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' 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

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Plaintiffs-Appellants American Freedom Defense Initiative, Pamela Geller, Robert Spencer, and Jihad Watch hereby submit the following certificate pursuant to Circuit Rules 12 and 28(a)(1):

1. Parties and Amici.

The following list includes all parties, intervenors, and amici who have appeared before the district court, and all persons who are parties, intervenors, or amici in this court.

Plaintiffs-Appellants:

American Freedom Defense Initiative; Pamela Geller; Robert Spencer; and Jihad Watch

Defendant-Appellee:

Jeff Sessions, Attorney General of the United States

2. Rulings Under Review.

Plaintiffs-Appellants are appealing from the order and supporting memorandum opinion of U.S. District Court Judge James E. Boasberg entered on November 9, 2016, granting Defendant-Appellee's Motion to Dismiss. The order and supporting memorandum opinion appear on the district court's docket at entries 11 and 12, respectively.

3. Related Cases.

The instant case was never previously before this court or any other court, other than the district court from which this case has been appealed. Plaintiffs-Appellants are not aware of any related cases pending in this or any other court.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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

/s/ *David Yerushalmi*
David Yerushalmi, Esq. (D.C. Bar No. 978179)

Counsel for Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Cir. Rule 26.1, Plaintiffs-Appellants American Freedom Defense Initiative and Jihad Watch, through undersigned counsel, state as follows: the American Freedom Defense Initiative and Jihad Watch are nonprofit corporations managed by their board of directors, all of whom are individuals. The American Freedom Defense Initiative and Jihad Watch have no parent, subsidiary, or affiliated corporation, and no public entity has any ownership interest in the American Freedom Defense Initiative or Jihad Watch.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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

/s/ *David Yerushalmi*
David Yerushalmi, Esq. (D.C. Bar No. 978179)

Counsel for Appellants

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GLOSSARY OF TERMS

AFDI	American Freedom Defense Initiative
CDA	Communications Decency Act

INTRODUCTION

The District Court granted the Attorney General's motion to dismiss, concluding that Plaintiffs-Appellants American Freedom Defense Initiative, Pamela Geller, Robert Spencer, and Jihad Watch (hereinafter "Plaintiffs") lack standing to challenge § 230 of the Communications Decency Act ("CDA"). The Court is mistaken.

The challenged congressional statute—which, by definition, is an Act of "Congress"[1]—alters the legal relations between Plaintiffs on the one hand and Facebook, Twitter, and YouTube on the other such that these media giants are permitted to censor, with impunity, Plaintiffs' speech based on its content and viewpoint. Consequently, state action lies in the enactment of this federal statute regardless of whether the private acts are attributable to the Government. And the resulting injury is "fairly traceable" to the challenged statute and "redressable" by the relief requested. In sum, Plaintiffs have standing to bring this action.

JURISDICTIONAL STATEMENT

On July 13, 2016, Plaintiffs filed their Complaint challenging § 230 of the CDA on federal constitutional grounds. (JA 5-29; R-1 [Compl.]). The District Court had jurisdiction under 28 U.S.C. § 1331.

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

On September 28, 2016, the Government filed a motion to dismiss, claiming that Plaintiffs lack Article III standing and, nevertheless, the Complaint fails to state a claim for relief. (R-6 [Govt. Mot. to Dismiss]).

On November 9, 2016, the District Court granted the Government's motion to dismiss on standing grounds, thereby resolving all claims in the Government's favor. (JA 30; R-11 [Order]; JA 31-41; R-12 [Mem. Op.]).

On November 14, 2016, Plaintiffs filed a timely Notice of Appeal. (JA 42-43; R-13 [Notice of Appeal]). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether Plaintiffs have standing to pursue their First Amendment challenge to § 230 of the CDA, an Act of Congress which alters the legal relations between Plaintiffs on the one hand and Facebook, Twitter, and YouTube on the other such that these social media companies are permitted to censor Plaintiffs' speech based on its content and viewpoint.

STATEMENT OF PERTINENT AUTHORITIES

All relevant portions of any pertinent statute or regulation cited by Plaintiffs are set forth in the body of this brief.

STATEMENT OF THE CASE

A. Procedural History.

On July 13, 2016, Plaintiffs filed their Complaint challenging § 230 of the CDA on First Amendment grounds. (JA 5-29; R-1 [Compl.]).

On September 28, 2016, the Government filed a motion to dismiss on two grounds: (1) that Plaintiffs lack Article III standing and (2) that Plaintiffs' Complaint fails to state a cognizable constitutional claim. (R-6 [Govt. Mot. to Dismiss]).

On November 9, 2016, the District Court, "[a]greeing that standing is lacking here," granted the Government's motion to dismiss. (JA 31-41; R-12 [Mem. Op. at 1-11]). In its Memorandum Opinion, the court "assume[d] without deciding that Plaintiffs have . . . plausibly alleged an injury in fact." (JA 36; R-12 [Mem. Op. at 6]). However, the court concluded that the "asserted injury . . . is not fairly traceable to the Attorney General, nor is it likely to be redressed by the relief sought." (JA 36; R-12 [Mem. Op. at 6]).

This appeal follows.

