

No. 25-6138

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BABYLON BEE, LLC, *et al.*,

Plaintiffs-Appellees,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF
CALIFORNIA, *et al.*,

Defendants-Appellants.

**BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFF-APPELLEES**

Thomas A. Berry
Counsel of Record
Brent Skorup
Sam Rutzick
CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, DC 20001
(443) 254-6330
tberry@cato.org

Dated: March 18, 2026

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Cato Institute is a nonprofit entity operating under § 501(c)(3) of the Internal Revenue Code. *Amicus* is not a subsidiary or affiliate of any publicly owned corporation, and none issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the *amicus*'s participation.

/s/ Thomas A. Berry
Counsel for Amicus Curiae
Cato Institute

Dated: March 18, 2026

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. AB 2655 TREATS LARGE ONLINE PLATFORMS AS PUBLISHERS.	4
II. THE STATE’S PUBLISHER–DISTRIBUTOR DISTINCTION MISREADS THE HISTORY OF PUBLISHER LIABILITY AND SECTION 230.	8
A. When Section 230 was Codified, Courts had Already Blurred the Publisher-Distributor Line.....	9
B. Section 230 Protects Distributors from Liability.	11
III. ACCEPTING THE STATE’S ARGUMENT WOULD INVITE FIFTY COMPETING ONLINE SPEECH CODES.....	12
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE.....	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Cases

<i>Am. Librs. Ass’n v. Pataki</i> , 969 F. Supp. 160 (S.D.N.Y. 1997)	13
<i>Auvil v. CBS</i> , 800 F. Supp. 928 (E.D. Wash. 1992)	10
<i>Barnes v. Yahoo!, Inc.</i> 565 F.3d 560 (9th Cir. 2009)	7
<i>Barrett v. Rosenthal</i> , 40 Cal. 4th 33 (2006).....	11, 12
<i>Calise v. Meta Platforms, Inc.</i> , 103 F.4th 732 (9th Cir. 2024)	7
<i>Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston</i> , 515 U.S. 557 (1995)	6
<i>Layne v. Tribune Co.</i> , 108 Fla. 177 (Fla. 1933).....	9
<i>Moody v. Netchoice</i> , 603 U.S. 707 (2024).....	6
<i>Smith v. California</i> , 361 U.S. 147 (1959)	9
<i>Zeran v. Am. Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997).....	5, 9, 11

Statutes & Legislative Materials

47 U.S.C. § 230(b)	12
47 U.S.C. § 230(c)	5
47 U.S.C. § 230(c)(1).....	3, 4
47 U.S.C. § 230(f).....	12
CAL. ELEC. CODE § 20510.....	2
CAL. ELEC. CODE § 20512(i)(1)	3
CAL. ELEC. CODE § 20513.....	2, 7
CAL. ELEC. CODE § 20513(a)	7
CAL. ELEC. CODE § 20515(b).....	8
CAL. ELEC. CODE § 20516.....	3
CAL. ELEC. CODE § 20520.....	2

Other Authorities

Brent Skorup & Jennifer Huddleston, <i>The Erosion of Publisher Liability in America Law, Section 230, and the Future of Online Curation</i> , 72 OKLA. L. REV. 635 (2020).....	4, 9, 10, 12
--	--------------

ERIC BURNS, INFAMOUS SCRIBBLERS: THE FOUNDING FATHERS AND THE ROWDY BEGINNINGS OF AMERICAN JOURNALISM (2007).....	2
Jack L. Goldsmith & Alan O. Sykes, <i>The Internet and the Dormant Commerce Clause</i> , 110 YALE L.J. 785 (2001).....	13
Jennifer Huddleston, <i>Would New Legislation Actually Make Kids Safer Online?</i> , CATO INST. BRIEFING PAPER NO. 150 (Apr. 6, 2023).....	2

STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case concerns the scope of federal protections for online speech and the limits of state regulation of Internet intermediaries—issues that directly implicate Cato's longstanding research on the First Amendment and Section 230.

¹ Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. Pursuant to Ninth Circuit Local Rule 29-2(a), all parties have been notified and have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Political speech since the American Founding—including speech by the Founders themselves—has often featured hyperbole, polemic, and what modern observers might call “misinformation.”² The Framers understood that such speech could mislead. Yet they nonetheless ratified the First Amendment to ensure that public debate remained a powerful check on government power.

Today, some states seek to regulate that debate by imposing liability on online platforms for failing to remove speech that public officials deem addictive, immoral, or deceptive.³ In response to concerns that AI-generated “deepfakes” could influence elections, the California legislature enacted Assembly Bill 2655. CAL. ELEC. CODE §§ 20510–20520.

