7 [citing 47 U.S.C. § 230(e)(3)]). Consequently, as a *direct* result of this federal law, Plaintiffs are denied legal protection they would otherwise enjoy (*see* Appellants'

[1] 47 U.S.C. § 230.

Br. at 14-21) and, concomitantly, these social media giants are empowered to continue their discriminatory practices. And because § 230, a federal law enacted by Congress, alters the legal relations between these parties, state action is involved, thereby implicating the First Amendment.[2] *See Denver Area Educ. Telcomms. Consortium v. FCC*, 518 U.S. 727, 782 (1996) (Kennedy, J., dissenting) (observing that "[t]he plurality at least recognizes this as state action . . . , avoiding the mistake made by the Court of Appeals" and stating that "[s]tate action lies in the enactment of a statute altering legal relations between persons, including *the selective withdrawal from one group of legal protections against private acts*, regardless of whether the private acts are attributable to the State") (emphasis added). In other words, the party responsible for the "selective withdrawal" from Plaintiffs "of legal protection against" the injurious "private acts" of these social media companies is the federal government. None of these private, social media companies are responsible for § 230. The federal government is solely responsible for giving these companies both a sword (to silence Plaintiffs) and a shield (to guard against any legal liability for doing so) to censor Plaintiffs' speech.

There is only one question for the Court to resolve on this appeal: whether Plaintiffs have standing to pursue this First Amendment challenge to § 230. That is, whether Plaintiffs are entitled to have a court decide the merits of this case. *See*

[2] The First Amendment provides, in relevant part, "*Congress* shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I (emphasis added).

Warth v. Seldin, 422 U.S. 490, 498 (1975) ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."). The formula for standing is well established: "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Plaintiffs meet this standard.

As an initial matter, neither the District Court nor the Government call into question Plaintiffs' injury (*see* Gov't Br. at 14 n.3 ["assum[ing], for purposes of argument here, that plaintiffs have sufficiently alleged a cognizable injury"), which includes harm to Plaintiffs' cognizable interest in conveying their messages and conducting their businesses free from discrimination (the sword) and Plaintiffs' cognizable interest in having access to the courts to prevent such discrimination (the shield). *See generally Butler v. Dep't of Justice*, 492 F.3d 440, 445 (D.C. Cir. 2007) ("Litigants have a constitutional right of access to the courts."). Additionally, the Government does not appear to dispute the fact that state action (and thus the First Amendment) is implicated by Plaintiffs' challenge since the Government argues that Plaintiffs could assert a First Amendment challenge to § 230 against wholly private entities in a separate lawsuit. (Gov't Br. at 22) ("In such a suit, plaintiffs would be free to challenge the constitutionality of § 230 on First Amendment grounds."). Thus, according to the Government, this is a case in

which we have multiple plaintiffs who are suffering cognizable injuries to their rights protected by the First Amendment by a *federal* statute but yet cannot advance their challenge here.

To that end, the Government asserts that "[t]he *principal* problem . . . is that the Attorney General has no responsibility for implementing, enforcing, or otherwise administering § 230; the statute merely provides a defense to civil liability that may be invoked in private litigation by providers of online services." (Gov't Br. at 1-2) (emphasis added). Therefore, according to the Government, "no relief that could be provided in this case would prevent those [social media] companies from relying on § 230 to defend their actions." (Gov't Br. at 2). The Government asserts that any such relief would amount to "an impermissible advisory opinion." (Gov't Br. at 2). The Government is mistaken.[3]

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[3] As stated by the Supreme Court:

> A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised . . . .

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted). This case presents a definite and concrete controversy between parties with adverse legal interests, and this controversy can be resolved through a decree of a

To begin, a declaration from the Court that § 230 is invalid and cannot be used as a sword or shield for discrimination would redress Plaintiffs' injury by restoring to them the legal protections they would otherwise enjoy absent § 230. In other words, declaratory relief would remove the federal law that is altering the legal relations between the private parties—the very relief Plaintiffs are seeking here. And it appears that federal courts have no impediment to granting broad relief in other contexts. *Hawai'i v. Trump*, No. 17-00050 DKW-KSC, 2017 U.S. Dist. LEXIS 36935, at *45 (D. Haw. Mar. 15, 2017) (temporarily enjoining President Trump's "Executive Order across the Nation"). Consequently, there is no reason why such relief cannot be provided here.[4] Thus, it is incorrect to argue that *no relief* could be provided in this case that would prevent social media companies "from relying on § 230 to defend their actions." (*Compare* Gov't Br. at 2). A declaration that § 230 is unconstitutional would prevent (indeed, it would halt) such reliance.