B. Statement of Facts.

Plaintiffs are two non-profit organizations—American Freedom Defense Initiative and Jihad Watch—and two of their leaders—Pamela Geller and Robert Spencer. "AFDI is dedicated to freedom of speech, freedom of conscience,

freedom of religion, and individual rights." (JA 6; R-1 [Compl. ¶ 6]). Jihad Watch has a similar orientation and, in particular, "is dedicated to exposing the truth, including the motives and goals, of Islamic jihadists." (JA 8; R-1 [Compl. ¶ 18]). Geller, AFDI's president, has authored *The Post-American Presidency: The Obama Administration's War on America* and *Stop the Islamization of America: A Practical Guide to the Resistance*. (JA 7; R-1 [Compl. ¶ 12]). Spencer, AFDI's vice president and the director of Jihad Watch, has authored, among other books, *The Truth About Muhammad* and *The Politically Incorrect Guide to Islam* (*and the Crusades*). (JA 7-8; R-1 [Compl. ¶ 17]). Plaintiffs actively use social media to share their religious and political views and to promote their related non-profit and commercial work. (JA 6-9; R-1 [Compl. ¶¶ 6-26]). Hundreds of thousands of individuals have "liked" Plaintiffs' Facebook pages, followed them on Twitter, and subscribed to their YouTube channels. (JA 7, 9; R-1 [Compl. ¶¶ 13-14, 16-17, 21-22, 25-26]).

Facebook, Twitter, and YouTube maintain publicly available policies that prohibit third party users like Plaintiffs from posting certain content through their services. (JA 21-25; R-1 [Compl. ¶¶ 95-96, 98, 100, 103-09, 117, 119]). Facebook, for example, does not allow "groups that are hateful, threatening, or obscene," and "take[s] down groups that attack an individual or group." (JA 87; R-1 [Compl. ¶ 87 [Facebook "Warning"]). YouTube prohibits, among other things,

"hateful content." (JA 22; R-1 [Compl. ¶ 100]). And Twitter bans "the promotion of hate content, sensitive topics, and violence globally," "[o]ffensive, vulgar, abusive or obscene content," and "[i]nflammatory content which is likely to evoke a strong negative reaction or cause harm." (JA 22-23; R-1 [Compl. ¶¶ 105, 108]).

Pursuant to these policies, the three social-media platforms have, at various points, removed Plaintiffs' content from their sites. In March 2016, for example, Facebook removed from Geller's "Islamic Jew-Hatred: It's In the Quran" page a photograph of an individual holding a sign reading "Death to All Juice [*sic*]" at an anti-Israel rally in New York City. (JA 17, 18; R-1 [Compl. ¶¶ 79-82]). The photograph was intended to demonstrate Geller's view that Islam promotes such hate-filled attacks against Jews. Facebook also removed from Geller's "Stop Islamization of America" page a photograph depicting graffiti reading "Kill the Jews" and "Jihad Against Israel" and directed Geller to review Facebook's Community Standards and remove anything on her page that was not compliant. (JA 19; R-1 [Compl. ¶¶ 85-86]). Once again, these photographs were posted to support Geller's view that Islam promotes Jew hatred. A few months later, Facebook removed "Stop Islamization of America" entirely, explaining that the page violated the company's Terms of Use. (JA 20; R-1 [Compl. ¶ 87]). YouTube also removed one of Geller's videos, which featured "a first-hand undercover investigation" in a Nashville mosque. (JA 22; R-1 [Compl. ¶ 102]).

At times, conversely, and to demonstrate the discriminatory way in which these policies are enforced, Plaintiffs sought to invoke the companies' policies to have other users' content removed, but those efforts were unsuccessful. Twitter and Facebook "profess[] a policy of protecting intellectual property," (JA 24-25; R-1 [Compl. ¶¶ 117, 119]), but determined that a group's use of the name "American Jihad Watch" did not infringe on Plaintiff Jihad Watch's trademark and so permitted its continued use. (JA 24, 25; R-1 [Compl. ¶¶ 118, 120]). The two social-media companies also declined to remove tweets and posts that contained threats against Spencer, including that he should be "shot" and "lynched." (JA 25, 26; R-1 [Compl. ¶¶ 121-24]).

These and other actions led Plaintiffs to conclude that Facebook, YouTube, and Twitter employ their company policies to suppress the speech and activities of disfavored speakers, including Plaintiffs, and to discriminate against "certain political parties, national origins, and religions," particularly Israelis, Jews, and conservatives. (JA 21, 26; R-1 [Compl. ¶¶ 93, 95, 125, 126]).

Plaintiffs have also alleged other examples of discrimination by these social media companies as further evidence to support their claim. For example, YouTube recently censored a counter jihad video, claiming that it was "hate speech" in violation of its Community Guidelines. The video was produced by the Center for Security Policy, a Washington, D.C. public policy organization

dedicated to promoting U.S. national security. The counter jihad video contained a factual analysis of the threat of ISIS and radical Islam. (JA 22; R-1 [Compl. ¶ 101]). As another example, a pro-Israel organization created two Facebook groups with nearly identical content, but with the words "Jews/Israelis" and "Arabs/Palestinians" swapped. The organization posted a video titled "The Big Facebook Experiment" (https://www.youtube.com/watch?v=i3KfQoFHEDs), showing Facebook's anti-Israel and pro-Palestinian bias. The organization continued posting messages to both pages, including a message on the pro-Israel group's page stating, "Death to Palestine!!" and a similar message on the pro-Palestinian group's page stating, "Death to Israel!!" The organization reported both groups to Facebook. Facebook closed the pro-Israel group's page, claiming that it violated the Facebook Community Standards. Facebook did not close the pro-Palestinian group's page, providing empirical evidence of discrimination against certain political parties, national origins, and religions, and against Israelis and Jews in particular. (JA 20-21; R-1 [Compl. ¶¶ 88-94]).