AB 2655 is novel and sweeps broadly. It establishes a complex notice-and-takedown and content labeling system for many social media and tech companies. *See id.* § 20513; Gov’t Br. 10–12. The law applies to digital content that is deemed

² For instance, by one modern account, Sam Adams was “perhaps the least ethical newsman of the entire colonial era, if not the entire history of American journalism.” ERIC BURNS, INFAMOUS SCRIBBLERS: THE FOUNDING FATHERS AND THE ROWDY BEGINNINGS OF AMERICAN JOURNALISM 134 (2007). On Adams’s paper, *The Gazette*, Burns says it “reported fabrications as facts; its predictions were unfounded; it was less a source of news than a vehicle through which Americans could ‘spit their venom’ at royal officials.” *Id.* at 137 (citation omitted).

³ *See, e.g.,* Jennifer Huddleston, *Would New Legislation Actually Make Kids Safer Online?*, CATO INST. BRIEFING PAPER NO. 150 (Apr. 6, 2023), available at <https://tinyurl.com/4f6fma9b>.

“materially deceptive” and that “would falsely appear to a reasonable person to be an authentic record of the content depicted in the media.” CAL. ELEC. CODE § 20512(i)(1). If a social media company fails to act on a user’s takedown or labeling report of such content in the weeks leading up to an election, political candidates and state or local prosecutors may bring suit to compel takedown or labeling. *See id.* § 20516.

The district court correctly ruled that AB 2655 is preempted by Section 230 of the Communications Decency Act. Section 230(c)(1) prevents providers of an interactive computer service from being treated as a “publisher” or a “speaker” of any information provided by another information content provider. 47 U.S.C. § 230(c)(1). Publishers are entities that review, evaluate, and remove third-party content. Despite the State’s attempt to characterize the law otherwise, AB 2655 requires online platforms—speakers protected by the First Amendment—to review and remove users’ speech. The district court therefore correctly concluded that content removal and labeling constitute “traditional publishing activity” that Section 230 immunizes.

The State attempts to avoid this conclusion by asserting that AB 2655 regulates platforms only as “distributors,” not as “publishers.” But distributor liability is simply a fault-based subset of publisher liability. Moreover, courts have long recognized that the distinction between publishers and distributors is often

indistinct. Even if large online platforms were treated as distributors under AB 2655, the statute would still be preempted by Section 230.

Finally, strong policy considerations reinforce this conclusion. Federal law governing the Internet tends to create a uniform regulatory environment for the interstate networks that comprise the Internet. Allowing AB 2655 to take effect would invite other states to enact their own notice-and-takedown laws. Online platforms would face a patchwork of inconsistent rules governing speech. The resulting compliance burdens would be enormous, and the predictable response would be widespread state regulation and removal of lawful speech—the precise effect Congress tried to prevent by enacting Section 230.

For these reasons, this Court should affirm the decision below.

ARGUMENT

I. AB 2655 TREATS LARGE ONLINE PLATFORMS AS PUBLISHERS.

Section 230 is widely regarded as foundational to the modern Internet. *See* Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in America Law, Section 230, and the Future of Online Curation*, 72 OKLA. L. REV. 635, 637 (2020). But the statutory rule it establishes is straightforward: providers of interactive computer services may not be treated as the publishers or speakers of content posted by users and other third parties. 47 U.S.C. § 230(c)(1).

If someone posts a defamatory image on X, Instagram, or Bluesky, the user who created the content may face liability. But, under Section 230, the platform hosting that content generally does not. Without this protection, the chilling effect would be obvious. Few companies would operate user-generated-content platforms if every user post could expose them to liability. As the Fourth Circuit explained in its influential *Zeran* decision, “Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

Courts typically apply a three-part test when determining whether Section 230 applies. A defendant is entitled to Section 230 immunity when:

1. The defendant is a provider or user of an interactive computer service;
2. The defendant is being treated as the publisher or speaker of information;
- and
3. The challenged information was provided by another information content provider.

See 47 U.S.C. § 230(c).

Two of these elements are plainly satisfied here. Social media companies are providers of interactive computer services, and the content at issue is created by third-party users. The only question is whether AB 2655 treats those platforms as publishers or speakers.

It does.

The Supreme Court recently confirmed that online platforms exercise First Amendment-protected editorial judgment when they decide whether and how to display third-party speech. Platforms “make choices about what third-party speech to display and how to display it.” *Moody v. Netchoice*, 603 U.S. 707, 716 (2024). In doing so, they operate like “[t]raditional *publishers* and editors,” who likewise “select and shape other parties’ expression into their own curated speech products.” *Id.* at 716–17 (emphasis added).

Social media companies also qualify as First Amendment speakers. As the Court explained in *Hurley*, discussing parade organizers, it is not necessary that an entity convey a “particularized message” to be a speaker. *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995). Merely “deciding to exclude a message [the parade organization] did not like from the communication it chose to make . . . is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.” *Id.* The State’s notice-and-takedown system intrudes on those core editorial and expressive functions by displacing platforms’ judgment with state-mandated removals of protected speech.