The Government is dismissive of Plaintiffs' reliance on *Romer v. Evans*, 517 U.S. 620 (1996), a case in which the Court struck down on *constitutional grounds*

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conclusive character. *Id*. It will not require the Court to render an opinion advising what the law would be upon a hypothetical state of facts. *Id*.

[4] The Government cites *In re Executive Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000) (per curiam) for the proposition that "a declaration by the district court regarding the constitutionality of § 230 would not even have precedential force." (Gov't Br. at 20). However, this case was referring to the *dicta* of the lower court. A ruling on the merits of this case would not constitute *dicta*. The case doesn't apply.

a law that withdrew specific legal protection from the injuries caused by discrimination against homosexuals, including discrimination caused by private parties. The Government argues, in a footnote, that this case is not relevant because:

> The question of standing was not before the Supreme Court. The suit was originally brought in state court, *see* 517 U.S. at 625, and plaintiffs' standing to challenge the state constitutional amendment in a suit against the defendants—the governor, the state attorney general, and the State—was a matter of state law. After the challenged amendment was held unconstitutional and its enforcement was enjoined by the state court, there could be no dispute that the defendants had standing to appeal to the U.S. Supreme Court.

(Gov't Br. at 23 n.5). Per the Government's position, Congress could pass a similar law that shielded all businesses engaged in interstate commerce from any and all liability under any state law that prohibited gender discrimination in places of public accommodation, and since no government official technically "enforces" such a law, it could not be challenged on its face or otherwise in federal court by a woman who claims that this federal statute is depriving her of legal protection otherwise afforded by state law. Granting the relief requested in this hypothetical case wouldn't ensure that the woman would be served at any particular business,[5] but it would now free her to challenge such discrimination ***and*** it would subject

[5] Here, the Government similarly argues that the relief sought by Plaintiffs would not technically halt the censorship of their speech. (Gov't Br. at 2).

such businesses to liability for their discrimination.[6] And even then, one could argue that the harm *in this case* is more pernicious because the existence of a statute like § 230, which directly affects *speech*, has a chilling effect that the statute in our hypothetical does not. *See generally Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("[A]n actual injury can exist when the plaintiff is chilled from exercising her right to free expression . . ."); *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) (recognizing that "a chilling effect on one's constitutional rights constitutes a present injury in fact"). Each time Plaintiffs prepare to post a message on Facebook, Twitter, or YouTube they have to consider whether it will pass the scrutiny of a social media censor (a censor who more than likely disagrees with Plaintiffs' viewpoint). Each time Plaintiffs prepare to expend the time, effort, and resources to create a video to post on *their* YouTube channel or write an article to post on *their* Facebook page or Twitter account, they have to think twice, and will often opt not to expend the resources since Plaintiffs are at the mercy of these hostile censors. Indeed, each time Plaintiffs post a message disfavored by the

[6] There can be little doubt that anti-discrimination laws, such as state public accommodation laws or even Title II (42 U.S.C. § 2000a), are intended to influence behavior broadly, and not just in those single instances where a plaintiff is forced to file a lawsuit against a specific business.

censors, Plaintiffs could face the harsh sanction of having their Facebook pages, Twitter accounts, and YouTube channels shut down completely, thereby causing great harm to themselves and their organizations. Such a result would force them out of business. *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter [the exercise of First Amendment rights] almost as potently as the actual application of sanctions."). Meanwhile, Plaintiffs' political opponents do not have such disincentives since the social media companies favor their contrary social and political views. (*See* JA 18-21; R-1 [Compl. ¶¶ 84-94]). As a result, § 230 undermines our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Indeed, the power wielded by these social media companies—a power that has the backing of the federal government—is immense and politically influential. And because of this power and influence, these fora pose unique problems for our political system,[7] which requires diversity in opinions, thoughts, and viewpoints. *See id.* Consequently, this government-granted power to censor with impunity (*i.e.*, § 230) allows these private companies to influence politics and public policy in ways that are

[7] *Denver Area Educ. Telcomms. Consortium*, 518 U.S. at 741-42 (1996) (noting the changing nature of communications and stating that "no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard [for applying the First Amendment], good for now and for all future media and purposes").

detrimental to our democracy. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("[Speech] concerning public affairs is more than self-expression; it is the essence of self-government.") (citations omitted); *Stromberg v. Cal.*, 283 U.S. 359, 369 (1931) (observing that "free political discussion" is "essential to the security of the Republic" and "a fundamental principle of our constitutional system").