Plaintiffs have not brought this suit against the social-media companies because doing so would be futile in light of the immunity granted to them by the Government through the operation of § 230. Instead, in July 2016, Plaintiffs filed suit against the United States Attorney General in his official capacity. They did so because § 230, a federal statute, authorizes and enables the companies' policies

and the discriminatory actions taken pursuant to those policies. (JA21, 22, 24, 26; R-1 [Compl. ¶¶ 97, 99, 111, 125]). As a result, § 230, an Act of Congress, alters the legal relations between persons to the detriment of Plaintiffs.

In this action, Plaintiffs allege that § 230, both facially and as applied, violates the First Amendment because it is a content- and viewpoint-based restriction; is vague, overbroad, and lacking in objective criteria; and permits Facebook, Twitter, and YouTube "to engage in government-sanctioned discrimination that would otherwise violate California Civil Code § 51," which prohibits discrimination by all business establishments in California, and Article I, section 2 of the California Constitution, which protects the freedom of speech. (JA 26-28; R-1 [Compl. ¶¶ 128-41]). Plaintiffs seek a declaration that § 230 violates the First Amendment and declaratory and injunctive relief that would render this statute unenforceable in any court of law. (JA 28, 29; R-1 [Compl. "Prayer for Relief"]).

SUMMARY OF THE ARGUMENT

Plaintiffs have standing to advance their constitutional challenge to § 230 of the CDA, an Act of Congress which alters the legal relations between persons. 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.

Traceability examines whether there is a causal connection between the claimed injury and § 230, which is a federal grant of immunity that permits social media giants such as Facebook, Twitter, and YouTube to engage in the injurious conduct at issue with impunity. Moreover, causation does not require that § 230 be the "sole" or "proximate" cause of the harm suffered or even a "but-for cause" of the injury. Rather, the causation inquiry for standing purposes asks simply whether the challenged statutory provision materially increased the probability of injury. Here, it cannot be reasonably disputed that § 230 materially increased the probability of injury to Plaintiffs.

Regarding redressability, the "fairly traceable" and "redressability" requirements for Article III standing ensure that the injury is caused by the challenged action and can be remedied by judicial relief. When, as in this case, the relief requested is simply the cessation of illegal conduct (*i.e.*, rendering § 230 unconstitutional and thus unenforceable in any court of law), this Court has held that the "fairly traceable" and "redressability" analyses are identical.

Finally, a suit against the Attorney General in his official capacity is a suit against the federal government. Section 230 is a federal law which is part of the Communications Decency Act, a statute which the Attorney General is responsible for enforcing and defending. Based on the District Court's reasoning, a plaintiff could not challenge this grant of federal immunity because it is not technically

"enforced" by any government officials. Such reasoning is wrong, and it would serve to ensure that certain statutes are essentially "above the law" (*i.e.*, above the U.S. Constitution, the supreme law of the land).

STANDARD OF REVIEW

The Court reviews the grant of a motion to dismiss *de novo*, "'accepting the factual allegations made in the complaint as true and giving plaintiff[] the benefit of all inferences that can reasonably be drawn from [his] allegations.'" *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 921 (D.C. Cir. 2013) (citation omitted).

And "[b]ecause the district court dismissed this case at the complaint stage, [Plaintiffs] need only make a plausible allegation of facts establishing each element of standing." *Cutler v. U.S. Dep't of Health & Human Servs.*, No. 14-5183, 2015 U.S. App. LEXIS 14268, at *13 (D.C. Cir. Aug. 14, 2015).

DISTRICT COURT'S STANDING DECISION

The District Court begins its decision by stating that "a quick glance at this case's caption reveals a surprise: Plaintiffs have not named the [social media] companies as Defendants. Instead, they have sued only the United States Attorney General, alleging that a provision in a federal statute—§230 of the Communications Decency Act—enables the companies' censorship and

discrimination and violates the First Amendment."[2] (JA 31; R-12 [Mem. Op. at 1]).

Accordingly, the thrust of the District Court's decision is its conclusion that "§ 230 affords [the Attorney General] no role—enforcement or otherwise—of any kind, nor does it delegate any enforcement role to any federal agency or federal official." (JA 38; R-12 [Mem. Op. at 8]). The court concluded that the Attorney General's "lack of enforcement authority is fatal to Plaintiffs' standing to bring this action . . . ." (JA 38; R-12 [Mem. Op. at 8]). Per the District Court, "Plaintiffs therefore cannot satisfy the causation prong of Article III's standing inquiry . . . [and f]or similar reasons, it is not 'likely' that Plaintiffs' 'injury will be redressed by a favorable decision.'" (JA 39; R-12 [Mem. Op. at 9] [citation omitted]). The court concluded that "[a]s the Attorney General has no enforcement authority, such an injunction would be meaningless." (JA 39; R-12 [Mem. Op. at 9] [citation omitted]). The District Court further claimed that "[t]he requested declaratory relief suffers from similar redressability defects. Plaintiffs' argument rests on the entirely speculative implication that Facebook, Twitter, and YouTube would voluntarily change course and permit Plaintiffs' censored content to stand were the Attorney General to declare § 230 unconstitutional." (JA 40; R-12 [Mem. Op. at

[2] The Government did not argue, nor did the District Court conclude, that the social media companies were parties required to be joined under Rule 19 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 19. And they are correct.