Accordingly, this Court has likewise explained that a law treats a defendant as a publisher when it imposes duties derived from the tech company’s role in

“reviewing, editing, and deciding whether to publish” third-party content. *Barnes v. Yahoo!, Inc.* 565 F.3d 560, 562 (9th Cir. 2009). If a law requires a platform to monitor or evaluate user content to avoid liability, that duty necessarily treats the platform as a publisher. *Calise v. Meta Platforms, Inc.*, 103 F.4th 732, 742 (9th Cir. 2024).

AB 2655 does precisely that. The statute requires large online platforms to “develop and implement procedures for the use of state-of-the-art techniques to identify and remove materially deceptive content.” CAL. ELEC. CODE § 20513. The State argues that the law only requires platforms to act after receiving a report from a user. Gov’t Br. 26. But once a report is received, the platform must evaluate the reported content to determine whether it qualifies as “materially deceptive” under the statute. *Id.* at § 20513(a).

The statute’s report-and-takedown system does not operate automatically—and platforms cannot simply accept every report at face value. They must review the content and decide whether it falls within the statute’s definition. In short, AB 2655 requires platforms to review, evaluate, and remove third-party speech. That is the essence of publishing activity and speech. Notice-based liability does not avoid publisher treatment; it simply shifts the moment of curatorial judgment from pre-publication to post-notice review.

A platform that refuses to comply on First Amendment grounds faces an injunction and, if noncompliance continues, contempt sanctions or damages—precisely a type of publisher liability that Section 230 forbids. *See id.* at § 20515(b) (providing for injunctions and “other equitable relief” against platforms).

II. THE STATE’S PUBLISHER–DISTRIBUTOR DISTINCTION MISREADS THE HISTORY OF PUBLISHER LIABILITY AND SECTION 230.

The State attempts to avoid preemption by arguing that AB 2655 regulates platforms only as “distributors,” not “publishers. *See* Gov’t Br. 20–29. (“[P]ublishers ‘are treated differently under common law than ‘distributors,’ . . . who usually cannot be held liable for repeating unlawful content”) (citation omitted). But in relying so heavily on this traditional conception of publishers and distributors, the State’s brief overlooks decades of development in publication doctrine.

As technology and free speech doctrine evolved throughout the twentieth century, the distinctions among publishers, distributors, and common carriers increasingly blurred. By the time Congress enacted Section 230 in 1996, courts had already begun collapsing these categories. The statute reflects that development. It prevents states from treating social media companies not only as “publishers,” but as “speakers,” indicating that Congress took a broad—not a doctrinaire—view when it decided to shield Internet intermediaries.

A. When Section 230 was Codified, Courts had Already Blurred the Publisher-Distributor Line.

Traditionally, courts followed a rule that “every repetition of a defamatory statement is considered a publication,” and republishers were as liable as the original author. *Zeran*, 129 F.3d at 332 (citation omitted). But both practical realities and First Amendment concerns led courts to move away from strict liability. Courts instead developed a sliding scale of liability based on the degree of editorial involvement in disseminating content. *See Skorup & Huddleston, supra*, at 639–51.

One example is the Supreme Court’s decision in *Smith v. California*, which rejected strict liability for booksellers. 361 U.S. 147 (1959). If booksellers could be held liable without knowledge of the contents of every book they sold, they would be forced to inspect every book before offering it for sale. Such a rule would inevitably restrict the distribution of constitutionally protected material. *Id.* at 153.

State courts also developed the “wire service defense.” In *Layne v. Tribune Co.*, the Florida Supreme Court held that newspapers could not be held strictly liable for republishing articles from news services absent negligence. *Layne v. Tribune Co.*, 108 Fla. 177, 182 (Fla. 1933). The court recognized that modern newspapers disseminate vast quantities of information and cannot independently verify every item they publish. *Id.* at 186–87.

The “wire service defense” from *Layne* was rapidly adopted by other states, who often recognized a broader version. *Skorup & Huddleston, supra*, at 643. Over

time, this doctrine expanded into what courts called “conduit liability”—akin to the expansive liability protection for common carriers such as telephone and telegraph operators. *Id.* at 644–45 (citation omitted). Courts applied it to radio broadcasters, television stations, and early Internet service providers. *See id.* (citing cases). For example, in *Auvil v. CBS*, a federal court rejected defamation liability against television affiliates that merely rebroadcast a national program. Imposing liability in such circumstances would be economically unrealistic and would chill public discourse. *Auvil v. CBS*, 800 F. Supp. 928, 932 (E.D. Wash. 1992); Skorup & Huddleston, *supra*, at 646.