Plaintiffs do not doubt, however, that § 230 immunity can validly serve the important policy goal of maintaining the robust nature of the Internet. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."). It can accomplish this objective, for example, by operating as a defense against defamation claims arising from postings by third parties. *See, e.g.*, 47 U.S.C. § 230(c)(1). However, it undermines this objective when it is allowed to operate offensively to restrict speech by permitting Facebook, Twitter, and YouTube to directly censor Plaintiffs' *personal* Facebook pages, Twitter accounts, and YouTube channels, thereby raising the serious First Amendment concerns advanced by Plaintiffs in this challenge. A court could craft relief that would permit the laudable goals of § 230, while prohibiting its use by social media companies as a tool for censorship. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006) ("It is axiomatic that a

statute may be invalid as applied to one state of facts and yet valid as applied to another. Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may be declared invalid to the extent that it reaches too far, but otherwise left intact.") (internal citations, quotations, and punctuation omitted).

In the final analysis, what this appeal boils down to, per the Government, is whether an injured plaintiff can sue an official of the United States to challenge an immunity provision of a federal statute that operates to violate the First Amendment, as in this case. According to the Government's argument, since immunity provisions by their nature are not "enforced" by any particular official, there is no representative of the U.S. Government that an injured plaintiff can sue. Bear in mind, however, that this is not a case "aris[ing] under an act of Congress undertaking to confer jurisdiction upon" a federal court "to determine the validity of certain acts of Congress. . . ." *Muskrat v. United States*, 219 U.S. 346, 348 (1911); (*see* Gov't Br. at 18 [citing *Muskrat* for the proposition that there is "no justiciable controversy in suit brought against the United States to determine the 'constitutional validity of an act of Congress'"]). This is a case involving the First Amendment (*i.e.*, it arises under the Constitution of the United States) where multiple parties are suffering a cognizable injury and cannot seek redress for that

injury due to a federal statute that grants immunity to private actors, thereby altering the legal relations between the parties.

Plaintiffs contend that the Attorney General, in his official capacity,[8] *is* the proper party to name. The Attorney General is the federal government's representative in all legal matters. He is responsible for enforcing and defending federal laws, including § 230. *See* 28 U.S.C. §§ 516, 517. Indeed, when a party files a lawsuit challenging the validity of a federal statute, notice must be provided to the Attorney General of the United States, who is permitted to intervene as a matter of right. *See* Fed. R. Civ. P. 5.1.

As a matter of federal law, in any lawsuit "in a court of the United States to which the United States or any agency, officer or employee thereof is *not* a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact *to the Attorney General*, and *shall permit* the United States to intervene for presentation of evidence . . . and for argument on the question of constitutionality." 28 U.S.C. § 2403(a) (emphasis added); *see also id*. ("The United States shall . . . have all the rights of a party and be subject to all liabilities of a party . . .").

Under the circumstances of this case (*i.e.*, a constitutional challenge to a federal immunity provision), the Attorney General is the proper party to name.

[8] A lawsuit against the Attorney General in his official capacity is a lawsuit against the federal government. *See Ky. v. Graham*, 473 U.S. 159 (1985).

In summary, Plaintiffs have suffered an injury that is fairly traceable to § 230 and likely to be redressed by the requested relief, which would render this provision unconstitutional and thus unenforceable against Plaintiffs in any court of law. Therefore, Plaintiffs have standing to advance this constitutional challenge.

CONCLUSION

The Court should reverse the District Court and remand the case for further proceedings.[9]

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (D.C. Court Bar No. MI 0052)
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
Tel: (734) 635-3756

/s/ *David Yerushalmi*
David Yerushalmi, Esq. (D.C. Bar No. 978179)
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20006
dyerushalmi@americanfreedomlawcenter.org
Tel: (646) 262-0500
Fax: (801) 760-3901

Counsel for Appellants

[9] If necessary, this Court can remand to the District Court with instructions to convene a panel of 3 judges to determine the constitutionality of § 230. (*See* Gov't Br. at 3 n.1 [stating, "Section 561 of the Communications Decency Act provides that 'any civil action challenging the constitutionality, on its face, of this title or any amendments made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code"); *see* 28 U.S.C.§ 2284.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 3,060 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users. I further certify that eight (8) copies of this filing will be sent via Federal Express overnight delivery to the Clerk of the Court.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

Counsel for Appellants