10] [citation omitted]). The court also noted that "even absent the affirmative defense supplied by § 230, the private social-media companies could argue that they cannot be compelled to publish a particular message." (JA 40; R-12 [Mem. Op. at 10] [citation omitted]). And the court asserted that "Plaintiffs' contention that a declaratory judgment against the Attorney General would redress its asserted injury 'overlooks the principle that it must be the effect of the court's judgment on the defendant that redresses the plaintiff's injury.'" (JA 40, 41; R-12 [Mem. Op. at 10-11] [citation omitted]).

The District Court concludes its decision by stating that "[i]f Plaintiffs remain unhappy with the companies' content decisions, they can sue them and attempt to defeat any § 230 defense that is raised—*e.g.*, by invoking the same constitutional arguments offered here." (JA 41; R-12 [Mem. Op. at 11]).

As argued below, the District Court is mistaken.

STATUTORY FRAMEWORK OF § 230

Section 230 of the CDA provides, in relevant part, as follows:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material.
>
> (1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user

> considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].

47 U.S.C. § 230(c). The statute further provides: "State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id*. at § 230(e)(3).[3]

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[3] (f) Definitions. As used in this section:

(1) Internet. The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service. The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider. The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

47 U.S.C. § 230(f).

"'Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.'" *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262 (N.D. Cal. 2006) (quoting *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000)).

By its plain language, § 230 would apply since Plaintiffs would be seeking to hold Facebook, Twitter, and YouTube civilly liable for denying access to their services (*i.e.*, their discriminatory business practice)—an "action voluntarily taken . . . to restrict access." (*See also* JA 36-38; R-12 [Mem. Op. at 6-8] [discussing § 230]).

ARGUMENT

I. STATE ACTION LIES IN THIS CHALLENGE TO FEDERAL LAW, WHICH ALTERS THE LEGAL RELATIONS BETWEEN PERSONS.

We begin by providing a framework for Plaintiffs' First Amendment challenge. By enacting § 230, the Government has conferred broad powers of censorship upon Facebook, YouTube, and Twitter and has thereby altered the legal relations between these social media companies and Plaintiffs.

Because of § 230, Plaintiffs are deprived of legal protection that would otherwise be available. That is, Facebook, Twitter, and YouTube are able to engage in unlawful, discriminatory business practices that suppress Plaintiffs'

speech because the Government has authorized such practices through the gaping immunity portal § 230 provides.

For example, a business providing services via the Internet and doing business in California[4] must comply with the California Unruh Civil Rights Act (California Civil Code § 51).[5]

> Section 51 of the California Civil Code provides, in relevant part,
>
> > All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.
>
> Cal. Civ. Code § 51(b).

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[4] Facebook, Twitter, and YouTube are all California corporations, and each Plaintiff does business in California. (JA 7, 9, 11; R-1 [Compl. ¶¶ 15, 23, 27, 35-37]).

[5] Regarding the District Court's concerns about the First Amendment rights of the social media companies (JA 40; R-12 [Mem. Op. at 10]), it is evident that Facebook, Twitter, and YouTube are unique. They are not like magazines, newspapers, television or radio stations. Unlike these other traditional media, Plaintiffs manage and operate their *own* Facebook pages, their *own* Twitter accounts, and their *own* YouTube channels. And this is why it would be appropriate to permit § 230 to be used in a way that would immunize Facebook, Twitter, and YouTube from liability for third-party content appearing on these private pages, accounts, and channels, but not permissible to grant these social media companies the power to directly censor these private pages, accounts, and channels. *Cf. Denver Area Educ. Telcomms. Consortium v. FCC*, 518 U.S. 727, 741-42 (1996) (stating that "no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single [First Amendment] standard, good for now and for all future media and purposes").

Section 51 is broadly construed to include *all* forms of discrimination. "Civil Code section 51, on its face, appears to be aimed at preventing discrimination in public accommodations on the basis of race, sex or religion. In *In re Cox*, *supra*, however, it was held that the Unruh Civil Rights Act prohibits a business establishment from arbitrarily excluding any prospective customer." *Wynn v. Monterey Club*, 111 Cal. App. 3d 789, 796 (Cal. App. 2d Dist. 1980). "[Both] its history and its language disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise. That the act specifies particular kinds of discrimination—[sex], color, race, religion, ancestry, and national origin—*serves as illustrative, rather than restrictive, indicia of the type of conduct condemned*." (*In re Cox* (1970) 3 Cal. 3d 205, 212 [90 Cal. Rptr. 24, 474 P.2d 992].)." *Rotary Club of Duarte v. Bd. of Dirs.*, 178 Cal. App. 3d 1035, 1047 (Cal. App. 2d Dist. 1986) (emphasis added).

In light of its history and application, a California business establishment violates § 51 by discriminating on the basis of political affiliation, religious affiliation, or political or religious beliefs.