Importantly, courts recognized these protections even when intermediaries retained some editorial control over content. The law had already moved away from rigid categorical distinctions when Section 230 was enacted. The same considerations that led courts to develop doctrines such as the wire service defense and conduit liability—practical rules that protect the free dissemination of speech for new types of media—also motivated Congress in enacting Section 230.

So, citing *Auvil*, the court in *Zeran* recognized the impracticality of requiring individual review by online bulletin board operators for each potentially defamatory statement they receive notice of: “[T]he sheer number of postings on interactive computer services would create an impossible burden in the Internet context.” *Zeran*,

129 F.3d at 333. The *Zeran* court noted that, “like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.” *Id.*

Online platforms host and transmit enormous volumes of user-generated content, typically without reviewing individual posts before publication. Just as a newspaper editor does not personally review every wire-service dispatch, the operators of modern platforms do not review each user post before it appears online. In this environment, the State’s attempt to revive a rigid publisher–distributor distinction ignores both the historical development of intermediary liability and the realities of modern communications networks.

B. Section 230 Protects Distributors from Liability.

Section 230 itself confirms that distributors are protected. In *Zeran v. America Online*, the Fourth Circuit held that distributor liability is simply a subset of publisher liability and is therefore barred by Section 230. *Zeran*, 129 F.3d at 332. Platforms cannot be held liable merely because they receive notice of allegedly unlawful content.

Publication torts are established by state law, so it’s notable that California courts have adopted the same reasoning. In *Barrett v. Rosenthal*, the California Supreme Court agreed with *Zeran* and held that the publisher–distributor distinction makes no difference for purposes of Section 230 immunity. 40 Cal. 4th 33, 41–42 (2006). It added that recognizing notice-based distributor liability would defeat “the

dual purposes” of section 230, by encouraging providers to restrict speech and abstain from self-regulation.” *Id.* at 45.

The same principle governs here. AB 2655 attempts to impose liability on platforms once they receive notice that certain content has been reported as “materially deceptive.” But imposing liability after notice is simply distributor liability by another name. Under *Zeran* and *Barrett*, Section 230 forecloses that theory. Whether framed as publisher liability or notice-based distributor liability, the statute ultimately seeks to hold platforms liable for failing to remove third-party speech. Section 230 prohibits states from imposing precisely that form of liability.

III. ACCEPTING THE STATE’S ARGUMENT WOULD INVITE FIFTY COMPETING ONLINE SPEECH CODES.

Even if this Court were to accept the State’s publisher–distributor distinction, allowing state-by-state notice-liability regimes would undermine Congress’s express purpose in enacting Section 230: to keep the Internet—an “international computer network”—“unfettered by Federal or State regulation.” 47 U.S.C. § 230(b), (f).

Section 230 allowed the early Internet to develop by creating legal certainty for online intermediaries. It enabled diverse communities to establish their own norms for moderating content. *See Skorup & Huddleston, supra*, at 661. Bottom-up moderation efforts proliferated. Platforms such as Reddit rely on volunteer moderators; X uses community notes; countless forums rely on their own internal moderation rules.

But many companies would struggle to comply with numerous state notice-and-takedown frameworks. As one federal court explained, “[r]egulation on a local level . . . will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities.” *Am. Librs. Ass’n v. Pataki*, 969 F. Supp. 160, 182 (S.D.N.Y. 1997).

Allowing California’s attempts to sidestep Section 230 would invite other states to adopt similar regulatory schemes using the same “distributor” rationale. The problem would be especially acute as states would likely have widely varying expectations and laws for what should be removed. Republican states may seek to require the removal of certain sexual or LGBTQ content, while Democratic states may seek to require removal of medical misinformation or hate speech. It is easy to imagine a world in which both red and blue states seek to regulate “election disinformation,” while adopting contradictory definitions of what that term means.

As scholars have explained, “different regulatory judgements may create costs of compliance with the various state regimes that are clearly out of proportion to the benefits of permitting decentralized regulation.” Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 808 (2001). Speech will inevitably be chilled. Few companies can track the moving target of dozens of competing state speech regulations.

Accepting the State’s dubious “distributor” theory would undermine the purposes of Section 230—including national uniformity and a free marketplace for speech and content moderation.

CONCLUSION

For the foregoing reasons, this Court should affirm judgement of the lower court.

Respectfully submitted,

/s/ Thomas A. Berry

Thomas A. Berry

Counsel of Record

Brent Skorup

Sam Rutzick

CATO INSTITUTE

1000 Massachusetts Ave., N.W.

Washington, DC 20001

(443) 254-6330

Dated: March 18, 2026

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. R. 29(a)(2) because it contains 2,841 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ Thomas A. Berry

Dated: March 18, 2026

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ Thomas A. Berry

Dated: March 18, 2026