Moreover, a business that provides Internet services, such as Facebook, Twitter, and YouTube, are subject to this law (but for § 230, which exempts them). Here is what a California Appellate Court said about a companion civil rights statute, the California Disabled Persons Act (California Civil Code §§ 54-55):

> The [Disabled Persons Act] is "intended to secure to disabled persons the 'same right as the general public to the full and free use' of facilities open to the public." (*Urhausen v. Longs Drug Stores California, Inc*. (2007) 155 Cal. App. 4th 254, 261 [65 Cal. Rptr. 3d 838].) Its focus is upon *physical* access to public places, though the statute *may also be construed as requiring equal physical access to a nontangible location such as an Internet site*. (Compare *Wilson v. Haria and Gogri Corp*. (E.D. Cal. 2007) 479 F. Supp. 2d 1127, 1140, fn. 16, with *National Federation of Blind v. Target Corp*. (N.D. Cal. 2007) 582 F. Supp. 2d 1185.)

Turner v. Ass'n of Am. Med. Colls., 167 Cal. App. 4th 1401, 1412 (Cal. App. 1st Dist. 2008) (emphasis added).

A case arising out of the U.S. District Court for the Northern District of California is more to the point. In *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022 (N.D. Cal. 2007), the plaintiffs alleged "that defendants' refusal to offer same-sex domestic partners the adoption-related services on ParentProfiles.com, on the same terms and conditions offered married couples, constitutes unlawful discrimination on the basis of marital status, sexual orientation, and sex, in violation of the Unruh Act." *Id*. at 1054.

In this case, the business was physically located in Arizona, but it provided its Internet services to consumers in California. The court stated, in relevant part, the following:

> Defendants in this case have actively sought business connections with Californian consumers, and as of October 2002, their Internet business was more closely tied to California than to any other state (based on the profiles posted by residents of various states). California has a strong interest in regulating defendants' activities

> because of defendants' penetration into the California economy, and the likelihood of exposure for violating California law was a foreseeable and reasonable business expense.
>
> As explained in some detail above, the question whether the Unruh Act prohibited marital status discrimination was not completely resolved in 2002. In 2005, however, the California Legislature clearly stated its agreement with the California Supreme Court's rulings, going back 35 years, that the categories listed in the Unruh Act should be considered illustrative rather than restrictive; and also "affirmed" that the bases of discrimination prohibited by the Unruh Act include marital status and sexual orientation.
>
> Defendants assert that plaintiffs' application to post their profile was denied in October 2002 pursuant to a policy that only opposite-sex married couples should be permitted to use the ParentProfiles service. They claim that this policy was applied evenly and was not personal to plaintiffs. The court finds that there is a triable issue as to whether the policy of not allowing unmarried couples to post profiles on ParentProfiles.com amounts to marital status discrimination.

Butler, 486 F. Supp. 2d at 1055-56.

The court's discussion of the alleged discrimination is relevant and quoted more fully below:

> [P]laintiffs contend that defendants are operating a public business, and do not have the option under the Unruh Act to violate the law based on their own beliefs. They also assert that defendants' allegedly neutral policy was and is applied in a discriminatory manner. They argue that the policy was applied in a discriminatory fashion in 2002, by virtue of the fact that defendants made exceptions to their policy for single people, but not for same-sex couples. They also assert that defendants have admitted that they do not provide services to gays and lesbians.
>
> The court is not persuaded by defendants' claim that ParentProfiles.com is not a "business establishment." As described herein, the ParentProfiles.com website is plainly a business

> establishment as defined under California law. *See Isbister*, 40 Cal. 3d at 78-79 (in enacting the Unruh Act, the Legislature intended that "business establishments" be interpreted in the broadest sense reasonably possible).
>
> With regard to the claim that Adoption Profiles LLC has legitimate business reasons for its "married-couples-only" policy—which the court notes appear to conflict with the claim that ParentProfiles.com is not a "business establishment"—the court finds that defendants have not actually articulated any such legitimate business reason.

Butler, 486 F. Supp. 2d at 1056-57.

Regarding the question of whether California law should apply to the situation presented with Facebook, Twitter, or YouTube, that is a straightforward question answered in Plaintiffs' favor in that not only do Facebook, Twitter, and YouTube "actively [seek] business connections with Californian consumers," their principal places of business are in Northern California. And given that in enacting the Unruh Act, the California Legislature intended that "business establishments" be interpreted in the broadest sense reasonably possible, *see Isbister v. Boys' Club of Santa Cruz*, 40 Cal. 3d 72, 78 (Cal. 1985) ("By its use of the emphatic words 'all' and 'of every kind whatsoever,' the Legislature intended that the phrase 'business establishments' be interpreted 'in the broadest sense reasonably possible.'") (citations omitted), it is evident that Facebook, Twitter, and YouTube are each considered a "business establishment" under this law.

At the end of the day, the impact of the Internet as a medium of worldwide human communication cannot be overstated. To that general proposition, we

would add that social media, particularly including Facebook, Twitter, and YouTube, are exceedingly important. Consequently, denying a person or organization access to these important platforms based on the speaker's viewpoint on matters of public concern would be an effective way of silencing or censoring speech. Indeed, this power—granted by the Government by way of § 230—to censor speech with impunity could literally impact a presidential election. (JA 26; R-1 [Compl. ¶ 127]); *see generally* Robert Epstein & Ronald E. Robertson, *The search engine manipulation effect (SEME) and its possible impact on the outcomes of elections* (available at http://www.pnas.org/content/112/33/E4512.full.pdf?with-ds=yes (study suggesting that a search engine company has the power to influence the results of a substantial number of elections with impunity) (last visited Mar. 1, 2017). In short, it is indisputable that the Government, by way of this federal law, is *empowering* the censorship of speech since it has effectively removed all legal barriers for doing so.

Moreover, § 230 is not tied to a *specific* category of speech that is generally proscribable (*i.e.*, obscenity), nor does it provide any type of objective standard whatsoever. *Compare Denver Area Educ. Telcomms. Consortium*, 518 U.S. at 747 (upholding § 10(a), which *permitted* cable operators to decide whether or not to broadcast "patently offensive" programming on leased access channels, on First Amendment grounds in light of "the permissive nature of the provision, coupled

with its viewpoint-neutral application"). The statute does permit the restriction of obscenity, but it also permits censorship of speech that is "otherwise objectionable, whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2)(A). Further, the subjective "good faith" of the censor does not remedy the vagueness issue—it worsens it. *See, e.g., United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) (stating that a speech restriction "offends the First Amendment when it grants a public official 'unbridled discretion' such that the official's decision to limit speech is not constrained by *objective criteria*, but may rest on 'ambiguous and subjective reasons'") (citation omitted).

In the final analysis, the Government has empowered social media giants Facebook, Twitter, and YouTube to shape public discourse by granting them the power to censor any speech they deem "objectionable." The First Amendment implications of this case and Plaintiffs' standing to assert their claim are clear, and they demand a reversal of the District Court's decision.

II. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION.

Article III confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. 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).

Here, there is nothing hypothetical, abstract, academic, or moot about the legal claim advanced. This case presents a real and substantial controversy between parties with adverse legal interests, and this controversy can be resolved through a decree of a 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.*

In sum, the District Court has the power to hear and decide this case. It can determine whether the challenged federal statute alters the legal relations between persons (thereby creating state action) in a way that infringes upon Plaintiffs' right to free speech. The court could then declare the statute, either facially or as applied, unconstitutional and enter an appropriate order enjoining its application in any court of law.[6] Thus, this case presents a justiciable controversy in which the judicial function may be appropriately exercised. *Id.*

[6] Indeed, the District Court could carve out legitimate purposes for and applications of § 230, while prohibiting its use as a blunt instrument for censorship. Doing so would advance the important policy goal of maintaining the robust nature

In an effort to give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted).

"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." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Consequently, to invoke the jurisdiction of a federal court, "[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).

In its motion, the Government did not challenge the injury-in-fact element, but "assum[ed] for purposes of [its] motion only that Plaintiffs have alleged a

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of Internet communication. For example, § 230 could continue to properly serve as a *shield* against defamation claims arising from postings by third parties. *See, e.g.*, 47 U.S.C. § 230(c)(1). However, it should not be allowed to be used as a *sword* to restrict speech in the way it is employed here—that is, by permitting social media companies to *directly* censor Plaintiffs' *personal* Facebook pages, Twitter accounts, and YouTube channels. By allowing § 230 to be used as a sword, it undermines this very goal of maintaining the robust nature of the Internet, thereby raising the serious First Amendment concerns advanced by Plaintiffs in this challenge. Should such a remedy be too unworkable, then it would be the duty of the court to strike down the entire provision and leave it to Congress to draft one that does comport with the First Amendment. *See, e.g., Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006).

cognizable injury-in-fact."[7] (R-6 [Govt. Mot. to Dismiss at 8]). In its decision, the District Court noted that Plaintiffs "allege two forms of injury: an 'inability to express certain views' because of discriminatory censorship by private social-media companies and an 'economic injury' that flows from the companies' removal of Plaintiffs' online content." (JA 36; R-12 [Mem. Op. at 6]). The court "assume[d] without deciding that Plaintiffs have . . . plausibly alleged an injury in fact." (JA 36; R-12 [Mem. Op. at 6]).

For purposes of completeness, Plaintiffs will address the "injury-in-fact" element of standing as well as "traceability" and "redressability" because the three elements are often interconnected, as in this case.

While the necessary injury-in-fact to confer standing is not susceptible to precise definition, it must be "distinct and palpable," *Warth*, 422 U.S. at 501, and not merely "abstract," "conjectural," or "hypothetical," *Allen*, 468 U.S. at 751. Put another way, the injury must be both "concrete and particularized," meaning "that the injury must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added).

[7] There is no dispute that Plaintiffs' speech is the type of speech that is afforded full protection under the First Amendment. *See, e.g., Connick v. Myers*, 461 U.S. 138, 145 (1983), ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) & *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

To that end, courts have recognized that "[a]n economic injury which is traceable to the challenged action satisfies the requirements of Article III." *Linton v. Comm'r of Health & Env't*, 973 F.2d 1311, 1316 (6th Cir. 1992); *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (holding that consumers who suffer economic injury from a regulation prohibited under the Constitution satisfy the standing requirement); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (acknowledging that regulations injuring a plaintiff's "economic interests" create the necessary injury-in-fact to confer standing).

In addition, the Supreme Court has long held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*).

Here, as the District Court noted, Plaintiffs have alleged "economic injury" flowing from the censorship of their speech. (*See* JA 36; R-12 [Mem. Op. at 6]). Plaintiffs have also alleged injury arising out of their "inability to express certain views" and to promote certain commercial interests through advertising. (*See* JA 36; R-12 [Mem. Op. at 6]). Consequently, as the Government conceded for

purposes of its motion and as the District Court assumed for purposes of its decision (JA 36; R-12 [Mem. Op. at 6]), Plaintiffs satisfy the "injury-in-fact" requirement for standing.

Turning now to causation, a cognizable injury, such as those suffered by Plaintiffs, can be "fairly traceable" to the challenged action even if it doesn't come directly from the action. In other words, an indirect injury that flows from the challenged action is sufficient to confer standing.

As noted by the Court in *Warth v. Seldin*, "The fact that the harm to petitioners *may have resulted indirectly* does not in itself preclude standing. When a governmental prohibition or restriction imposed on one party [or, in this case, the granting of governmental immunity that changes the legal relations of the parties] causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." *Warth*, 422 U.S. at 504-05).

In *Jet Courier Services, Inc. v. Federal Reserve Bank*, 713 F.2d 1221 (6th Cir. 1983), for example, the Sixth Circuit stated as follows: "Here, if the affidavits of customers of the air couriers are credited, these couriers will suffer economic losses *flowing from actions which the* ***private banks*** *will take* ***in response to*** *the revised schedules of the Federal Reserve Banks*. Though the injury alleged by the plaintiffs is indirect, it is 'distinct and palpable' and 'fairly traceable' *to the action*

of the Board of Governors. . . . We believe the plaintiffs have sufficiently alleged a 'personal stake,' . . . in the outcome of the controversy and have demonstrated a likelihood that their injury would be redressed by a favorable decision. Thus, they have satisfied the constitutional requirements for standing."[8] *Id*. at 1226 (emphasis added).

Consequently, even indirect harm caused by third parties that is fairly traceable to government action is sufficient to confer standing to challenge the action at issue. Thus, where the injury to a party flows from actions which a private party takes in response to government action, the injured party has standing to challenge that government action. In short, Plaintiffs have standing to challenge § 230 in light of the injuries they have suffered from third parties as a result of this federal statutory provision.

Consider, for example, a hypothetical situation in which the Government enacted an immunity statute that permitted private restaurants and other private businesses to refuse service to blacks and Hispanics, thus immunizing these businesses from any local or state anti-discrimination laws. Similarly, consider a

[8] The Sixth Circuit ultimately concluded that "[e]ven though the constitutional requirements for standing [were] satisfied, those based on prudential considerations" were not because the plaintiffs were "not arguably within the zone of interests which Congress sought to protect in enacting the MCA." *Jet Courier Servs., Inc.*, 713 F.2d at 1226-27. There are no such "prudential considerations" at issue here, nor did the Government argue or the District Court conclude that such considerations exist.

situation in which the Government enacted a statute granting immunity to private persons who assaulted anyone who was lawfully picketing against racial or ethnic discrimination outside such a business. Based on the Government's theory (and the District Court's ruling), a black or Hispanic person who was denied service by a private business or assaulted for picketing the business (*i.e.*, exercising his free speech rights) couldn't challenge either federal statute on First Amendment free speech or Fifth Amendment equal protection grounds.[9] The Government (and the District Court) would contend, as in this case, that the discriminatory denial of services and the injury caused by the assault were not "fairly traceable" to the Government's grant of immunity, and nevertheless, there is no state action in either situation since the harms (denial of service and physical injury) were caused by private parties. Indeed, the District Court would contend that since there is no statute to "enforce"—the statute is simply a federal grant of immunity—there is no one to sue. That view of the law is wrong. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (striking down on constitutional grounds a law that withdrew specific

[9] In addition to the equal protection violation caused by the discriminatory refusal of service in our first hypothetical situation, a law that discriminates against certain speakers, as in our second situation, violates both the First Amendment and the equal protection guarantees of the Fifth and Fourteenth Amendments. *See Police Dept. of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

legal protection from the injuries caused by discrimination against homosexuals, including discrimination caused by private parties).

As noted, the District Court's decision (both the "traceability" and "redressability" components) was based on its claim that it was improper to sue the Attorney General because he was an official without power to enforce the challenged statute. In reaching this conclusion, the court relied on cases "concern[ing] suits against state officials," but it could "discern no principled reason why their logic as to Article III standing would not apply with equal force to suits against federal officials (or the federal government) . . . ." (*See* JA 38-39; R-12 [Mem. Op. at 8-9]). The District Court is mistaken. The "principled reason" why these cases do not apply is because the courts were confronted with situations involving the interplay between the Eleventh Amendment and Article III standing (and the legal fiction created by *Ex parte Young*, 209 U.S. 123 (1908)). The principle case cited by the District Court, *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001), explains:

> A plaintiff may not avoid this bar [Eleventh Amendment immunity] simply by naming an individual state officer as a party in lieu of the State. Yet, few rules are without exceptions, and the exception to this rule allows suits against state officials for the purpose of enjoining the enforcement of an unconstitutional state statute. This exception rests on the fiction of *Ex parte Young*—that because a sovereign state cannot commit an unconstitutional act, a state official enforcing an unconstitutional act is not acting for the sovereign state and therefore is not protected by the Eleventh Amendment. Indeed, the Eleventh

> Amendment inquiry today turns on a proper interpretation and application of the Supreme Court's holding in *Young*.

Okpalobi, 244 F.3d at 411. The court alternatively addressed Article III standing, but it is clear from its reasoning that the context of the case (suing a state official in federal court) was dispositive of its standing ruling because pursuant to *Ex parte Young* (and the Eleventh Amendment), the plaintiff could not bring suit against the State in federal court but could only sue a state official that had enforcement authority. Because the plaintiffs did not do that, they could not establish "causation" or "redressability." *Id*. at 426-27 (concluding that "a plaintiff may not sue a state official who is without any power to enforce the complained-of statute" and "[b]ecause these defendants have no powers to redress the injuries alleged, the plaintiffs have no case or controversy with these defendants that will permit them to maintain this action in federal court"). In short, the plaintiffs would have to seek relief in state court.

The District Court also cites *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 960 (8th Cir. 2015), to support its decision. (JA 39; R-12 [Mem. Op. at 9]). But that case too recognizes the interplay between the Eleventh Amendment and Article III standing when a party is seeking to sue a state official in federal court. *Id*. at 960 (stating that its prior precedent "did not necessarily state a universal rule that equates the *Ex parte Young* exception with Article III standing to sue," but it nonetheless "assume[d] the asserted equivalence

for the sake of analysis"). As the court noted, "A state official is amenable to suit to enjoin the enforcement of an unconstitutional state statute only if the officer has 'some connection with the enforcement of the act.' . . . Without that connection, the officer would be sued merely 'as a representative of the state' in an impermissible attempt to 'make the state a party.'" *Id*. (quoting *Ex parte Young*, 209 U.S. at 157) (internal citations omitted).

Hope Clinic v. Ryan, 249 F.3d 603, 605 (7th Cir. 2001), also doesn't resolve the issue. (*See* JA 39; R-12 [Mem. Op. at 9] [citing case]). In *Hope Clinic*, as the District Court noted, the court stated that "[b]ecause the public officials named as defendants *could not cause the plaintiffs any injury by enforcing the statutes' private-action provisions*—for these are official-capacity suits, so the possibility that the defendants may bring suits as private citizens is not before us—the plaintiffs lack standing with respect to these provisions." *Id*. at 606 (emphasis added). This case is inapposite.

To begin our analysis, when a federal statute changes the legal relations between private persons, as in this case, not only is there "state action," but there is injury that is fairly traceable to that statute. *See Denver Area Educ. Telcomms. Consortium*, 518 U.S. at 782 (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). Suffice to say, the challenged immunity provision (§ 230) is not a "private-action provision," like the one at issue in *Hope Clinic*; it is a federal statute that withdraws legal protection from injuries caused by discrimination. *See, e.g., Romer*, 517 U.S. at 620 (striking down a law that withdrew specific legal protection from injuries caused by discrimination).

Additionally, a claim against the Attorney General in his official capacity is a claim against the federal government—the entity responsible for enacting, maintaining, and defending § 230. *See Ky. v. Graham*, 473 U.S. 159 (1985); *see also Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) (holding that "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents"). And § 230 is a provision of a federal statute (the CDA) that the Attorney General has "some connection" with enforcing. *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (reviewing a constitutional challenge to the CDA). Finally, 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. In sum, it is entirely appropriate to advance this action against the Attorney General in his official capacity.

Regarding traceability, this element "examines whether there is a causal connection between the claimed injury and the challenged conduct, that is, whether the asserted injury was the consequence of the defendant's actions. Causation does not require that the challenged action must be the 'sole' or 'proximate' cause of the harm suffered, or even that the action must constitute a 'but-for cause' of the injury. . . . At its core, the causation inquiry asks whether the agency's actions *materially increase*[*d*] *the probability of injury*." *Nat'l Treasury Emps. Union v. Whipple*, 636 F. Supp. 2d 63, 73 (D.D.C. 2009) (quotation marks, brackets, and citations omitted) (emphasis added).

Here, § 230 "materially increased the probability of injury" to Plaintiffs. The very reason why Facebook, Twitter, and YouTube are able to engage in their discriminatory practices with impunity ***is*** this statutory provision. *See Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014) (concluding that § 230 foreclosed tort liability predicated on Facebook's decision to allow or to remove content). In other words, the Government has sanctioned these discriminatory practices by placing them above the law. Consequently, the traceability element is satisfied. *See Jet Courier Services, Inc.*, 713 F.2d at 1226 (stating that "these couriers will suffer economic losses flowing from actions which the private banks will take in response to the revised schedules of the Federal Reserve Banks," and concluding

that "[t[hough the injury alleged by the plaintiffs is indirect, it is 'distinct and palpable' and 'fairly traceable' to the action of the Board of Governors").

Finally, regarding redressability, this Court stated:

> The "fairly traceable" and "redressibility" requirements for Article III standing ensure that the injury is caused by the challenged action and can be remedied by judicial relief. When, as in this case, the relief requested is simply the cessation of illegal conduct, the Court has noted that the "fairly traceable" and "redressibility" analyses are identical.

Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 793 F.2d 1322, 1334 (D.C. Cir. 1986).

Because the relief requested here is an order that seeks to nullify and/or strike down a provision of federal law (§ 230) from which the injury to Plaintiffs flows (*i.e.*, the withdrawal of legal protections otherwise provided to Plaintiffs), the fairly traceable and redressability analyses are "identical." *Id.* Indeed, this case falls squarely within the Declaratory Judgment Act, which provides that "in a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.

In conclusion, Plaintiffs have alleged a personal injury that is fairly traceable to the challenged federal statute and likely to be redressed by the requested relief. Therefore, Plaintiffs have standing to assert their claim.

CONCLUSION

For the foregoing reasons, Plaintiffs hereby request that the Court reverse the District Court and remand this case for further proceedings.

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

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 8,470 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 March 6, 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 were sent this day 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